

**GOD’S LAW OR STATE’S LAW:  
AUTHORITY AND ISLAMIC FAMILY LAW REFORM IN BAHRAIN**

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God's law or state law? Authority and Islamic family law reform in Bahrain

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*For Toby*  
*and my girls*

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The idea for this project was born by accident in 2003 when I was living in Manama while my husband conducted research in the eastern province of Saudi Arabia. At that time, talk of the possibility of a new family law in Bahrain permeated the media and the streets. I was in the process of applying to study Egypt's personal status law, which had been in existence for decades. As the debate in Bahrain heated up before my eyes, I quickly realized the significance of studying a society in the process of working out what role Islamic law should play, and what the future of the family courts should look like. After many exploratory conversations with my husband, also a scholar of the Middle East, and Bahraini friends, I decided to change my topic to Bahrain's family law debate. I am especially indebted to Farīda Ghulām Ismā'īl and Munira Fakhro for patiently answering my initial questions about the scope of the debate. Farīda generously provided me with stacks of documents that were the products of two decades of activism on the part of the Personal Law Committee, and never refused my requests for additional information.

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**ABSTRACT**

**GOD’S LAW OR STATE’S LAW:  
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**Sandy Russell Jones**

**Dr. Joseph E. Lowry**

This dissertation examines the role of religious authority in the debate over the codification of family law in Bahrain. It analyzes the grounds upon which three sets of actors claim authority over family law: religious scholars, women activists, and the state. While the state already holds the power to determine its laws simply by nature of its character as an authoritarian regime, religious scholars and women activists challenge that power by referencing sources of authority outside the state, such as religious texts and institutions, international human rights treaties, and regional ideals of justice. Elements of Bahrain’s debate are similar to legal debates in other Muslim-majority countries. However, Bahrain’s demography adds a layer of complexity that is not present in any other state. Bahrain’s Shii majority is ruled by the Sunni Āl Khalīfa family. Therefore, the debate regarding the fate of religious law takes on a specifically political tone. The research involved a combination of ethnography, textual analysis, and archival research. A multi-disciplinary approach is used which draws upon work in the fields of religious studies, the history of Islamic law, anthropology, and political science in order to understand, primarily, the workings of power. For instance, the state may have the power to enact a family law, but it does not have the legitimacy to do so

in the eyes of many Bahrainis. For those citizens, religious scholars have legitimate authority over family law, however, they do not have power. Considering Foucault's phrase "where there is power, there is resistance," as well as its inverse, "where there is resistance, there is power," women's activism is analyzed here as a "diagnostic of power." By discovering where and when women activists exert influence reveals relationships of power between and among the state and non-state actors. While the family law debate in Bahrain is about many things: women and the family, the role of *sharī'a* in contemporary Muslim society, sectarian relations between a Sunni ruling elite and its Shii population, it is, at the broadest level, a symbolic referendum on the authority of the modern nation-state and its relationship to religious authority.

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## **CHAPTER 1: INTRODUCTION**

In a significant departure from Bahrain's history of allowing *sharī'a* court judges to use independent reasoning to rule on family-related cases, the Sunni-ruled kingdom passed a codified family law on May 27, 2009. Lawyers, human rights activists, and women's NGOs had been calling for such a law since the early 1980's. The new law, however, will only apply to the nation's Sunni population. The ruler had submitted two separate drafts to the Parliament, one for Sunnis and one for Shiis. Because members of Parliament rejected the draft applying to Bahrain's Shiis, the majority Shii population will remain subject to the old system. While women activists applaud the passing of the Sunni law, they voice great concern about where this leaves Shii women. "I have some Shi'ite women who worry that their law will be forgotten," said Mariam Al Ruwaie, president of the Bahrain Women's Union.<sup>1</sup> Examples abound in regional newspapers of individual Shii women in desperate legal situations who will not be helped by the new law. Some women feel that the situation is now even worse: "The passing of [the] Sunni family law is a direct act of discrimination," Amal Juma Abdulla told the press, "We are all Bahraini women and we all have Bahraini families - Sunni or Shi'ite...we are all suffering and this move is a total neglect of Shi'ites as human beings."<sup>2</sup> If the Shii community, which by some counts amounts to a healthy sixty to seventy percent of the population, has as much need for a codified law as the Sunnis, why would the government not pass a law that applies to both sects?

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<sup>1</sup> Gulf Daily News, May 28, 2009.

<sup>2</sup> Ibid.

The Kingdom of Bahrain has been struggling with the fate of its *sharī'a* courts for nearly three decades. Having declared its independence in 1971, Bahrain's Sunni rulers initially allowed its Sunni and Shii *qāḍīs* (religious judges) to proceed as they had done for centuries: to adjudicate family issues such as marriage, divorce and child custody by referencing Islamic jurisprudence and religious texts. In 1982, a small group of lawyers and women activists began to call for the reform of the *sharī'a* court system. Citing inconsistencies in rulings, inefficiency, and even corruption, the reformists argued for the institution of a codified, Western-style law. At first, these calls were ignored by the then ruler, King 'Īsā ibn Salmān Āl Khalīfa, whose priorities did not include addressing social concerns. However, when 'Īsā's son Ḥamad was crowned in 1999, activists saw hope for change. Immediately upon taking office, Ḥamad reversed some of his father's most oppressive measures and announced a plan for far-reaching reforms. The women activists were pleased to learn that one of these reforms was the enactment of a codified family law. While the activists enthusiastically applauded the king's initiative, many others opposed it. Those who most strongly opposed the idea of codification were Shii male religious scholars ( '*ulamā*' ). The Shii '*ulamā*' asserted that codification is a Western invention, and that the reformers are secularists, aping the West and threatening Islam.

At first glance, Bahrain's family law struggle looks like the battles that have been fought over family law in many other Muslim-majority countries: conservative *rijāl al-dīn* (men of religion) defending an institution they have construed as authentically "Islamic" against modernist, secular, or otherwise Western-influenced



reformers pushing for change. This characterization is certainly part of the story in Bahrain. The women and men who began the reform movement borrowed many of their strategies from activist groups in other countries, within the region and in the West, and use the language of international human rights. Also, members of the *'ulamā'* blamed the West for influencing events in Bahrain. However, as Deniz Kandiyoti points out, "Anti-imperialistic pronouncements about the West are often a thinly disguised metaphor to articulate disquiet about more proximate causes for disunity."<sup>3</sup> Bahrain has a complicated history. The simple fact of the nation's demographic make-up suggests that sect plays a significant role in the debate. The majority of the more than 100,000 protesters who demonstrated against a proposed family law in 2005 were Shii, and had been prompted by the Shiis' largest political organization and the council of Shii *'ulamā'* to participate. However, not even the *intifāda* (uprising) of the mid-1990's, which specifically addressed the Shiis' political grievances, mobilized the public to the extent that the family law, which deals only with the Islamic rules regarding marriage, divorce, and other personal issues, managed to do.

The family law debate is not just about the rights and responsibilities husbands and wives retain within a marriage or the role of *sharī'a* in contemporary society. Nor is it only about sectarian politics. The family law debate in Bahrain is a symbolic public referendum on the authority of the modern nation-state and its relationship to religious authority. In seeking to understand the basis of contemporary, popular calls to restore the *sharī'a*, Wael Hallaq, a major historian of Islamic law, submits that the Muslim

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<sup>3</sup> Deniz Kandiyoti, "Introduction," in *Women, Islam, and the State*, ed. Deniz Kandiyoti, Philadelphia, P.A.: Temple University Press, 1991, pp. 3-9, p. 8.

world is suffering from a severe crisis of authority.<sup>4</sup> This crisis, he argues, was created by the transition from the pre-modern world to the modern nation-state in which the centralized state appropriated control over aspects of life that, before, were managed by others in society. This crisis is manifest on many levels: social, ethical, political, and legal. With regard to legal authority specifically, Hallaq argues that the law was once the province of a professional legal elite, the Muslim jurists, and that rulers generally considered themselves subject to that law. The modern state, however, reversed this principle, and assumed the responsibility to determine what the law is or is not. Suddenly there were two competing sources of legal authority: the state, and the religious legal elite, whose authority, while seriously compromised by the erosion of the traditional systems of religious and legal education, was still sought out by Muslims who resisted what they saw as the illegitimate authority of the state. Indeed, Hallaq points out that these two forms of authority were different in kind. Power does not equal authority, and Hallaq shows how the authority of the jurists was born of their erudition and piety, and was therefore seen as legitimate, while that of the state was merely backed by physical force. The modern state, therefore, suffers from a crisis of political legitimacy, a fact which has imbued modern calls to the return of *sharī'a* with a distinctly political tone.

In Bahrain, the modern state has encountered this crisis on many levels, but the fact that the *sharī'a* courts were left alone by the state until recently saved the state from confronting the full extent of the crisis in the legal sphere. King Ḥamad's announcement

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<sup>4</sup> Wael B. Hallaq, "Juristic authority vs. state power: The legal crises of modern Islam," *Journal of Law and Religion*, Vol. 19, no. 2 (2003-2004), pp. 243-258.

in 2003 of his intention to enact a codified family law forced Bahrainis to measure the king's authority to apply such a law versus the authority of the *qāḍīs* over what was, in theory, a religious matter. Dale Eickelman and James Piscatori suggest that in order to understand the way in which power works in Muslim societies, or in any society, it is helpful to use a geopolitical framework which may be defined as "the art and science of understanding and predicting spatial aspects of the shifts in political power among groups, particularly states."<sup>5</sup> While geopolitics are most often used to analyze relations of state power, Eickelman and Piscatori demonstrate that a consideration of various social actors' spatial awareness of loyalties, opportunities, and affinities can reveal networks of authority and can explain those actors' actions. For Bahrain's Shii '*ulamā*', authority over the *sharī'a* resides in the religious texts and those who are qualified to interpret them. The person most qualified to determine laws for the majority of Bahraini Shiis is Ayatollah 'Alī al-Sīstānī, a senior Shii cleric who happens to reside outside of Bahrain. When confronted with King Ḥamad's initiative, the Shii '*ulamā*' insisted that any law that would be applied to the Shii population would have to be approved by this supremely authoritative jurist. Shii religious networks existed long before the Bahraini state came into being, connecting Shii scholars in Bahrain with those in Jabal 'Āmil in south Lebanon, the shrine cities of Iraq, and the centers of learning in Iran. To demand that this continuity be maintained did not seem, to Shiis, unreasonable. What did seem out of place, on the other hand, was the fact of a Sunni and arguably secular state

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<sup>5</sup> Dale F. Eickelman and James Piscatori, *Muslim Politics*, Princeton, N.J.: Princeton University Press, 1996, p. 136, citing Demko and Wood, 1994: 3.

suddenly disrupting that connection and deciding for itself how the Shiis' religious matters should be handled.

Bahrain's women activists are in a different position from the Shii clerics. They accept the authority of the state over family law, and in fact, invoke the state's own definition of its responsibilities toward its citizens in this matter as laid out in the constitution. However, an analysis of the sources that the activists draw upon in their demands reveals that they, also, invoke networks of authority that extend beyond the physical borders of the Bahraini state. In addition to claiming their rights as Bahraini citizens, the women activists claim their rights, as humans and as women, that are defined and enumerated in international treaties. They also claim that Muslim women have rights as Muslims that derive from Islamic texts, the authority of which spans all space and time, according to Islamic theology. The Middle East, and especially the Arab world, as an area mainly comprising Muslim-majority states, has developed regional ideals of justice based on Islamic texts, history and culture. The activists also refer to these regional Islamic ideals as sources of authority. There is no doubt that the activists' approach is in part based on expedience. Their primary concern is to allieviate the suffering of Bahraini women in crisis. However, they have also consistently concerned themselves with criticism of the *sharī'a* courts. Their claims, that the courts are inefficient, incompetent, and biased toward men echo those of Westerners who have been exposed to the workings of Islamic law. As Hallaq has also pointed out, the term "law" itself is fraught with Western cultural and ideological baggage that prevents it

from accurately representing non-Western systems of law.<sup>6</sup> There are definitely some women in both of the NGOs examined here who would not object to the adoption of an entirely Western code of family law. However, the recurring theme of the activists' statements from the early eighties and into the present is a sense of anger and having been betrayed that they would have to resort to Western forms of law. By studying court records in Ottoman Syria, Palestine, and Jordan, and the Sudan, Judith Tucker, Amira Sonbol, Carolyn Fluehr-Lobban and Abdullahi Ibrahim and others have demonstrated that in the pre-modern period, and in some cases the modern period, the *sharī'a* courts were very much champions of women's causes.<sup>7</sup> Aware of the compassionate, just, and thoughtful manner in which women were treated by *sharī'a* judges in the past, Bahraini women activists feel betrayed because contemporary Bahraini judges are not living up to this legacy, and the ideals that they feel Islam stands for. In a television interview discussed below, activist Ghāda Jamshīr nearly shouts at the host that the men who claim to speak for Islam have used it for their own selfish purposes, and that this is the image of Islam people see. "Islam is innocent of this," she said.<sup>8</sup>

As for the state, Bahrain's government is authoritarian. King Ḥamad does not technically require the permission of either the '*ulamā*' or the women activists to enact any law he wishes. So, if a codified family law is what the ruler wants, and he has stated

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<sup>6</sup> Wael B. Hallaq, *Sharī'a: Theory, Practice, Transformations*, Cambridge, New York: Cambridge University Press, 2009, pp. 1-4.

<sup>7</sup> See Judith Tucker, *In the House of the Law: Gender and Islamic law in Ottoman Syria and Palestine*, Berkeley, C.A.: University of California Press, 1998; Amira Sonbol, *Women, the family, and divorce laws in Islamic history*, Syracuse, N.Y.: Syracuse University Press, 1996; Carolyn Fluehr-Lobban, *Islamic law and society in the Sudan*, London, England; Totowa, N.J.: F. Cass, 1987; Abdullahi Ibrahim, *Manichaean Delirium: Decolonizing the Judiciary and Islamic Renewal in Sudan, 1898-1985*, Leiden; Boston: Brill, 2008.

<sup>8</sup> Ghāda Jamshīr, Interview on "*al-Idā'āt*," *Al-Arabiyya*, December 21, 2005.

that it is, what can explain the fact that it has not been achieved? Dale Eickelman writes that while the politics of the state inevitably involve the allocation of resources and the definition of physical boundaries, political struggles are not just battles over power, but also struggles over the meaning of symbols. Warning against viewing politics and religion as separate and independent categories, Eickelman demonstrates the way in which all societies base cooperative relations on a common set of “ideas about what is right, just, or religiously ordained.”<sup>9</sup> These “background understandings” inform and frame all social action. For instance, if a ruler wants more than just a military state; if he wants *legitimacy*, then he must compete for control over “the interpretation of symbols and the control of the institutions, formal and informal, that produce and sustain them.”<sup>10</sup>

Considerations of religious doctrine, which necessarily changes and evolves, are only one part of what contributes to the meaning of these symbols and common understandings. There are also competing interests, and Eickelman and Piscatori argue that “politics may have as much, if not more, to do with bargaining among several forces or contending groups as with compulsion,” that it is important also to see “politics as public negotiation over the rules and discourse that morally bind the community together.”<sup>11</sup> In the case of Bahrain and the issue of the family law, most obviously, King Ḥamad is confronted with two diametrically opposed groups, the Shii *‘ulamā’* and the women activists. There are several other forces that maintain

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<sup>9</sup> Dale F. Eickelman, Islam and the languages of modernities, *Daedalus*, Vol. 129, No. 1, Multiple Modernities (Winter, 2000), pp. 119-135.

<sup>10</sup> Ibid.

<sup>11</sup> Eickelman and Piscatori. p. 7.

significant interests in the outcome of the family law project. The state itself is comprised of various agencies that are not necessarily in agreement on the issue. The Parliament, the judiciary, and the Supreme Council for Women are all participants in the debate and have varying needs and interests. In attempting to act on his family law initiative, Ḥamad has had to balance the interests of these forces, along with his own, through negotiation and persuasion.

In some manner, Ḥamad himself is responsible for creating a situation in which various social forces can exert power. The transformation to a modern society, which was accomplished in part by British reforms of the early twentieth century such as centralization, bureaucratization, and the conversion to a market economy created the conditions for the emergence of a public sphere in which private persons could ideally participate in critical debate about public issues.<sup>12</sup> However, Bahrain's first modern ruler, 'Īsā, instituted a repressive regime in which public political opposition was met with harsh, and arbitrary, consequences. It was not until 'Īsā's successor Ḥamad granted the freedoms of speech, press and association that Bahraini citizens were allowed fully to engage in public discussions of state affairs. Once he did so, the genie was out of the bottle, so to speak. The expectation of democratic political participation, once created, could not be extinguished. The problem for Ḥamad was that, Shiis being the majority, an increase in political participation would give the Shiis more power than he was prepared to offer. When it became clear that the majority of the Shii population opposed the codified family law, Ḥamad found that he had a powerful political tool to use to

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<sup>12</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere*, trans. Thomas Burger, Cambridge, MA: The MIT Press, 1991.

leverage the Shiis into a position of acquiescence. When the Shiis began to agitate for greater political rights, Ḥamad could threaten to pass the family law.

The special character of the family law issue has made it a lightning rod that has focused the country's attention on matters that go well beyond marriage and divorce law. As Bahrain is one of a very few Muslim-majority countries that continues to maintain a *sharī'a* court system, the future of family law has implications for perceptions of the nation's Islamic identity, cultural authenticity, moral authority, and/or progressive nature in the eyes of the world. More importantly, it is in this moment of reform that relations of power are shifting: relations between the state and the religious scholars, between the state and its citizens *as citizens*, and relations between lay people and the religious scholars. By framing this study in terms of the way in which each actor claims authority over family law, this dissertation reveals the fundamental conflict between networks of religious authority and the sovereignty of the modern nation-state. These actors are in the process of working out the role that religious authority plays in a contemporary Muslim society. The attendant power struggles and shifts in power relations are indicative of the kinds of conflicts taking place throughout the Muslim world. While this study contributes a wealth of empirical data on a country about which very little is known, in no other Muslim-majority country does sect play such a significant role in the debate over family law. The effect of administrative centralization on Islamic religious institutions has been considered by many scholars. However, the present work addresses this question specifically in a dual-



sect context in which the sects have historically maintained for the most part separate judicial institutions.

## LITERATURE

It is likely due to its small size that there is so little scholarly literature that addresses Bahrain. A fair amount of archaeological research has been carried out in the town of Saar where there exists a field of burial mounds believed to belong to the ancient civilization of Dilmun. There are isolated works that look at Bahrain's indigenous music, folklore, poetry, or natural attributes. Some of this work relates to the history of Bahrain's pearling industry, which remained vibrant until the late nineteenth century. However, the bulk of twentieth century scholarship on Bahrain deals with the country's relationship with the West and its strategic value as a British protectorate, its role as a producer of oil, the location of the base of the U.S. Navy's Fifth Fleet, or its role as a rising center for business and finance.

The Bahraini state has produced several works of official history of the kingdom. These studies offer a version of the country's history that presents the Āl Khalīfa as benevolent rulers who established peace on the islands, protected its inhabitants from foreign threats, and brought economic success.<sup>13</sup> Even to a casual observer, these accounts read as contrived and self-congratulatory. One volume even

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<sup>13</sup> See 'Abd Allāh ibn Khālīd Āl Khalīfa and 'Abd al-Mālik Yūsuf al-Ḥamer, eds., *Bahrain Through the Ages*, Government of Bahrain, 1983; Shaykha Hayā 'Alī Āl Khalīfa and Michael Rice, eds., *Bahrain Through the Ages, the Archaeology*, London: Kegan Paul International, 1986; 'Abd Allāh ibn Khālīd Āl Khalīfa and Michael Rice, eds., *Bahrain Through the Ages, the History*, London: Kegan Paul International, 1993; Ḥamad bin 'Isā Āl Khalīfa, *First Light: Modern Bahrain and its heritage*, London; New York: Routledge, 1995.

openly states in its introduction that contributors were asked to avoid controversial topics and not to engage with “seriously contested views on recent political history.”<sup>14</sup> Madawi Al Rasheed, a historian of modern Saudi Arabia who has analyzed the production of official historiography in Saudi Arabia reviewed the volume, calling it, “an ideological product of a state and ruling elite desperate to search for historical depth and authenticity.”<sup>15</sup>

The sum of serious literature that examines Bahrain for its own sake and is relevant to the current project amounts to a handful of studies, one on pre-modern Shi'i legal theory, and the others on shifts in twentieth century political authority. Robert Gleave's work, *Inevitable Doubt*, concerns the debate between what are termed the Usuli and Akhbari schools of Shi'i legal thought. In the eighteenth century, Bahrain was home to the prominent Akhbari scholar, Yūsuf al-Baḥrānī (d. 1186/1772). Gleave compares al-Baḥrānī's legal theory to that of Muḥammad Bāqir ibn Muḥammad al-Bihbihānī (d. 1207/1792), a scholar who many Shi'is consider responsible for returning Usulism to prominence against the Akhbari critiques of the eighteenth century. Of greatest concern to Gleave is the question of the origin of the Akhbari school. While other scholars such as Andrew Newman see continuity between the traditionalist tendencies of Shi'i scholars in the earliest centuries of Islam, Gleave argues that one cannot truly speak of an Akhbari school until the time of Muḥammad Amīn al-

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<sup>14</sup> Āl Khalīfa and Rice, *The History*, p.

<sup>15</sup> Madawi Al Rasheed, review of *Bahrain Through the Ages, The History*, by 'Abd Allāh ibn Khālīd Āl Khalīfa and Michael Rice, eds., *Middle Eastern Studies*, Vol. 31, No. 1 (Jan., 1995), pp. 192-193.

Astarābādī (d. 1033/1623).<sup>16</sup> While the question of the origins of the Akhbaris is not directly germane to the present project, Bahrain's intellectual heritage is significant in terms of its legacy for current modes of thinking, especially about law. There is still a divergence between Akhbari and Usuli thought among Bahrain's Shii scholars.

Although the divide is much less pronounced than it is reported to have been in the past, that split cleanly divides the kingdom's Shii *'ulamā'* on the question of the family law, a fact of significance that is explored in Chapter Three. In addition to the work of Gleave and Newman that discusses the role of Yūsuf al-Baḥrānī in Shii thought, there are some references to Bahrain as a thriving center of Shii legal and religious scholarship in the pre-modern era. However, no full-length study of this aspect of the country's history has been completed.<sup>17</sup>

Studies of twentieth century Bahrain are for the most part political analyses of the effects of colonial intervention by the British, and the subsequent processes of state-building carried out by the new Āl Khalīfa ruling family after independence was declared in 1971. After a number of border disputes with other tribal powers in the Gulf, the modern territory of Bahrain was determined to include the main island on

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<sup>16</sup> Robert Gleave, *Inevitable doubt: two theories of Shī'ī jurisprudence*, Leiden; Boston: Brill, 2000. See also Gleave, "The Akhbari-Usuli dispute in tabaqat literature: An analysis of the biographies of Yusuf al-Bahrani and Muhammad Baqir al-Bihbihani," *Jusūr*, 10 (1994), pp. 79-109; Gleave, *Scripturalist Islam: the history and doctrines of the Akhbārī Shii school*, Leiden; Boston: Brill, 2007; and Gleave, "Two Shī'ī Theories of Judicial Authority," in *Studies in Islamic and Middle Eastern texts and traditions in memory of Norman Calder*, G.R. Hawting, J. A. Mojaddedi, and A. Samely, eds., Oxford; New York: Oxford University Press, 2000. See also Devin J. Stewart, "Capital, Accumulation, and the Islamic Academic Biography," *Edebiyat: Journal of Middle Eastern Literatures*, July 1997, Vol. 7, Issue 2, pp. 345-362.

<sup>17</sup> The most comprehensive treatment of this aspect of Bahrain's history can be found in Chapters Three and Four of Juan Cole, *Sacred space and holy war: The politics, culture and history of Shi'ite Islam*, London: I.B. Tauris, 2002. References to this topic can also be found in Hossein Modarressi, *An Introduction to Shī'ī Law: a bibliographical study*, London: Ithaca Press, 1984; and Moojan Momen, *An Introduction to Shi'i Islam*, New Haven; London: Yale University Press, 1985.

which sits the capital of Manama, Muharraq to the northeast, the Hawar islands to the southeast, and the Umm al-Nasan islands to the northwest. M.G. Rumaihi offers a breakdown of the Bahraini population, an investigation of the shifts in the domestic economy from pearling and agriculture to oil and commerce, and an analysis of the role of the British in early twentieth century domestic affairs, especially the reforms of the 1920's.<sup>18</sup> Rumaihi also looks at the development of the educational system and asserts that some of its social effects include new roles for women, sectarian unity, and "a sense of Bahraini identity that is stronger than any class feeling." While the nationalist movement of the 1950's drew together both Sunnis and Shiis, united in their opposition to colonial interference, the domination of the Āl Khalīfa, and the high rate of employment of immigrants from South Asia, this unity was simultaneously undermined by continuous, and sometimes violent, sectarian clashes.<sup>19</sup> Despite the strength of the nationalist causes, it is doubtful that a sense of national identity ever surpassed the deep-seated divide between the sects. Rumaihi himself points out that this divide was routinely exploited by the rulers, whose interests were served by ongoing sectarian strife.

Mahdi Abdalla al-Tajir's study covers the period of 1920 to 1945, and focuses on British imperial policy in Bahrain.<sup>20</sup> Al-Tajir attributes the success of the administrative reforms of this period to the pressure exerted from below by the native

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<sup>18</sup> M. G. Rumaihi, *Bahrain: social and political change since the First World War*, London; New York: Bowker, 1976.

<sup>19</sup> Fuad I. Khuri, *Tribe and State in Bahrain: the transformation of social and political authority in an Arab state*, Chicago: University of Chicago Press, 1980, pp. 196-198.

<sup>20</sup> Mahdi Abdalla al-Tajir, *Bahrain, 1920-1945: Britain, the sheikh, and the administration*, London; New York: Croom Helm, 1987.

Shii population. As the British records on which al-Tajir relies attest, the native Shiis supported British reforms because they were aimed at dismantling the feudal system dominated by the Sunni tribes. The Sunnis of the ruling ‘Utūb alliance, on the other hand, vehemently opposed these reforms. Emile Nakhleh’s work takes up where al-Tajir’s leaves off, and focuses on the process of nation-building prior to, during, and immediately after independence.<sup>21</sup> Through a close look at the history of labor unrest, Nakhleh demonstrates that after independence, the movement for greater political rights continued unresolved. The work provides the reader with thorough and valuable empirical data drawn from the Bahraini press and personal interviews.

Fred Lawson’s book is a compact and nuanced analysis of the origins of the post-independence Bahraini political structure.<sup>22</sup> Carefully considering the formation of political alliances influenced by British involvement, Lawson demonstrates the way in which the Āl Khalīfa managed their rule by distributing favors and patronage in typical rentier state fashion, and achieved a delicate balance between competing domestic forces and various foreign interests. In the course of his analysis, Lawson also addresses the role of the nationalist movement of the 1950’s. In contrast to Rumaihi, Lawson perceives the fragmented nature of the movement, which, along with the rapid response of the Āl Khalīfa to a perceived threat to its sovereignty, eventually leads to its failure.

The only study to consider the role of religious authority in the events that led to independence and the subsequent establishment of the modern nation-state is Fuad

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<sup>21</sup> Emile A. Nakhleh, *Bahrain: political development in a modernizing society*, Lexington, Mass.: Lexington Books, 1976.

<sup>22</sup> Fred H. Lawson, *Bahrain: the modernization of autocracy*, Boulder, CO.: Westview Press, 1989.

Khuri's *Tribe and State in Bahrain*.<sup>23</sup> Like the authors mentioned above, Khuri is primarily concerned with explaining how the current political system came into being. Unlike the other authors, however, Khuri seeks to explain the emergence of the political order by examining three forms of social organization: tribe, peasantry, and urban society. Viewing colonial rule and the development of the oil industry as the two major forces that have affected Bahrain's development into a modern nation-state, Khuri analyzes these forces' effects on social organization, an analysis which in turn reveals shifts in underlying structures of social and political authority. In comparing the different forms of social organization, Khuri shows how social organization affects ideas about religious authority. Demonstrating that the Sunni rulers belong to a tribal form of social organization, and that meanwhile the native Shii population is organized according to the village model, Khuri argues that Sunni concepts of religious authority are quite different from those of the Shiis. The role of the *qāḍī* in the Sunni community is compared at length to that of the *qāḍī* in the Shii community, with special consideration given to the respective *qāḍīs*' access to communal resources such as *waqf*<sup>24</sup> holdings. Because the *qāḍī* served dissimilar needs in each community, the effect of centralization on each community was also very different. Khuri shows that because the Sunni *qāḍīs*' responsibilities were limited to fairly mundane matters, British attempts to define the office of the *qāḍī* within a bureaucratic structure changed little in the Sunni community. On the other hand, limiting the Shii *qāḍīs*' responsibilities to

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<sup>23</sup> Khuri, *Tribe and State in Bahrain*.

<sup>24</sup> A *waqf* is an Islamic endowment, usually denoting a building or an area of land for religious or charitable purposes.

purely judicial matters created a substantial shift in the authority structure of the Shii community, as the *qāḍī* served as a community leader, advisor, and civil administrator, as well as a judge. While Khuri at times overstates his case, achieving a full understanding contemporary attitudes toward the state of the *sharī'a* courts and toward the possibility of codification of the family law would not be possible without this important study.

Bahraini women have been active and visible in national events for half a century. They have participated in the nationalist movement, protests over the dissolution of Parliament in 1975, Shii demonstrations of the 1990's, and the family law debate. However, almost nothing has been written about them by scholars in Western languages. Bahrain's own Munira Fakhro is the only scholar who has completed a full-length study of women in Bahrain. *Women at work in the Gulf* looks at women's participation in the workforce, obstacles to that participation, and possible solutions to overcoming those obstacles.<sup>25</sup> Another scholar, May Seikaly, published a small number of articles on women in Bahrain.<sup>26</sup> Seikaly examines Bahraini women's changing identities as a result of the steady increase in educational opportunities and women's increased participation in both the workforce and political protest movements. One article focuses specifically on women's involvement in the protests of the mid-1990's

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<sup>25</sup> Munira A. Fakhro, *Women at work in the Gulf: a case study of Bahrain*, London; New York: Kegan Paul International, 1990.

<sup>26</sup> May Seikaly, "Women and Religion in Bahrain: An Emerging Identity," in Islam, Gender and Social Change, Yvonne Yazbeck and John L. Esposito, eds. New York; Oxford: Oxford University Press, 1998, pp. 169-187; "Women and Social Change in Bahrain," *International Journal of Middle East Studies*, Vol. 26, No. 3 (Aug., 1994), pp. 415-426; and "Bahraini Women in Formal and Informal Groups and the Politics of Identification," in *Organizing Women: Formal and informal women's groups in the Middle East*, Dawn Chatty and Annika Rabo, eds. Oxford; New York: Berg 1997, pp. \*.

and explores the relationship between political radicalization and Islamic revivalism. In a series of personal interviews with both Sunni and Shii women Islamists of varied ages and socio-economic backgrounds, opposition to the West was reported most often as the factor which motivated their activism. Seikaly also argues that the Islamist movement gave women a sense of authentic identity, status, and worth as guardians of morality and social values.

To supplement the meager literature that exists on Bahrain, I looked to works produced in several other fields. My reading was guided by a need to understand the roles of relevant actors in the family law debate. Those who led the vanguard of opposition to family law reform were the Shii '*ulamā*'. The opposition of the Shii '*ulamā*' was based in part on the argument that a codified law would remove control over family law from religious scholars and place it in the hands of elected lawmakers. These lawmakers, the '*ulamā*' argued, have no authority over religious law since they have not participated in a specific tradition of education, scholarship, and the acquisition of piety. To analyze this part of the '*ulamā*'s argument, I have drawn upon the work of Marilyn Robinson Waldman and Muhammad Qasim Zaman. Waldman examined contemporary Muslims' references to the past as efforts to lend authenticity to current projects, to legitimate themselves as authoritative figures, and as a response to and strategy for social change.<sup>27</sup> The act of piecing together elements of history in response to current social and political needs is a creative act in which the Islamic narrative is constructed anew. Waldman writes that, "Traditions can be part of the

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<sup>27</sup> Marilyn Robinson Waldman, "Tradition as a Modality of Change: Islamic Examples," *History of Religions*, Vol. 25, No. 4, Religion and Change: ASSR Anniversary Volume (May, 1986), pp. 318-340.



ideology of modernity as well as of the ideology of tradition; and not all things from the past have to be recognized as tradition, just as not all traditions originated in the pre-modern past. Furthermore, either ideology can support change.”<sup>28</sup> Muhammad Qasim Zaman examines the role of the ‘*ulamā*’, specifically, in the active creation of Islamic tradition.<sup>29</sup> Zaman’s work, *The Ulama in Contemporary Islam: Custodians of Change*, focuses on British India and Pakistan during the nineteenth and twentieth centuries; however, it also provides a comparative study on the role of the ‘*ulamā*’ in the contemporary Muslim world. In analyzing transformations the ‘*ulamā*’ have undergone, and their growing religious and political activism, Zaman specifically interrogated the ways in which “perceptions and imaginings of the past shape articulations of identity in the present.”<sup>30</sup>

Most helpfully for the present project, Zaman considers the ‘*ulamā*’s confrontation with the emergence of the modern nation-state. One of the elements of modernity that has had a great effect on the role of the ‘*ulamā*’ in society is the codification of law. Zaman found that there is a relationship between *madhhab* and the degree to which Western codified legal systems have been resisted by members of the ‘*ulamā*’. Where legal scholars are given wide latitude in the ability to perform *ijtihād*,<sup>31</sup> codified systems are usually opposed. On the contrary, schools that require conformity to the existing legal tradition tend to concede rather easily to the enactment of a codified law. For instance, in Saudi Arabia where Hanbali scholars are free to interpret the texts

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<sup>28</sup> Waldman, “Tradition,” p. 322.

<sup>29</sup> Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change*, Princeton: Princeton University Press, 2002.

<sup>30</sup> Zaman, *Ulama*, p. 3.

<sup>31</sup> *Ijtihād* refers to the jurist’s ability to perform independent legal reasoning.

themselves, codification has been vehemently opposed. In contrast, the Hanafi ‘*ulamā*’ of Pakistan consented to codification without incident. The reason for this, Zaman argues, is that the act of codifying law is not dissimilar from the method of deriving rules used by schools such as the Hanafi. Both processes select rules from already extant sources. According to this premise, ‘*ulamā*’ in Bahrain who follow *madhhabs* that allow a high degree of *ijtihād* (Shii Usulis) would be most likely to oppose codification, while those who follow *madhhabs* that encourage *taqlīd* (Shii Akhbaris and Sunni Malikis and Shafi‘is) would not. The relationship between *ijtihād* and *taqlīd* is complex and cannot be summed up by this simple equation, nevertheless, the equation holds for the case of Bahrain.<sup>32</sup>

On the other side of Bahrain’s debate over family law are the women activists. The work of Lila Abu-Lughod addresses most fully the relationship between Muslim women’s activism and structures of power.<sup>33</sup> While studies of “unlikely” forms of resistance, for example by women or subalterns, have provided us with valuable empirical material and have filled previously blank spaces in our understandings of the workings of society, Abu-Lughod observes that these studies can fall into the trap of romanticizing resistance, and seeing all of its forms as indications of the ineffectiveness of systems of power. It is potentially much more interesting, she argues, to look at various forms of resistance in terms of power *relations*, rather than a power binary. She contemplates Foucault’s phrase “where there is power, there is resistance,” and also, its

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<sup>32</sup> See Wael B. Hallaq, *Authority, continuity and change in Islamic law*, Cambridge; New York: Cambridge University Press, 2001, pp.

<sup>33</sup> Lila Abu-Lughod, “The Romance of Resistance: Tracing Transformations of Power Through Bedouin Women,” *American Ethnologist*, Vol. 17, No. 1 (Feb., 1990), pp. 41-55.

inverse: “where there is resistance, there is power.” This latter phrase is especially illuminating as it opens up the possibility to locate specific points where power is applied and the methods by which this is accomplished. Bahrain’s women activists use many different strategies to influence the government’s actions with regard to the family law. They engage in public debate, they form liaisons with key political figures as well as respected members of the ‘*ulamā*’. They participate in international forums on women’s and human rights, and report to the international community on the state of affairs in Bahrain, a measure that creates pressure on Bahrain’s ruler from the outside. In all of these actions, Bahraini women are exercising limited amounts of power. Additionally, the opportunities to do so are always changing. Abu-Lughod views women’s activism as a diagnostic of power that can also reveal the ways in which relations of power are historically transformed, especially, by the introduction of techniques and forms of power that are specific to the modern nation-state. In this way, one is able to get past the East/West binary by looking instead at the “ways in which intersecting and often conflicting structures of power work together these days in communities that are gradually becoming more tied to multiple and often nonlocal systems.”<sup>34</sup>

Saba Mahmood, analyzing urban women’s mosque movements in Egypt, is also concerned with the ways in which women’s activities affect power relations.<sup>35</sup>

Mahmood argues that it is not only women’s overt resistance to power structures that

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<sup>34</sup> Abu-Lughod, “The Romance of Resistance: Tracing transformations of power through Bedouin women,” *American Ethnologist*, Vol. 17, No. 1 (Feb., 1990), pp. 41-55, p. 42.

<sup>35</sup> Saba Mahmood, *The Politics of piety: the Islamic revival and the feminist subject*, Princeton, N.J.: Princeton University Press, 2005.

can result in shifts in power relations, but also, and at times more importantly, their performance of “pious” activities that re-inscribe religious norms that can influence those relations. Mahmood’s work is an important corrective to the tendency to focus solely on political activities as resistance. Bahraini women activists are examined here for the role they play in advocating family law reform. Therefore, the types of activities analyzed are by definition political. However, Mahmood encourages us to consider how the demonstration of piety within those activities, for instance, justifying an argument by citing a hadith, or seeking the endorsement of a member of the ‘*ulamā*’, also affects political outcomes. The result is a more nuanced understanding of the ways in which power and authority are applied.

## METHODS

In a survey on feminist research methods, Shulamit Reinharz and Lynn Davidman found that feminist research tended to be subject-driven rather than method-driven, meaning that “feminist research will use any method available and any cluster of methods needed to answer the questions it set for itself.”<sup>36</sup> While the current project is only feminist in part, it is subject-driven in that its central questions determined the multiple methods that were used. As I developed my research agenda, the questions that most immediately begged for an answer could not be categorized as addressing only one type of issue. Most definitely, these questions were about religion: as a newly-

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<sup>36</sup> Shulamit Reinharz with the assistance of Lynn Davidman, *Feminist Methods in Social Research*, New York, Oxford: Oxford University Press, 1992, p. 213.

formed modern nation-state that defines itself as an Islamic nation, how would the codification of family law affect Bahrain's status as such? After centuries of maintaining a traditional *sharī'a* court system under the rule of several different types of sovereigns, what can account for the desire to change now? *Sharī'a* is believed to be God's law, and as such has historically been administered by religious scholars and officials. What factors have made it possible in contemporary Bahrain for laypeople to engage in debates over this topic? What does their participation in the debate say about the role of religion in contemporary society? What does it say about the role of women in Islam?

Questions that emerged in my initial consideration of the topic also involved law, society, and politics. In their effort to codify the *sharī'a*, how would Bahrainis blend these two different forms of law? How does *madhhab* affect legal scholars' perspectives on codification and reform? What is the historical relationship between the *madhhabs* in Bahrain, and how does this relationship shape contemporary attitudes, if at all? And the most nagging question of all for which there did not seem to be an immediate or obvious answer, what is the relationship between religion and politics in the modern Muslim-majority nation-state? It was this question that dogged me throughout the research and writing period, and for which I am still not sure I have a satisfactory answer. The family law debate is, in the end, a debate about authority; namely, about *who* has the authority to grant or deny women's rights; to preserve, amend, or discard particular rules of Islamic jurisprudence; to preserve or eschew the

particularities of each sect; and most broadly, the authority to determine the future of the role of Islam in society.

The only way to answer these questions and to get at the heart of an issue as elusive as authority was to look at several different types of sources. My research involved a combination of formal interviews and ethnography, textual analysis, and archival research. I resided in Bahrain for a total of twelve months during three separate visits between 2003 and 2006. During this time I conducted formal interviews with women activists, human rights activists, religious scholars, judges, lawyers, women *sharī'a* court litigants, and government officials including members of Parliament, representatives of the Supreme Council for Women, and the Ministry of Foreign Affairs. In addition to formal interviews, I spent time with Bahrainis on a social basis and participated in various aspects of Bahraini life.

The types of texts I analyzed were many and varied. I looked at current and past issues of major newspapers. From the women activists, I received copies of petitions to the Bahraini government as well as to the United Nations, seminar papers from conferences held on the topic of family law, organizational documents, personal statements or responses to my or other researchers' questions, and in one case, a newly published book on one of the activists' experiences. The '*ulamā*' that were most involved in the debate were those who are members of the Shii organization *Majlis al-Islāmī al-'ulamā'ī* ('*Ulamā*' Islamic Council, hereafter, UIC). The UIC maintains a website on which the *khuṭab* of the leading members are archived. The website also provides articles and statements written by members, press articles relevant to specific

issues, and information about the organization's history and goals. There is a large file on the family law initiative including these many different types of documents as well as photographs of demonstrations the UIC held to oppose the family law. From *sharī'a* court judges, I received copies of past and current procedural rules, examples of marriage contracts, and copies of both the Sunni and Shii family law draft proposals. The Supreme Council for Women (SCW) was generous with their time and materials, providing me with summaries of the results of their studies on divorce and the public opinion poll on family law; current and back issues of SCW newsletters; lists of royal decrees relevant to the SCW; and, most helpfully, promotional materials from the 2005 family law campaign.

To situate the current debate within a historical context, I spent many hours at Bahrain's Historical Documents Center, searching for records relevant to the history of the *sharī'a* courts. My search there did not meet with a great deal of success; however, I did obtain copies of some correspondence between the Āl Khalīfa and the British agency on the subject of the courts. As it turned out, these same letters were transcribed in the records of the British India Office. Nevertheless, seeing the documents in their original form was exciting. The majority of my archival research was done using the Government of Bahrain records of Britain's India Office, together with the memoir of Charles Belgrave, advisor to the ruler during the years 1926 – 1957. I also consulted the biographical dictionaries of Yūsuf al-Baḥrānī and 'Alī ibn Ḥasan al-Baḥrānī, which describe the lives and work of major Bahraini Shii '*ulamā*' of the pre-modern period.

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In order to make sense of positions held by the '*ulamā*' regarding family law and the *sharī'a* courts, Chapter Two provides an historical sketch of Bahraini legal institutions. Beginning in the ninth century, the chapter demonstrates that Sunni and Shii legal institutions have remained, for the most part, separate. The government-sponsored law would, for the first time, not only standardize the rules to be applied in the *sharī'a* courts, but also give the Sunni rulers control over Shii family law. Contemporary attitudes of Bahrain's Shiis toward the government's family law are better understood in light of these historical patterns.

The response of the Shii '*ulamā*' to the government's initiatives to enact a codified family law are analyzed in Chapter Three. Through examining press statements, Friday sermons, and political activism, the chapter demonstrates that the Shii '*ulamā*' claim authority over family law by referencing Islamic texts and tradition. They also argue that through the enactment of a codified law, the Sunni government would be one step closer to its alleged goal of eradicating Shiism completely. The chapter also addresses the religious and legal ideological divergence within the Shii '*ulamā*' between Usulis and Akhbaris.

Chapter Four examines the two women's NGOs that have been most active in advocating a codified family law. These groups argue for greater rights for women which they believe to emanate from four sources: Islam, the Bahraini constitution, international human rights treaties of which Bahrain is a signatory, and regional Islamic and pan-Arab ideals of justice.



## NARRATIVE

Before analyzing each of the main actors in the debate, I would like to provide a basic narrative of the development of the debate within the last eight years. This can be used as a general reference, and will help the reader to situate points of analysis within the context of a timeline of events.

Upon Bahrain's independence in 1971, adjudication of cases involving family and personal status issues was left in the hands of the *sharī'a* courts. These courts consisted of a small number of appointed *qāḍīs* who issued judgments based on independent consideration of rulings of past jurists or Islamic texts. Prior to the establishment of the British agency, Sunni *qāḍīs* were chosen by tribal leaders, and Shiī *qāḍīs* emerged as authoritative figures sanctioned by the community. When the British agency began during the early twentieth century to take a more active role in the domestic affairs of the islands, *qāḍīs* for both communities began to be appointed by the Āl Khalīfa. By the time of independence, *qāḍīs* were salaried employees of a central government into which the *sharī'a* courts had been absorbed. The sources consulted and the manner in which cases were handled, however, was left to the individual discretion of the *qāḍīs*.

In 1982, a small group of lawyers and representatives of NGOs began to discuss the state of the *sharī'a* courts. A couple of these lawyers were women, the first women to argue cases before the Bahraini courts. This group, headed by Lūlwa al-ʿAwaḍī and a member of the royal family, Shaykha Maryam Āl Khalīfa, began to speak to the press

about aspects of the *sharī'a* courts that they considered to be flawed. Primarily, the women contended that the *qāḍīs* discriminated against women litigants, and that they did not follow the precepts of Islam. The small group began to petition the ruler to reform the courts by enacting a codified personal status law, or at the least, to address some of their concerns. The calls of the group that eventually took the name The Personal Law Committee were largely ignored by the ruling Emir, 'Īsā ibn Salmān Āl Khalīfa.

The PLC continued to work for reform. In 1987 they held a conference titled, "Perspective on the position of women in the issue of personal status law". Papers were delivered by scholars, lawyers, and activists, covering such topics as the effects of social and economic changes on the family in Bahrain, divorce in Bahrain, the role of the women's organizations in advancing women's rights, and the comparison of the personal status laws of Arab countries. Committee members formed ties with activists in other countries, and in 1985, some members travelled to Beijing to take part in the United Nations' International Decade for Women Convention.

Events of the 1990's brought the PLC's advocacy for a personal status law to a halt. Political repression, social and economic discrimination, and incidents of torture of political prisoners spurred a Shii *intifāḍa* (uprising). Demonstrators and government forces clashed frequently in the streets, and Shii community leaders were exiled.

The crowning of Ḥamad in 1999 heralded an era of new hope for Bahrain. Ḥamad promised an end to the repression and violence that had wracked the country under his father's rule. Within a year, Ḥamad had drafted the National Action Charter, a

document in which the new administration pledged reforms that would grant citizens the freedoms they had previously been denied. The charter mapped out a new government with checks and balances that would create more transparency and accountability to the Bahraini people. Receiving overwhelming support in a public referendum on the Charter in February of 2001, the new King began immediately to implement key reforms. Most significantly, Ḥamad abolished the State Security Law, the most oppressive tool in his father's arsenal, which had allowed the government to arrest and imprison citizens without due course or fair trial.

The improvement of women's conditions was also featured prominently as a means to move toward a more progressive society. In 2001, Ḥamad established the Supreme Council for Women, a government agency charged with assessing women's status and proposing actions that would lead to its elevation. The following year, the ruler formed a committee of legal specialists to draw up a proposal for a codified law to be applied in the *sharī'a* courts. The committee, which included women lawyers and members of the Supreme Council for Women, initially began to draw up two separate laws: one for Sunnis and the other for Shiis. However, after realizing that there were only a small number of issues on which the sects differed, the committee decided to merge the two drafts into one, unified law that included some separate articles that applied only to one sect or the other. The completed draft was announced in the press in September of 2003, an announcement that ignited a firestorm of controversy. The country's '*ulamā*' were incensed, and accused the government and the women activists of being influenced by the West. Members of Parliament engaged in heated debates.

Primarily at issue was the unified nature of the draft. Many Shiis were concerned that Shii legal particularities would not be preserved. Shii *'ulamā'* opposed the whole project of codification, arguing that what they considered to be God's law had no place in Parliament.

The issue proved so contentious that the draft was shelved. Additionally, the Minister of Justice was dismissed and replaced. No explanation was given for these moves. In the meantime, a new women's NGO was founded. The Women's Petition Committee was founded in 2002 by Ghāda Jamshīr, a member of a prominent Sunni family who had recently been divorced from her husband. Jamshīr began by petitioning the king for a codified family law, but it quickly became evident that her approach was to be much more aggressive than that of the PLC. Jamshīr began to organize demonstrations in which women who had received what they considered to be unjust rulings from the *sharī'a* courts stood outside the court buildings. The women held signs on which each woman printed the name of her judge, the case number, and the ruling he delivered. Bahrainis reacted strongly to the unseemly nature of the demonstrations; however, the women's claims struck a chord with the public. Women of both sects started to contact Jamshīr and to tell her their stories. Within a few years of founding her organization, Jamshīr had heard from hundreds of women, and had amassed stacks of court rulings that demonstrated the judges' lack of training and professionalism, the courts' inefficiency, inconsistency in rulings, and the existence of corruption. Jamshīr told the women's stories to the press. She described instances of bribery and extortion, and in one case revealed a taped recording of a judge offering a woman litigant a

favorable verdict in exchange for sexual favors. Jamshīr also pursued reform through more official channels. She requested meetings with the Minister of Justice, members of Parliament, and members of the *‘ulamā*,’ in which she presented her case for Bahrain’s adoption of a codified family law. During these meetings, Jamshīr called for the dismissal of several of the *sharī‘a* court judges whom she felt had committed the worst offenses.

Officials were reeling from the media storm Jamshīr had created. She had aired the country’s dirty laundry in the eyes of the region and the world, and her claims were difficult to deny. Jamshīr’s identity also prevented her from being silenced. She was well aware that not many others could get away with what she had done. She admitted, “You know why I can say the things I say? One, I’m rich. Two, I’m Sunni. Three, because of who my family is. Nobody can say the things I say.”<sup>37</sup> The extent of Jamshīr’s influence became evident after she publicized the case of Badriyya Rabī‘a, a mother who lost custody of her children during a particularly ugly divorce. Jamshīr obtained the written documents relating to Rabī‘a’s case and exposed its details to the press. Several months later, Ḥamad dismissed six judges from the *sharī‘a* courts. Officially, the judges “retired,” however, rumors abounded that they were fired as a result of Jamshīr’s work.

Despite the fact that women activists and some members of Parliament alike expressed anger and frustration at the king for stalling the codification project, it was not the case that Ḥamad had abandoned it. In 2002, he instructed the SCW to carry out a

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<sup>37</sup> Personal conversation, March 19, 2006.

study of *sharī'a* court cases. The study was completed by four women lawyers chosen for their expertise in family law. The lawyers examined 306 cases in both the Sunni and the Shii courts and found that much of what Jamshīr had claimed was in fact an accurate assessment of the state of affairs in the courts. Approaching the issue from a different angle, the government formulated a plan to run a national campaign that would educate the public about the benefits of a codified law and build popular support. In preparation for the campaign, the Supreme Council for Women commissioned a research firm to conduct an opinion poll regarding Bahraini's knowledge of and views on the prospect of a codified family law. The sampling was not large (1261 individuals), and, opponents of the law charged, not necessarily representative of the entire public. However, the poll confirmed what opponents had long been arguing, that any family law that would be applied in Bahrain must be drawn from the *sharī'a*, and not from Western law.

As the results were being compiled, the king was at work on another front. He formed a second drafting committee. This time, it included only religious scholars and no women. The new committee also prepared entirely separate drafts each for the Sunni and the Shii courts. By the time the SCW campaign was launched in November of 2005, the drafts were nearing completion. The SCW campaign was designed to have three stages. The first stage included a series of public information sessions, the delivery of public statements of support by prominent national figures, and the distribution of promotional materials such as flyers, pamphlets, posters, and T-shirts. Understanding that there were strong associations between codification and the West, the campaign focused on providing the public assurances that any law passed in Bahrain

would be drawn from Islamic texts. Members of the '*ulamā*' and judges who were supportive of codification spoke on behalf of the campaign, pledging that Islam is not incompatible with codification. The second stage was to involve the assessment of the results of the first stage, and the third stage would be determined thereafter.

Unfortunately for supporters of the new law, the campaign failed. Days after the campaign was launched, over 100,000 Bahrainis marched on one of Manama's main thoroughfares in opposition to the family law initiative. The demonstrators were mostly Shii, mobilized by a partnership between the '*Ulamā*' Islamic Council, the council of leading members of the Shii '*ulamā*', and al-Wifāq, the primary Shii political organization. A statement issued on the UIC website expressed the Shiis' rejection of the government's project, on the grounds that lawmakers were not religious scholars, and possessed no authority to handle matters of the *sharī'a*. The UIC explained that it was not the idea of codification itself that they opposed, but the fact that the laws would be submitted to the Parliament for approval and that in the future, the Parliament may amend the laws in a way that could violate the *sharī'a*. The UIC offered their support for codification in exchange for the satisfaction of three demands. First, that the laws, separate for each sect, would be drafted exclusively by *sharī'a* scholars; second, that the constitution would be amended to guarantee that the Shii law would not be passed until it was approved by the Shii's highest religious authority, the *marja'* (who, for the majority of Bahraini Usuli Shiis was Ayatollah 'Alī al-Sīstānī; and third, that the law could not be amended in the future without the *marja'*'s agreement. Observers were exceedingly skeptical that the king would meet the UIC's demands. It was also believed

that the UIC's demands were merely a cover for their more urgent goal to acquire greater political rights through constitutional reform.

In January, 2006, the SCW admitted defeat. SCW Secretary-General Lūlwa al-ʿAwaḍī explained that the campaign failed to reach the grassroots. The reason for this, she claimed, was that women in some segments of society are unreachable because of their dependence on male religious leaders. Despite the failure of the campaign, it quickly became clear that the government intended to push forward anyway. In January the press announced that the new drafts were complete, and that the government intended to submit them to the Parliament for approval before the 2006 elections which were to take place in November. Speaking to the press, the UIC expressed surprise and anger that a draft had already been prepared. The Council said it had not been consulted on the contents of the draft and that the government had hand-picked the Shii scholars that composed it. Arguing that the draft did not in any way represent their views, they vowed to prevent it from passing in the Parliament. In the spring of 2006, president of the UIC ʿĪsā Qāsim invited all Shii members of Parliament to a meeting to discuss the family law draft. Qāsim's goal was to encourage the lawmakers to vote against the law. One member of Parliament reported that Qāsim went so far as to threaten to revoke the Shii community's support of any candidate who voted in favor of it. As it turned out, the drafts were not submitted for a vote until three years later.

On January 3, 2009, two family law drafts were presented to the Parliament, one that would apply to Sunnis and the other for use in the Shii courts. Shii members of Parliament rejected the Shii draft, but announced that they would not stand in the way if



Sunnis chose to approve their own draft. On May 27<sup>th</sup>, the Sunni draft was re-submitted and passed by a large majority. Only three members voted against it, members of the minority Salafi bloc who told the press that they had consulted Salafi authorities abroad who had advised them to reject the law.

## **CHAPTER 2: LAW AND SECT IN BAHRAIN: A Brief History of Legal**

### **Institutions**

In considering the reactions of Bahrain's religious scholars to the government's proposed family law, one of the central questions that arises is why most Sunnis support it, while most Shiis do not. The fact that each sect would respond differently to this major change in the judicial system is not surprising when viewed from a historical perspective. It has only been since 1926 that the Sunni and Shii *sharī'a* courts have existed within the same institutional framework. It is not known exactly how long Sunnis and Shiis have coexisted on the islands, but there is evidence suggesting that it has been at least as long as five centuries, dating back to the mid-fifteenth century when the Shii officials of the Banū Jarwān administration were replaced by the Maliki Sunnis of the Banū Jabr tribe of Eastern Arabia. From that time until 1923, Sunnis and Shiis in Bahrain developed and maintained separate legal institutions to adjudicate family issues. While there were periods when the entire population fell under the jurisdiction of a single official with respect to certain matters, such as the *muḥtasib* (market inspector), who ensured fair market prices and maintained a standard of public behavior, family issues such as marriage contracts, divorce settlements, and child custody arrangements were handled by a *qāḍī* of the litigant's own sect.

In fact, even since 1926, Bahrain's *sharī'a* courts have had separate sections for each sect which have preserved the legal competence of religiously-trained judges to administer to their respective sect's personal status cases. The government's law could

have, for the first time in Bahrain's history, forced Sunni and Shii *qāḍīs* to adjudicate these cases by referring to the same, codified legal document, or even dispossess religious judges altogether of their roles, and replace them with judges trained only in secular law. Viewing the issue from a historical perspective demonstrates the enormous shift this law could produce in Bahrain's legal and religious landscape.

The present chapter provides a sketch of the history of Bahrain's legal institutions to show that these institutions have remained for the most part separate according to sect. It outlines shifts in political authority and analyzes the effects of these shifts on legal institutions, and conversely, ways in which religious doctrine affects attitudes toward political and legal authority. This chapter also compares Sunni and Shii religious authorities and argues that not only did Sunnis and Shiis have separate authority structures, but that those authority structures were different in kind, a situation that complicated British efforts to unite both sects under one, centralized state. *Sharī'a* in particular was positioned differently in relation to other communal forces in the Sunni community than it was in the Shii community. Understanding the role *sharī'a* has played within each community historically helps to explain current Sunni and Shii perspectives on family law reform.

### **Bahrain Before the Modern Era**

#### **Shii Rule of the Ismā'īlīs: 899 – 1460 C.E.**

In early Islamic sources, the name Bahrain refers to the islands that comprise present-day Bahrain in addition to the regions of al-Ḥasā and Qaṭīf in eastern Arabia. These early references mention Bahrain as the location where the Ka'ba's black stone was held for almost twenty-two years during the tenth century by Abū Sa'īd al-Ḥasan b. Bahrām al-Janābī (d. 301/913-914), chief of an Ismā'īlī sect referred to as the Qarmaṭīs.<sup>38</sup> Unlike Imami Shiis who believe in a line of twelve Imams extending from the Prophet's nephew 'Alī to Muhammad, son of Ḥasan al-'Askarī, Ismā'īlīs hold that the sixth Imam, Ja'far al-Ṣādiq, designated his eldest son Ismā'īl as his successor even though Ismail predeceased his father. While both sects are messianic in the sense that they believe in the existence of a savior, the Mahdī (Muhammad, son of Ḥasan al-'Askarī; and Muhammad, son of Ismā'īl, respectively), Imamis see his coming at the end of time, while Ismā'īlīs saw it as imminent, and in fact, believed that the Mahdī had come, according to some sects, just before and in the early years of the tenth century. In 931 C.E. the Ismā'īlīs of Bahrain under Abū Ṭāhir Sulaymān, son of Abū Sa'īd, believed that the Mahdī had arrived among them in the form of a Persian slave. Since the Mahdī was present to decide questions of law, Islamic law was abolished. The Mahdī issued rules that were considered strange and even repulsive, and began to

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<sup>38</sup> For more on the Qarmaṭīs, see Farhad Daftary, *The Ismā'īlīs: their history and doctrines*, Cambridge; New York: Cambridge University Press, 2007; M.J. de Goeje, *Mémoire sur les Carmathes du Bahran et les Fatimides*, Leiden: Brill, 1886; Heinz Halm, *Shi'ism*, Edinburgh: Edinburgh University Press, 2004; Wilfred Madelung, "Fatimiden und Bahrainqarmaten," *Der Islam*, Bd. 34, 1959, pp. 34-48; Moojan Momen, *An introduction to Shi'i Islam: the history and doctrines of Twelver Shi'ism*, New Haven: Yale University Press, 1985, p. 66.

execute Qarmaṭī notables. Abū Ṭāhir realized that the man was an imposter and had him killed.<sup>39</sup>

During the following century, Ismāʿīlīs continued to rule in Bahrain, and had established a type of welfare state in which several members of one family ruled as a council. Al-Aḥsāʾ in eastern Arabia was made the capital, and an army was comprised of Ismāʿīlīs themselves (rather than slaves or captives). It seemed that everyone participated in periodic attacks against non-Ismāʿīlīs, creating a sense of an egalitarian order. Islamic law and ritual had disappeared, and the only existing mosques were for visitors. In 1070 C.E., al-Aḥsāʾ was conquered by the Sunni tribe of ʿAbd al-Qays and held for seven years, after which the Qarmaṭīs under Abū Ṭāhir were defeated.<sup>40</sup>

The extent to which the general population adopted Ismaʿīlī beliefs is difficult to trace. Moojan Momen suggests that the general trend is that native Bahrainis, or as they are called in contemporaneous Arabic sources, the Baḥarna or the Baḥārīna, adopted Ismāʿīlī beliefs after the arrival of the Qarmaṭīs, and then gradually embraced Imami Shiism. Juan Cole likewise speculates that Bahrainis were predominantly Ismāʿīlī at least until the fourteenth century, basing his view in part on the fact that the traveler Ibn Baṭṭūṭa described the inhabitants of Qaṭīf in 1331 as “extremist Shiis” (*rāfiḍīyya ghulāt*), reasoning that this is how a Sunni would describe Ismaʿīlīs.<sup>41</sup> Cole suggests that there were remnants of Ismaʿīlī beliefs even into the nineteenth century.<sup>42</sup>

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<sup>39</sup> Patricia Crone, *God's Rule: Government and Islam*, New York: Columbia University Press, 2004, pp. 325-326; and Daftary, *The Ismāʿīlīs*, pp. 162-163.

<sup>40</sup> Daftary, *The Ismāʿīlīs*, pp. 220-221.

<sup>41</sup> Juan R. I. Cole, *Sacred space and holy war: the politics, culture and history of Shiʿite Islam*, London, New York: I.B. Tauris, 2002, p. 33.

<sup>42</sup> *Ibid.*, p. 55.

Juan Cole writes that because the Qarmaṭīs lacked their own religious and legal institutions, they looked to the schools of Iraq for qualified individuals to serve in positions such as *qāḍī* ‘*l-quḍāt* (chief judge) and the *muḥtasib*.<sup>43</sup> Because the Qarmaṭīs of Bahrain under Abū Ṭāhir and then Sa‘īd ibn Muḡhammis are reported to have had little use for law, it is likely that Cole is referring to the later Qarmaṭī tribe, the Banū Jarwān, which held Bahrain from 1305 – 1363. Shii biographical dictionaries testify that several Bahraini scholars of this period held legal posts. For instance, Shaykh Aḡmad ibn ‘Abdallāh Ibn al-Mutawwaj al-Baḡrānī (d. 764/1363), who is discussed below, served as *muḥtasib*. The institutionalization of these positions allowed for the spread of Imami beliefs in Bahrain. Given that these scholars emigrated from Iraq, they were most likely familiar with the ideological trends current in the Iraqi cities at that time. Until the *Ghayba* (Occultation)<sup>44</sup> of the twelfth Imam in 874 C.E., Imamis looked to their Imams to answer legal questions. It was not until several decades later that, realizing that the *Ghayba* might last longer than was initially anticipated, scholars began establishing methods of addressing legal issues.

The theory of the Imamate, that the Imams were the legitimate successors to the Prophet because they were designated as such, and because they alone were *ma‘ṣūm* (infallible), led to a nearly exclusive focus in early Imami jurisprudence on the *akḡbār*

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<sup>43</sup> Cole, *Sacred Space*, p. 33.

<sup>44</sup> Twelver Shiis believe that the Mahdī, or messiah, is hiding, but will reappear at the end of time and institute an era of peace and justice. This period of hiding is referred to as the “*Ghayba*,” or Occultation, and has two distinct periods. The Lesser Occultation refers to the period from 874-941, during which the final and twelfth Imam, Muḡammad al-Mahdī led the Shii community through four deputies. In 941, the last deputy reported that the Mahdī would cease communication with his representatives and would not be seen until the end of time. Thus, 941 until the present is considered the Greater Occultation.

(sg. *khbar*) or Hadith of the Imams.<sup>45</sup> Because it was also believed that the Imams alone had the ability to interpret the Qur'an and the Hadith of the Prophet, the Imams' *akhbār* often took precedence over the primary texts themselves.<sup>46</sup> So-called "rationalist" methods used by Sunnis, especially *qiyās*, were rejected, in part because many *akhbār* exist in which the Imams denounce it. Imams dismissed rationalist methods also because certainty (*qaṭʿ*) can only be achieved by referring to the words of the Imams, while the use of reason can only yield probability (*ẓann*).<sup>47</sup> Hence, these early scholars were often referred to as "*muḥaddiths*" (scholars of Hadith), as opposed to *faqīhs* (jurists) or *mujtahids* (Muslim jurists capable of independent reasoning). The performance of the duties of the office of imam were also prohibited during the *Ghayba* because of the exclusive nature of the Imams' authority, along with the fact that the Shia during this period lived under Sunni rule and often practiced *taqiyya* (dissimulation). Therefore, early treatises argued against holding Friday prayer, the collection of taxes, and the declaration of *jihād*. These were the views of the scholars of the Iraqi cities from the time of the *Ghayba* until approximately the mid-eleventh century when the work of Muḥammad ibn al-Ḥasan al-Ṭūsī (d. 460/1067), known as Shaykh al-Ṭāʿifa, brought rationalism to the fore.

<sup>45</sup> On Shii Hadith, see Robert Gleave, "Between Hadīth and Fiqh: The "Canonical" Imāmī Collections of Akhbār," *Islamic Law and Society*, Vol. 8, No. 3, Hadith and Fiqh (2001), pp. 350-382.

<sup>46</sup> Andrew Joseph Newman III, *The Development and political significance of the Rationalist (Uṣūlī) and Traditionalist (Akhbārī) Schools in Imāmī Shīʿī history from the third/ninth to the tenth/sixteenth century A.D.*, Ph.D. Dissertation, Los Angeles: University of California, 1986, p.

<sup>47</sup> Robert Gleave, *Inevitable doubt: Two theories of Shiʿi jurisprudence*, Leiden; Boston: Brill, 2000, pp. 4-5. See also Robert Gleave, *Scripturalist Islam: The History and Doctrines of the Akhbari Shiʿi School*, Leiden; Boston: Brill, 2007.

By al-Ṭūsī's time, Imami scholars had begun to accept limited rationalist positions. It was no longer practical to continue waiting for the return of the Mahdī to address the growing body of legal issues for which no *khavar* (singular of *akhbār*) existed.<sup>48</sup> Two scholars of the tenth century referred to as *al-Qadīmāyn* (the Two Ancients), Abū Muḥammad Ḥasan ibn 'Alī ibn Abī 'Aqīl al-'Umānī al-Hadhḥā' (first half of the 4<sup>th</sup>/10<sup>th</sup> c.) and Abū 'Alī Muḥammad ibn Aḥmad ibn al-Junayd al-Kātib al-Iskāfī (middle of the 4<sup>th</sup>/10<sup>th</sup> c.) employed proto-rationalist methods that, in the case of the former, became a standard Shii rationalist position, but in the case of the latter, caused his works to be abandoned. Ibn Abī 'Aqīl rejected the *khavar al-wāḥīd* (tradition that is not widely transmitted; pl. *akhbar āḥād*) as invalid and gave precedence to Qur'anic principles over traditions that conflicted with them. While Ibn al-Junayd upheld the validity of *akhbar āḥād*, he exercised a kind of *qiyās* in which he interpreted traditions by referring to other similar traditions, and attempted to discover the rationale ('*illa*) behind various precepts.<sup>49</sup>

During the following century, rationalist methods, especially the rejection of *akhbar āḥād*, gained more legitimacy through the work of al-Shaykh al-Mufīd, Abū 'Abd Allāh Muḥammad ibn Muḥammad ibn al-Nu'mān al-'Ukbarī al-Baghdādī Ibn al-Mu'allim (d. 413/1022), and Abū al-Qāsim 'Alī ibn Ḥusayn al-Sharīf al-Murtaḍā (d.

<sup>48</sup> In fact, one of the techniques developed by early scholars to deal with a question that was not addressed by any of the *akhbār* was hesitation, or the delay of the decision until the return of the Mahdī. This position is supported by a report from the sixth Imam, Ja'far al-Ṣādiq, preserved in Muḥammad ibn Ya'qūb al-Kulaynī's (d. 940) *al-Kaḥfī*. In the report, the Imam is asked a series of questions about how to resolve a dispute involving inheritance. To one of the questions, the Imam replies, "wait until you meet your Imam. Indeed, hesitation at points of doubt is better than leaping into destruction." Al-Kulaynī, *Al-Furū' min al-Kaḥfī*, A.A. al-Ghaffārī, ed., Tehran, 1362, 1: 67-68. Also cited in Newman, *Rationalist (Uṣūlī) and Traditionalist (Akhbārī)*, pp. 74-75.

<sup>49</sup> Hossein Modarressi Tabataba'i, *An Introduction to Shi'i Law: a bibliographical study*, London: Ithaca Press, pp. 35-37.



436/1044). However, it was their student, al-Ṭūsī, who established a satisfactory middle ground between the traditionalists and the rationalists by justifying the use of some rationalist methods in order to validate *akhbar āḥād*. Al-Ṭūsī's methodology and opinions remained the dominant Twelver doctrine for at least a century and a half.<sup>50</sup>

Al-Ṭūsī studied and taught first in Baghdad, and later in Najaf. His work, and that of his students made these two cities the centers of Shii thought. After the sack of Baghdad and the invasion of the central Islamic lands by the Mongols in 1258, most Shii scholars of Baghdad and Najaf either fled or were killed. As centers of Shii scholarship, these cities were replaced by Ḥilla, located south of Baghdad, and Jabal 'Āmil, a mountainous region in what is present-day southern Lebanon.

Along with Ḥilla, Bahrain and the Gulf also escaped the Mongol invasion. The Qarmaṭīs regained control there under Sa'īd ibn Muḡhammis until 1305. The Banū Jarwān, another Qarmaṭī tribe, captured Bahrain that year and held the islands until approximately 1460. During their rule, the Banū Jarwān paid tribute to the Sunni king of Hormuz, a kingdom founded by a confederation of Arab tribes that controlled gulf trade routes from the tenth to the fifteenth centuries at which point they allied with the Portuguese.<sup>51</sup> The rulers of Hormuz were content to allow the existing local Shii administration to govern, and did not curtail the activities of the Shii '*ulamā*'.

Biographical dictionaries attest to the continued maintenance of Shii religious and judicial offices, and to the fact that Bahraini scholars followed ideological trends

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<sup>50</sup> Ahmad Kazemi Moussavi writes that the work of Shaykh al-Ṭā'ifā prevailed for "more than a century and a half," while Modarressi puts it at three. See Moussavi, *Religious authority in Shi'ite Islam: from the office of Mufti to the institution of Marja'*, Kuala Lumpur: International Institute of Islamic Thought and Civilization, 1996, p. 27, and Modarressi, *Shi'i Law*, pp. 44-45.

<sup>51</sup> Faroughy, *Bahrein Islands*, pp. 60-61.

present in the Iraqi cities and Jabal ‘Āmil. Shaykh Aḥmad ibn ‘Abdallāh Ibn al-Mutawwaj al-Baḥrānī (d. 764/1363) served as *muḥtasib* and was consulted on legal matters. Another Imami scholar, Shaykh Nāṣir al-Dīn Ibrāhīm ibn Nizār al-Aḥsā’ī served as chief judge, and was a distinguished teacher.<sup>52</sup>

Bahraini legal thinking of this period seems to reflect current trends in Ḥilla as well as Jabal ‘Āmil. There was a vibrant exchange of scholars and ideas between Bahrain and the two cities. Many Bahraini scholars studied in one of those cities before taking up their posts in Bahrain. Shaykh Aḥmad had studied in Ḥilla, and was called a renowned *mujtahid*, a title he would not have been given had he been a traditionalist. He was referred to by one biographer as “the leader of the Imamis in his time.”<sup>53</sup> Alternately, it seems Bahraini scholars were sought out by those in Jabal ‘Āmil and Ḥilla to enrich their own institutions. Because of his scholarly renown in theology, Maytham ibn ‘Alī al-Baḥrānī (d. 681/1282) traveled to Ḥilla at the request of the scholars there. The period of Qarmaṭī rule was one of intellectual prosperity for Bahrain’s Shii community. Juan Cole suggests that the Twelver community of fourteenth century Bahrain and eastern Arabia may have enjoyed more independence and institutional prominence than any other Muslim community at that time.<sup>54</sup>

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<sup>52</sup> ‘Alī ibn Ḥasan al-Baḥrānī, *Anwār al-baḥrayn fī tarājīm ‘ulamā’ al-Qaṭīf wā-l-Aḥsā’ wa-l-Baḥrayn*, Qum: Maktabat Āyatallāh al-‘Uzmā al-Mar‘ashī al-Najafī, 1407 [1986 or 1987], p. 400; Cole, *Sacred Space*, p. 34.

<sup>53</sup> Yūsuf ibn Aḥmad al-Baḥrānī, *Lu’lu’at al-Baḥrayn fī l-ijāzāt wa tarājīm rijāl al-ḥadīth*, Najaf: Dār al-Nu‘mān, 1966, pp. 177-85; ‘Alī al-Baḥrānī, *Anwār*, pp. 70-72; Cole, *Sacred Space*, p. 34.

<sup>54</sup> Cole, *Sacred Space*, p. 34.

### **Sunni Tribal and Portuguese Rule: 1460 – 1602 A.D.**

In the mid-fifteenth century, the situation changed drastically for Bahrain's Shiis. The leader of the Banū Jarwān was killed, and his lands were confiscated by a Sunni Bedouin tribe, the Banū Jabr. The ruling family of Hormuz still claimed the greater Gulf region as their empire, and therefore, the Banū Jabr required a cession from them for Bahrain. This was granted at first, but thereafter was disputed for the better part of the remainder of Hormuzi rule. The Banū Jabr took an active role in asserting their Maliki Sunni orientation in their new territory. They replaced the Shii head of the market police and the *qāḍī 'l-quḍāt* with Sunnis, and appointed several Maliki judges while forcing the conversion of some of the Twelver judges.<sup>55</sup>

In the meantime, the Gulf region attracted the attention of the Portuguese who were interested in taking over the spice trade that passed through Hormuz. Bahrain's pearling industry was also an attractive prize. In 1515, they conquered Hormuz, but faced greater resistance from the Banū Jabr. It was not until 1521 that they were able to take Bahrain. Interested only in reaping economic benefits, the Portuguese ruled Bahrain through Hormuzi governors and did not become involved with the local population. With the exception of the remains of a fort outside Manama, the Portuguese had no lasting effect on the culture, language, or methods of government. No significant changes were made to the judiciary or the local administration. Sunnis continued to hold major offices, appointed by the Hormuzi governors, and Shiism was discouraged.

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<sup>55</sup> Ibid.

Despite the Sunni tribe's persecution of Shiis, it appears that a small number of Twelver '*ulamā*' continued to engage in scholarship and advise the Shii community on legal and theological issues. A few extant works have come down to us from the region in this period, although none that could rival either the works of the thirteenth and fourteenth centuries or those of later centuries when the island becomes a center of Akhbārī thought. In his compilation of extant Shii works on law, Modarressi lists only one Bahraini scholar from this period, Muḥammad ibn Ḥārith al-Manṣūrī al-Baḥrānī (d. after 952/1545), author of *Al-Sayfiyya*, on dogmatics and prayer, and *Mas'ala fī ishtirāʾ istiqrār al-ḥayāt fī l-dhabīḥa*.<sup>56</sup> In his biographical dictionary, 'Alī al-Baḥrānī mentions a Bahraini *mufīṭ*: Shaykh Ḥusayn ibn Shaykh Mufliḥ (d. 933/1526) received his *ijāza* (academic degree) from the prominent Safavid scholar 'Alī al-Karakī and composed fatwas on various issues, collected the fatwas of his father, and wrote many works on *fawā'id* (lessons in legal issues).<sup>57</sup>

During this time, major changes were taking place northeast of the Gulf. The Safavids defeated the Sunni Tīmūrīds and took control of parts of Persia in 1501. The Safavid leader, Ismā'īl, proclaimed Twelver Shiism the religion of the state and began taking steps to eradicate Sunnism. Because they lacked a navy and were occupied with defending their northwestern border against the Ottomans, the Safavids could not conquer the Gulf. Therefore, they allied themselves first with the Hormuzis, and later the Portuguese, and Bahrain remained under Sunni control for another century.

<sup>56</sup> Modarressi, *Shi'i Law*, pp. 135 and 199; 'Abd al-Ḥusayn al-Ḥā'irī, *Fihrist-i kitābkhāna-i Majlis-i Shūrā-yi Millī*, Tehran: Majlis, 1353-(1974- ), vol. XII, p. 38.

<sup>57</sup> 'Alī al-Baḥrānī, *Anwār*, pp. 76-77.

During the reign of the first two Safavid rulers, Ismā‘īl and Shāh Ṭahmāsp (1533-1576), Twelver ‘*ulamā*’ were recruited from Jabal ‘Āmil and the shrine cities of Iraq to form a religious establishment that would be fully supported by the state. A major figure responsible for setting the state’s new religious policy was Shaykh ‘Alī ibn ‘Abd al-‘Alī al-Karakī (d. 1534). Originally from a town at the foot of Mount Lebanon, al-Karakī studied with prominent Shii authorities in Jabal ‘Āmil and Najaf, and also studied with Sunni scholars in Damascus, Jerusalem, and Cairo. After receiving an *ijāza* from ‘Alī ibn Hilāl al-Jazā’irī, the leading Shii jurist in Najaf, he was imprisoned by the Tīmūrid authorities in 1508. Shāh Ismā‘īl freed him and brought him to Khurasan, where he joined the Safavid court and was given the authority to create a Shii religious establishment.<sup>58</sup> Despite the fact that al-Karakī’s position was never formally institutionalized, he was granted authority over all other religious officers, as well as all state functionaries.<sup>59</sup>

Al-Karakī’s initiatives affected thorough and far-reaching changes in the way in which Twelver Shiism was practiced. One of the first directives al-Karakī issued was that a prayer leader be appointed in every town and that Friday prayer be resumed. In the years after the Occultation of the twelfth Imam, many Shii scholars advocated the suspension of formal practices until his return. These practices included the collection and distribution of *zakat* and *al-khums*, the collection of the land tax, *kharāj*, and the

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<sup>58</sup> Devin Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System*, Salt Lake City: The University of Utah Press, 1998, pp. 83-84.

<sup>59</sup> Said Amir Arjomand, “The Mujtahid of the Age and the Mullā-bāshī: An Intermediate Stage in the Institutionalization of Religious Authority in Shi‘ite Iran,” in *Authority and Political Culture in Shi‘ism*, Said Amir Arjomand, ed., Albany: State University of New York Press, 1988, p. 81; Devin J. Stewart, “Notes on the Migration of ‘Amilī Scholars to Safavid Iran,” *Journal of Near Eastern Studies*, Vol. 55, No. 2 (April, 1996), pp. 84-85.

holding of Friday prayer. The prayer leaders were instructed to bless the Safavid rulers during the sermons. Public cursing of Abū Bakr and ‘Umar, the first two Sunni caliphs was also encouraged. Al-Karakī also instituted the collection of *kharāj*, or land tax, and forbade the practice of *taqiyya*, which is the dissimulation of Shii beliefs in order to protect oneself from Sunni persecution.<sup>60</sup> Legal questions were referred to Twelver *mujtahids* who were trained in *uṣūl al-fiqh* and who established rationalism, or what is also referred to as the Uṣūlī (from *uṣūl al-fiqh*) school of legal thought as orthodoxy under the Safavids. At first, these scholars were either recruited from other Shii centers, or Persians were sent to those centers to study. Eventually, however, the Safavids built their own network of *madrasas* (religious colleges), and Isfahan became a prominent center of Shii learning. This development effected a major change in Shii religious education. While Sunnis had had an extensive *madrasa* system in place since the tenth-eleventh centuries, Shiites transferred knowledge through master-apprentice arrangements in which students gathered around individual scholars. The Safavids established the first structural framework for Shii learning in which a formal legal curriculum was taught.<sup>61</sup> The Safavid *madrasa* system, along with the official recognition of *mujtahids* as the predominant legal authorities, promoted the institutional development of the Twelver professional legal *madhhab* and the cultivation of a religious hierarchy of Shii ‘*ulamā*’.

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<sup>60</sup> Cole, *Sacred Space*, pp. 39-40.

<sup>61</sup> Momen, *Shi‘i Islam*, p. 111.

### Safavid Rule: 1602 - 1717

In 1602, the Safavids conquered Bahrain. Although a thorough study of the effects of the Safavid administration on Bahraini society has never been done, biographical dictionaries of some of Bahrain's own '*ulamā*' provide some insight into developments in this period. Entries of Bahraini scholars under Safavid rule are numerous, and confirm that as in Persia, a complete institutional framework was set up that promoted Uṣūlī Twelver Shiism. The town of Bilād al-Qadīm was made the capital, from which affairs of the islands were managed. Appointments were made to the positions of *shaykh al-islām* (chief judge), *ra'īs* (chief religious dignitary), *muḥtasib* and imam (Friday prayer leaders). Often one or more of these positions were held by the same individual, simultaneously or consecutively. '*Ulamā*' were given full control over the operation of the courts and the policing of the markets. The Safavid state sent funding for the patronage of mosques, individual '*ulamā*', and the founding of *madrasas*. Another important source of income for the '*ulamā*' were the dividends earned from the management of *awqāf*: lands, properties, or funds endowed by private individuals for the benefit of either the founder's family or for the public. Additional wealth came from the pearl industry. Many *mujtahids* engaged in pearl trading, acting as wholesalers, and became individually wealthy. Much of this wealth ended up helping to fortify the Shii establishment in the form of furthering a scholar's own studies or contributing to mosque or *madrasa* funds.

Early in the 1600's, the first Imami Shii religious office in Bahrain was instituted. Shaykh Muḥammad ibn al-Ḥasan ibn Rajab al-Baḥrānī al-Maqābī al-Rūwaysī (d. mid-1600's) was appointed as imam to lead the Friday prayers, the first to do so in Bahrain after "its opening to the untroubled [Safavid] empire."<sup>62</sup> Al-Rūwaysī wrote in support of Friday prayer as a religious obligation, and was also an accomplished legal scholar and teacher. As well as being named imam, he was also appointed as the first *shaykh al-islām*.<sup>63</sup> After al-Rūwaysī, ten additional scholars served in the position of *shaykh al-islām* during this period, ending with Aḥmad ibn 'Abdullāh al-Bilādī (d. 1725).<sup>64</sup>

Even though the individual that held the position of *muḥtasib* received his salary from the ruler, those who held this office in Bahrain enjoyed a great amount of independence and acted as a substantial check on local government authority. Shaykh 'Alī ibn Sulaymān al-Baḥrānī al-Qadamī (d. 1064/1654) was known primarily for spreading the study of Hadith in Bahrain, so much so that he was known as "*Umm al-Hadīth*" (Source of Hadith). He assumed the position of *muḥtasib*, and performed it with excellence, restraining the power of the governor and those who were corrupt. He was said to "spread the carpet of justice," and to have eradicated numerous heresies (*bid'a*).<sup>65</sup> Sayyid Hāshim ibn al-Marḥūm Sayyid Sulaymān ibn Sayyid Ismā'īl (d. 1108/1697) was also a *muḥaddith* (a scholar of Hadith) who took up the post of

<sup>62</sup> Yūsuf al-Baḥrānī, *Lu'lu'at*, p. 138.

<sup>63</sup> 'Alī al-Baḥrānī, *Anwār*, pp. 117-119.

<sup>64</sup> Cole, *Sacred Space*, p. 47.

<sup>65</sup> Yūsuf al-Baḥrānī, *Lu'lu'at*, pp. 14-16; 'Alī al-Baḥrānī, *Anwār*, pp. 199-200. *Bid'a* is somewhat of a loaded term. Explain.



*muhtasib*. He was said to be of the most pious nature, and also checked the authority of kings and officials.<sup>66</sup>

The Safavids' political stability allowed for considerable mobility of scholars and also ideas between Persia and Bahrain. Bahraini scholars became well-known for the quality of their jurisprudence throughout the Shii Muslim world, and their opinions were sought by Persian jurists as well as the Safavid administration. The jurists of Isfahan sometimes submitted legal questions to the ruler, who then referred the queries to Bahraini jurists. Shaykh Ḥasan al-Damistānī was one such jurist who was often consulted.<sup>67</sup> In another example, the decision of a local *qāḍī*, Aḥmad ibn Muḥammad al-Iṣba'ī, was questioned by Bahrain's *shaykh al-islām* at the time, 'Alī ibn Sulaymān al-Qadamī (d. 1654). Al-Qadamī sent a query regarding the case to the jurists in Shiraz and Isfahan, who upheld al-Iṣba'ī's decision.<sup>68</sup> Until this time, Jabal 'Āmil had been the predominant Shii center of learning. The political stability and financial prosperity enjoyed by Bahraini scholars under the Safavids during the seventeenth century, however, allowed Bahrain to rival, and perhaps even supplant Jabal 'Āmil as Shiism's intellectual center.<sup>69</sup>

One family in particular, the Āl 'Aṣṣūr, became known for their erudition. From the village of Dirāz, on the northeastern coast of the main island, the Āl 'Aṣṣūr engaged in pearl diving and trading, and date farming, as well as legal scholarship. The most prominent member of the family is Yūsuf al-Baḥrānī, who is regarded as Bahrain's

<sup>66</sup> Yūsuf al-Baḥrānī, *Lu'lu'at*, pp. 63-66; 'Alī al-Baḥrānī, *Anwār*, pp. 125-127.

<sup>67</sup> 'Alī al-Baḥrānī, *Anwār*, pp. 217-220.

<sup>68</sup> Cole, *Sacred Space*, p. 50.

<sup>69</sup> Said Amir Arjomand, *The shadow of God and the Hidden Imam: religion, political order, and societal change in Shi'ite Iran from the beginning to 1890*, Chicago: University of Chicago Press, p. 129.

greatest legal scholar, and one of the most influential proponents of the Akhbārī school of the eighteenth century.<sup>70</sup> Yūsuf was born in 1107/1696 in the village of Māhūz, in the northeastern corner of the main island. His family was staying there while his father Aḥmad (d. 1132/1720) studied with Shaykh Sulaymān al-Māhūzī. Aḥmad was an accomplished scholar in his own right. He wrote several works on matters such as prayer formulas, marriage, divorce, and purity issues. He also collected responsa from various prominent shaykhs, such as ‘Abd al-Imām al-Aḥsā’ī, ‘Alī ibn Luṭf Allāh al-Baḥrānī, Nāṣir ibn Muḥammad al-Khaṭṭī al-Jārūdā, and Sayyid Ḥusayn al-Aḥsā’ī. Many of his works are still extant. As well as studying with his father, Yūsuf also studied the Qur’an with his grandfather Ibrāhīm.

While Yūsuf was born into a time of intellectual and financial prosperity for Bahrain’s Shiis, it is during his lifetime that we begin to see this idyllic era of Safavid Bahrain crumble. Although Safavid rulers were generous in their financial support of the local Bahraini institutions, they did not provide the islands with much physical security. They set up a nominal headquarters on the coast that was guarded by just a few garrisons. The Safavids were also not skilled in naval maneuvers, so when Arab tribes of the gulf, who were historically a seafaring people, began actively seeking a foothold on Bahrain, the Safavids had difficulty fighting them off. In his autobiography, Yūsuf writes that when he was five years old, war broke out between Persian Sunnis referred to as the Hawala (Persians) and the ‘Utūb, which was a confederation of Sunni Arab

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<sup>70</sup> The following information about Yūsuf al-Baḥrānī’s life is taken from his autobiography found in *Lu’lu’at al-Baḥrayn*, pp. 442-449, which is also found in Robert Gleave, “The Akhbārī-Uṣūlī Dispute in Tabaqāt Literature: An Analysis of the Biographies of Yūsuf al-Baḥrānī and Muḥammad Bāqir al-Bihbihānī,” *Jusūr* 10 (1994), pp. 79-109.

tribes from eastern Arabia and what is today Qatar.<sup>71</sup> The Hawala were successful in fighting off the ‘Utūb, but soon after that another attack came, this time from the southern Gulf. Yūsuf writes that the Khawārij (Arab tribes from what is present-day Oman who adhered to Ibādism, a branch of Khārijism) came three times in as many years, finally defeating the Hawala. It was a tragic event with a great amount of violence. Many of the elite fled the island to Qaṭīf, among them Yūsuf’s father and some other family members. Yūsuf was among those who remained in Bahrain for the following two years.

Beginning with the invasion of the Khawārij, Bahrain entered a period of political instability that would last throughout the eighteenth and most of the nineteenth centuries. Yūsuf fled, though he also returned to Bahrain several times throughout his life, trying to maintain his family’s businesses there. Eventually he was overcome with debt and began a new life in a Persian village called Fasā. He fared well there. The local governor, Mīrzī Muḥammad ‘Alī took a liking to him and exempted him from the land tax (*kharāj*). After a time, war came to Fasā as well, causing Yūsuf to flee. He finally settled in Karbala, where he studied and taught, and wrote most of his several-volume work of *uṣūl al-fiqh*, *Ḥadā’iq al-nāḍira fī ahkām al-‘itra al-ṭāhira* (Gardens of splendor on the rules of the pure and the unpure), before passing away in 1186/1772.

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<sup>71</sup> The Hawala had controlled Gulf sea routes under the loose governance of the Banū Khālīd of al-Ḥasā, and were considered subjects of the Ottomans. Their centers were located on the Persian side of the Gulf, but they were present on the Arabian side as well. The eventual victory of the ‘Utūb represents the ascendancy of the Arabian side of the Gulf, which is connected with the rising influence of the Āl Sa‘ūd. See Ingham, B. “‘Utūb.” *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W. P. Heinrichs. Brill, 2010. Brill Online. UNIVERSITY OF PENNSYLVANIA. 02 January 2010  
<[http://proxy.library.upenn.edu:3678/subscriber/entry?entry=islam\\_SIM-7780](http://proxy.library.upenn.edu:3678/subscriber/entry?entry=islam_SIM-7780)>

### The Shii Religious/Legal Divide: Uṣūlī vs. Akhbārī

Yūsuf al-Baḥrānī is best known for his role in spreading a school of legal thought, Akhbārism, that opposed the rationalism that was initiated by Muḥammad ibn al-Ḥasan al-Ṭūsī (d. 460/1067), Najm al-Dīn Abu al-Qāsim Ja‘far ibn Al-Ḥasan al-Ḥillī (d. 676/1277), known as al-Muḥaqqiq, and Ḥasan ibn Yūsuf Ibn al-Muṭahhar al-Ḥillī (d. 726/1325), known as al-‘Allāmah, and institutionalized by al-Karakī and the Safavids. As described above, this school of thought advocated the use of reason and came to be called “Uṣūlism,” after the term *uṣūl al-fiqh*. In Uṣūlism, a religious scholar who is recognized by the community as having adequately studied the Qur’an, the traditions of the Prophet and the Twelve Imams, and the consensus of Shii jurists can act as a representative of the Hidden Imam. This representative, having the title *mujtahid*, can perform tasks that were only to be carried out by the Imam before the Occultation, such as the rendering of legal judgments, the collection and distribution of alms, the declaration of holy war, and leading Friday prayer. In the rendering of legal judgments specifically, the Uṣūlī school of thought accepted four sources of law: the Qur’an, the traditions, the consensus of the Shii jurists (*ijmā‘*), and the *mujtahid*’s own use of reason (*‘aql*). When the Safavid rulers came to power and undertook to establish the Uṣūlī version of Twelver Shiism as orthodoxy, they reinstituted public religious activities of the kind that were within a *mujtahid*’s competence. They also initiated the persecution of Sunnis.

Another effect of Safavid rule that was seen as negative by some Shiites was the rapidly growing authority of the clergy. According to the Uṣūlī conception, the Shia community was divided into two parts: *mujtahids*, and laymen who were to follow the *mujtahids*. The *mujtahids* retained ultimate authority in matters of doctrine and law. Because the Safavid state initiated the first centralized, politically stable Imami government, new questions arose that the Imamis had to confront, such as the application of the land tax (*kharāj*), and the limits of the clergy's own authority *vis a vis* the political authority of the ruler. The *mujtahids* were allowed a great amount of autonomy in responding to these concerns.<sup>72</sup> This, combined with their close ties to political power, afforded the *mujtahids* an inviolability that Shiite clerics had rarely, if ever, experienced in any other period. According to one account, the head cleric was among the king's closest advisors: "The king enquired about religious problems and scientific subtleties through him...and in assemblies and gatherings, he would sit above the 'ulamā' and close to the seat of the king. He was required to be in attendance in the company of the victory-favored (king) in all journeys."<sup>73</sup>

The Sunni backlash against Safavid policies and the growing power of the *mujtahids* engendered disapproval from traditionalist-minded Shii scholars. These scholars found fault with the methods of the *mujtahids*, which relied more and more on the use of their own reason and, as the conservative scholars saw it, less on authoritative sources. In 1622, Shii scholar Muḥammad Amīn al-Astarābādī (d. 1033/1623 or 1036/1627) wrote a treatise titled *al-Fawā'id al-madaniyya* that refuted the use of logic,

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<sup>72</sup> Modarressi, *Shī'ī Law*, p. 50.

<sup>73</sup> Arjomand, *The Mujtahid*, p. 86.

reason and the specific jurisprudential methods based on them, such as *istihsān* and *istiṣhāb*. Al-Astarābādī argues for an exclusive focus on the traditions of the Imams.<sup>74</sup> This treatise revived a debate that had existed earlier between traditionalists and rationalists. At the core of the debate was a difference in concepts of religious authority. Traditionalists believed that after the Occultation, the only authorities on which legal or religious investigations could be based were the Qur'an and the traditions, the *akhbār*, of the Prophet and the Imams, thus they were sometimes called the *Akhbāriyya*. They disapproved of holding Friday prayer during the Occultation and the performance of other Shii religious obligations such as the collection of *kharāj* and *khums*. Devin Stewart argues that the Akhbārīs' position was not just against the use of reason, but also against the adoption of Sunni methods. Stewart explains that because Shiis were a minority in most areas in the Muslim world, many of them accepted Sunni rationalist methods, or even joined Sunni *madhhabs* while practicing *taqiyya*. He contends that those who rejected these methods, the traditionalists or Akhbārīs, did so not only on doctrinal grounds, but also as a movement against the professionalization of the *madhhabs* and the corresponding elevation of the role of the *mujtahid*. In analyzing the early history of Shii legal thought, Stewart sees the work of the tenth and eleventh century Baghdadi scholars (al-Shaykh al-Mufīd, al-Sharīf al-Murtaḍā, and al-Shaykh al-Ṭūsī), and especially al-Murtaḍā's acceptance of *ijmā'* (consensus) as a legitimate source of law as efforts to establish their own Shii *madhhab* modeled after that of the Sunnis. The traditionalists/*akhbāriyya* disapproved of this effort because the effect of

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<sup>74</sup> Muḥammad Amīn al-Astarābādī, *al-Fawā'id al-madaniyya*, Tehran, 1904.

the *madhhab* is to separate the Muslim community into two halves: scholars and laymen, and raises the scholar to a position of authority similar to that of the Imams. Stewart argues that Al-Astarābādī's work is a refutation of the Sunni system, and that this point is often neglected by scholars who tend to focus on Shii law as a discrete phenomenon, separate from the inter-sectarian context in which it developed.

Scholars disagree about the origins of Akhbārism. Most recently (2007, *Scripturalist Islam*), Robert Gleave argued that we cannot speak of a definitive movement or school of "Akhbārism" until al-Astarābādī, and that Shii sources after al-Astarābādī's time name him specifically as the founder of the school.<sup>75</sup> Gleave also argues that early traditionalist scholars that may have been referred to as "*akhbāriyya*" had concerns that were different from those of al-Astarābādī and his students. In this, Gleave refutes the work of scholars such as Andrew Newman, whose 1986 dissertation details the "development...of the Rationalist (Uṣūlī) and Traditionalist (Akhbārī) schools...from the Third/Ninth to the Tenth/Sixteenth century," clearly presupposing the origin of Akhbārism in the ninth century.<sup>76</sup> Newman begins by analyzing "the Akhbārism of the first century following the occultation," as it is represented in the *akhbār* chosen for inclusion in two of the "Four Books" of Shii Hadith, that of Muḥammad ibn Ya'qūb al-Kulaynī (d. 329/941) and Muḥammad ibn 'Alī al-Qummī (d. 381/991-992).<sup>77</sup> Modarressi notes that the term "*akhbāriyya*," is used as early as the tenth century to describe those traditionalist scholars who stressed reliance on the

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<sup>75</sup> Robert Gleave, *Scripturalist Islam*.

<sup>76</sup> Andrew Newman, *Rationalist (Uṣūlī) and Traditionalist (Akhbārī)*, title.

<sup>77</sup> Ibid., p. 3. Also see Robert Gleave, "Between Hadīth and Fiqh: The 'Canonical' Imāmī Collections of Akhbār, *Islamic Law and Society*, Vol. 8, No. 3, Hadith and Fiqh (2001), pp. 350-382.

Qur'an and the reports (*akhbār*) of the Prophet and the Imams as the only legitimate sources of doctrine and practice. Some of these traditionalists were more extreme in their views than others, arguing that *all* reports are valid, and that any attempt to question their authenticity entails the use of reason, which they firmly rejected. Others recognized the limited use of methods of Hadith criticism, but otherwise refrained from extrapolating from either the Qur'an or the Hadith on any given matter. All of these scholars were referred to at times as "*akhbāriyya*," or "*ahl al-ḥadīth*," or even "*ḥashwiyya*," and contrasted with Sunni scholars who advocated rationalist methods such as *qiyās*, or Mu'tazilī theologians, whether Sunni or Shīi, who used rationalist and philosophical methods to interpret scripture. Newman argues that the dispute involves not only a disagreement over sources, but also over the nature of the authority of the '*ulamā*' during the Occultation: whether members of the '*ulamā*' are allowed to stand in for the Imam in leading Friday prayer, collecting taxes, and the implementation of criminal punishments (*al-ḥudūd*). He sees a continuity between this early dynamic, and that which existed later. With regard to the considerable influence extended by the work of al-Astarābādī, those who argue for a continuous Akhbārī trend refer to al-Astarābādī as initiating a "Neo-Akhbārism."

Whether Al-Astarābādī initiated Akhbārism itself or merely a revival of an older debate, his ideas gained rapidly in popularity. He lived in Mecca at the time of the completion of *al-Fawā'id*, but his ideas spread quickly throughout the region, especially to the shrine cities of Iraq. Akhbārī thought became so dominant in this region that scholars writing about the arrival there of the renewer of Uṣūlism, Muḥammad Bāqir al-



Bihbihānī (d. 1205/1791), say that one could not even carry Uṣūlī books in open view: “Before his arrival, the land of Iraq, especially the two Holy places of martyrdom, were full of the sect of the Akhbārīs...so much so that if one of them wished to carry a book [written by] our *fuqahā*’...he carried it in a handkerchief.”<sup>78</sup> Akhbārī ideas also found fertile ground in the Gulf. Yūsuf al-Baḥrānī credits Shaykh ‘Alī ibn Sulaymān (d. 1653-4) as being “the first to spread *‘ilm al-ḥadīth* [the science of Hadith] in Bahrain.”<sup>79</sup> Akhbārism would take hold in Bahrain and remain dominant there until well into the twentieth century. However, when Yūsuf al-Baḥrānī was born, Uṣūlism still prevailed. Yūsuf’s father and grandfather were Uṣūlis, and schooled him in classical works on grammar and morphology. His other teachers in Bahrain included Aḥmad ibn ‘Abdallāh al-Bilādī (d. 1137/1725) and ‘Abdallāh ibn ‘Alī (d. 1148/1735).<sup>80</sup> In Qaṭīf he studied with Shaykh Ḥusayn al-Māḥūzī (d. 1181/1767), who was also from Yūsuf’s village, but lived most of his life in Qaṭīf. After Bahrain had been laid waste by the Omani tribes and Yūsuf’s family’s businesses had been destroyed, he migrated to Persia where he taught in a *madrasa* and became a Friday prayer leader. It was there that he wrote his *risāla*.<sup>81</sup> However, he was again pursued by war, and spent several years roaming before finally settling in Karbala. In Persia and Iraq Yūsuf would have found himself surrounded by Akhbārī thought. In his initial works, he advocated a strict Akhbārism, but gradually established a moderate view such that Uṣūlī biographers claimed him as

<sup>78</sup> Gleave, “Akhbārī-Uṣūlī Debate,” citing *Muntahā al-Maqāl* by Muḥammad ibn Ismā‘īl al-Hā‘irī (d. 1206 or 1207/1791-92), *Nujūm al-Samā’* by Muḥammad ‘Alī Kashmīrī (d.1309/1891), and *Rawdāt al-Jannāt* by Muḥammad Bāqir Khwānsārī (d. 1313/1895), p. 96.

<sup>79</sup> Yūsuf al-Baḥrānī, *Lu’lu’at*, p. 14.

<sup>80</sup> Ibid., p. 73.

<sup>81</sup> Thesis produced at the conclusion of one’s studies.

one of their own, calling him an ex-Akhhbārī, and citing arguments in Yūsuf's works in which he challenges Akhhbārī views.<sup>82</sup> In *Ḥadā'iq al-nāḍira*, although he rejects the use of *ijmā'*, *ijtihād* and *'aql*, he accepts some Uṣūlī positions, such as the permissibility of Friday prayer, and advocates lay persons' reference to the *'ulamā'*.<sup>83</sup>

Although Yūsuf lived out the entirety of his professional life abroad, he remained in close touch with his relatives who had stayed in Bahrain. He mentored and taught two of his nephews and judging them worthy, issued each an *ijāza*: Khalaf, son of his brother 'Abd 'Alī, and Ḥusayn, son of his brother Muḥammad.<sup>84</sup> Ḥusayn remained in Dirāz and produced such highly regarded scholarship that prominent members of the *'ulamā'* praised his excellence and diligence in teaching, writing, and studying, and considered him a “renewer” (*mujaddid*) of his age.<sup>85</sup> Through his teaching and influence, Dirāz became a well-known center of Akhhbārī thought. Ḥusayn regularly debated the scholars of the city of Bilād, who continued for a time to ascribe to Uṣūlism.<sup>86</sup>

The revival of the Uṣūlī-Akhhbārī debate coincided with the start of the weakening of Safavid rule. The later Safavid rulers became immersed in the enjoyment of their wealth and had less interest in the running of the state than earlier leaders had. The Afghans were encroaching from the north, and the 'Ibāḍīs of Oman were gathering strength to the south. The Omanis, together with some Sunni tribes in the region, invaded Bahrain in 1717. In 1722 the Safavids fell to the Afghans. The arrival of the

<sup>82</sup> Gleave, “Akhhbārī-Uṣūlī Debate,” pp. 94-95.

<sup>83</sup> Yūsuf al-Baḥrānī, *Ḥadā'iq al-nāḍira fī ahkām al-'itrah al-ṭāhira*, Bayrūt: Dār al-Aḍwā', 1993.

<sup>84</sup> Yūsuf al-Baḥrānī, *Lu'lu'at*, p. 4.

<sup>85</sup> 'Alī al-Baḥrānī, *Anwār*, p. 207; www.al-asfoor.com.

<sup>86</sup> 'Alī al-Baḥrānī, *Anwār*, p. 207-211.

Omanis signaled the end of the extensive Shii legal establishment and period of freedom of religious and legal thought. The Omanis immediately began applying heavy taxes on the Shii population and replacing Shii officials.<sup>87</sup> Not only did these forces curb Shii intellectual freedoms, they also hurt local Bahraini commerce, in which the ‘*ulamā*’ were actively engaged. This drove some Bahraini ‘*ulamā*’ to emigrate to Persia or the shrine cities of Iraq. The Āl ‘Aṣḥūr’s businesses, for example, were bankrupted by the effects of the invasion.

Despite the political turmoil of the eighteenth century, some Shii scholars stayed in Bahrain and continued to produce works on theology and jurisprudence. Akhbārī thought became predominant for a time in all the Shii centers of learning as well as in Bahrain, although it was never exclusive. There was still a measure of intellectual diversity on the islands, with some families remaining Uṣūlī, traces of Ismā‘īlī beliefs, and some interest in the esoteric ideas of Shaykh Aḥmad ibn Zayn al-Dīn al-Aḥṣā’ī. Juan Cole suggests three reasons for Akhbārism’s rise to prominence in Bahrain. Politically, Akhbārī beliefs accommodated non-Shii governance better than Uṣūlism did. Denying the validity of public Shii religious obligations, and reserving religious authority to the sacred texts (and not an active clergy), Akhbārīs could exist comfortably under non-Shii rule. Geographically, Akhbārism became tied to certain Bahraini towns, such as the Āl ‘Aṣḥūr’s hometown of Dirāz. Cole also argues that there is a generational aspect to Bahrain’s move toward Akhbārism. The sons of Safavid-

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<sup>87</sup> Cole, *Sacred Space*, pp. 52-53.

appointed Uṣūlī officials were disappointed by the failure of the Safavids, and thus rejected the ideology of their fathers.<sup>88</sup>

Towards the end of the eighteenth century, Uṣūlī thought enjoyed a reawakening with the work of al-Bihbahānī (d. 1791). Akhbārism died out throughout most of the Shii world except for Bahrain. The Āl ‘Aṣfūr family remained proponents of this school. The work of Shaykh Ḥusayn Āl ‘Aṣfūr (d. 1802) became well-known. His thesis in jurisprudence, *Sadād al-‘ibād wa rashād al-‘ubbād* (The propriety and integrity of the pious) is still used by Bahraini jurists today.<sup>89</sup> Shaykh Khalaf Āl ‘Aṣfūr served as the Shii community’s chief judge for almost half a century, from the mid-nineteenth to the early twentieth centuries. Shaykh Khalaf’s grandson, Shaykh Muḥsin, served as a judge in the senior *sharī‘a* court for ten years and continues today to produce works on jurisprudence.

### **The Arrival of the Sunni ‘Utūb Tribes and the Beginning of British Involvement: 1783 - 1869**

The period between Safavid rule and the establishment of the rule of King ‘Īsā in 1869 was one of political turmoil for Bahrain. Aware of the islands’ strategic position on various trade routes, as well as the potential wealth to be gained from its pearling industry, Persian, European and Arab tribal powers vied for control. The Omani Arabs

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<sup>88</sup> Ibid, pp. 55-56.

<sup>89</sup> Interview with Shaykh Muḥsin Āl ‘Aṣfūr, 9 March 2006, and Radhi, *Judiciary*, p. 7.

had developed a strong navy modeled after that of the Portuguese and became a significant force in the Gulf. They captured Bahrain from the Safavids in 1717 and a number of other islands to the east of Bahrain. After Nādir Shāh established a new government in Iran in 1737, his forces recaptured Bahrain and held it as a province maintained by local Arab governors.<sup>90</sup> Although Nādir Shāh's government was Shii, it pursued a policy of ecumenism by appointing both Sunnis and Shiis to office, and promoting friendly relations between the sects. This was not an easy task after the Sunnis suffered the discriminatory policies of the Safavids and while the Sunni Wahhābī movement was emerging on the Arabian peninsula pursuing the violent suppression of Shiis. Ultimately, Nādir Shāh's policies were unsuccessful and his administration was defeated by Karīm Khān Zand in 1750. Bahrain remained under Persian control, again governed by local members of the Āl Madhkūr tribe, a Sunni tribe of Omani origin, until the arrival of the 'Utūb tribes in 1783.<sup>91</sup>

After the defeat of the Portuguese in the mid-seventeenth century, the Dutch had taken over the spice trade in the Gulf. This was short-lived, however, as the British East India Company arrived and quickly gained strength. Because all commercial activity in the Gulf at the time was carried out via seafaring operations, the British saw any other powers with capable navies as competition, such as the Omanis and the Arab tribes. They therefore allied themselves with Iran, which had no navy. This arrangement was successful for a time, but as the British exerted more control over the Gulf, they met

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<sup>90</sup> Fuad I. Khuri, *Tribe and State in Bahrain: the transformation of social and political authority in an Arab State*, Chicago: University of Chicago Press, 1980, p. 18.

<sup>91</sup> Fred H. Lawson, *Bahrain: The Modernization of Autocracy*, Boulder; San Francisco; London: Westview Press, pp. 28-29.

with increasing resistance from Arab tribal forces. A period began in which tribes fought each other for territory, “pirates” pillaged freely throughout the Gulf, and the British made various attempts to secure their hold on trade and commerce by forging various alliances with particular tribes.

The ‘Utūb was a federation of Sunni tribes indigenous to eastern Arabia and what is now Qatar. Having long been involved in seafaring activity, the ‘Utūb were in an excellent position to compete for control over trade and pearling in the Gulf. In the early eighteenth century two of the ‘Utūb tribes, the Āl Jalāhima and the Āl Khalīfa, established themselves in Kuwait under the rule of the Āl Šabāh tribe. From there, they began to send pearling vessels into the waters around Bahrain. Sometime around 1760, they were forced out of Kuwait and resettled in Zubāra on the northwestern coast of Qatar.<sup>92</sup> By the late eighteenth century, a rivalry had developed between the tribes of the ‘Utūb. Not long after settling in Zubāra, the Āl Khalīfa built up successful trade and pearling businesses such that Zubāra became a prominent commercial center. This drew the resentment of other ‘Utūb tribes who expected to share in the profits of these new enterprises. When the Āl Jalāhima seceded and began to build a navy of their own, the

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<sup>92</sup> IOR: L/P&S/5/264, Correspondence No. 18 of 1870, from the Foreign Department to the Duke of Argyll, Secretary of State for India, 22 February 1870, *Records of Bahrain: Primary Documents, 1820-1960*, Vol. 2: 1868-1892, Archive Editions, 1993, p. 304. Archive Editions is a series that collects primary documents regarding the history of specific countries or regions. Most or all of the documents contained in the *Records of Bahrain* multi-volume collection originally come from the archive of the India Office Records (IOR) in London. Because Archive Editions does not provide the specific IOR record number (it lists several documents, then several IOR numbers, not specifying the exact IOR set of each document), and for reasons of consistency, I will cite document information as it appears in the Archive Editions volumes.

Āl Khalīfa attacked them and killed their chief, a move that made the Āl Khalīfa undisputed leaders of the ‘Utūb.<sup>93</sup>

The Āl Khalīfa also had to contend with the Omani tribes. In 1782, Oman launched an attack on Zubāra. The Āl Khalīfa were successful in repelling this attack. A Kuwaiti fleet had been on its way to assist the Āl Khalīfa when news of the Omanis’ defeat reached them. The fleet then changed course and sailed to Bahrain and captured the fort at Manama. The Āl Khalīfa and its allies then claimed Bahrain and Zubāra for themselves. Early in 1783, Shaykh Aḥmad ibn Khalīfa<sup>94</sup> became the first member of the family to rule Bahrain.<sup>95</sup>

Shaykh Aḥmad spent most of the year in Zubāra and ruled Bahrain through agents. It was a prosperous time for the Āl Khalīfa. Most of the Indian trade between southern Iraq and Oman passed through Bahraini ports. Very little is known about the details of Aḥmad’s rule, but Khuri ventures that he managed it as an occupied territory in much the same way as the Persians did before him, collecting taxes and demanding that the local population pay tribute. He most likely did not become directly involved with Bahraini society. The Āl Khalīfa, along with the other tribes that were part of the ‘Utūb confederation followed their own system of government which consisted of tribal councils that decided the political, economic, and social concerns of the tribe based on customary rules.<sup>96</sup>

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<sup>93</sup> Fuad I. Khuri, *Tribe*, p. 24.

<sup>94</sup> It is customary in the Gulf to use the title “Shaykh” for tribal leaders as well as for religious scholars.

<sup>95</sup> Fred H. Lawson, *Bahrain*, p. 29.

<sup>96</sup> Radhi, *Judiciary*, pp. 13-14.

The Āl Khalīfa's success attracted once again the attention of the Omanis and a new force in the Gulf, the Wahhābīs. In 1795, the Wahhābīs attacked Zubāra and the Āl Khalīfa were forced to retreat to Bahrain the following year, the year that Shaykh Aḥmad died. He was succeeded by his two sons, Sulaymān and ‘Abdullāh, who took charge of Manama and Muharraq respectively. Khuri writes that the fall of Zubāra initiated a new era in Bahrain, one in which the Āl Khalīfa began to exert direct control over the islands.<sup>97</sup> This did not result in good fortune for either the local population or successful trade endeavors for the Āl Khalīfa. The two branches of the family represented by Shaykh Aḥmad's sons competed for wealth and power and the support of the other ‘Utūb tribes, and appeared more interested in this power struggle than in the success of their new territory. Even after the deaths of Sulaymān (1825) and his son Khalīfa (1834), Khalīfa's son Muḥammad continued the feud with his great uncle ‘Abdullāh. To fund their activities, the Āl Khalīfa levied heavy taxes on local farmers and merchants, and even resorted to extortion and confiscation of property. The situation continued to grow worse as Muḥammad came to gain greater support from the other tribal chiefs as well as from Wahhābī tribes in Arabia. In 1834, he attacked ‘Abdullāh and forced his retreat to the Eastern coast of Arabia. Thereafter, he began to indulge in excessive practices of oppression and violence. A British agent of the government of India who was charged with monitoring affairs in Bahrain described the situation there as follows: “Piratical outrages were frequent; the Resident's advice was asked only to be disregarded; agreements were broken as soon as made; trade

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<sup>97</sup> Ibid., p. 27.



languished; the common people were oppressed, and took every opportunity that presented itself of flying from the hands of the oppressors.”<sup>98</sup> By 1843, trade had declined to half of what it had been during Aḥmad’s rule.<sup>99</sup>

In the meantime, Britain was becoming a military as well as a commercial force in the Gulf. Their trade operations and those of their allies were continually being interrupted by piracy carried out mainly by the Āl Qawāsīm, a tribe that controlled the Strait of Hormuz and exacted tolls from all passing ships. The British refused to pay the tolls, and instead sent a military force to attack the Āl Qawāsīm and the coast of Oman, which they referred to as the “Pirate Coast.” After soundly defeating the Āl Qawāsīm and subduing the Pirate Coast, the British imposed the General Treaty of Peace on several ruling shaykhs in the Gulf. Signatories agreed to refrain from acts of piracy and intertribal warfare in exchange for British protection.<sup>100</sup> The 1820 treaty recognized the Āl Khalīfa as rulers of Bahrain and began a relationship in which Britain gradually came to exercise more and more control over Bahrain’s affairs. The Political Residency at Bushire sent one of its Indian assistants to Manama to open and maintain an office in 1829.<sup>101</sup> Britain helped to protect Bahrain from external threats, yet the feuding between the two branches of the Āl Khalīfa continued unabated. As was described above, any agreements made between the Āl Khalīfa and the British were

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<sup>98</sup> IOR: L/P&S/7/164, Correspondence No. 18 of 1870, from the Foreign Department to the Duke of Argyll, Secretary of State for India, 22 February 1870, *Records of Bahrain*, Vol. 2, pp. 312-313.

<sup>99</sup> Khuri, *Tribe*, p. 30.

<sup>100</sup> James Onley, *The Arabian frontier of the British Raj: merchants, rulers, and the British in the nineteenth-century Gulf*, Oxford; New York: Oxford University Press, 2007. The view that Arab piracy was common through the early nineteenth century, and that it threatened trade is challenged in *The Myth of Arab Piracy in the Gulf*. Sultan Muhammad Al-Qasimi argues that the Gulf was peaceful until the arrival of the British. See Sultan Muhammad Al-Qasimi, *The Myth of Arab Piracy in the Gulf*, London; Dover, NH: Croom Helm, 1986.

<sup>101</sup> *Ibid.*, p.

largely ignored, and ‘Utūb tribes continued to engage in piracy, which disrupted British trade operations. In an effort to control the situation, in 1861 the British navy seized two of Muḥammad’s war vessels and encouraged him to sign a treaty that declared all previous agreements in force.<sup>102</sup> In it, Muḥammad also agreed to refrain from piracy, acts of war, and slavery in exchange for British protection from external threats.<sup>103</sup> Although Muḥammad did sign the treaty, he did nothing to alter his activities. He continued to engage in acts of piracy and violence, most notably the murder of his brother ‘Alī, who had begun working with the British toward Muḥammad’s overthrow.<sup>104</sup>

Finally in 1869, a British task force again seized Muḥammad’s war vessels, fort, and weaponry, and publicly burnt the vessels. After interviewing local merchants and some of the minor tribes’ chiefs, finding that they would agree to be ruled by a member of ‘Alī’s branch of the Āl Khalīfa, the British sought out Shaykh ‘Īsā ibn ‘Alī who was responsible for the Āl Khalīfa territory in Qatar. They invited him to accept the position of sole ruler of Bahrain under their protection, and he accepted. On the second of December, 1869, ‘Īsā took up residence in Bahrain and began the period of active Āl Khalīfa rule. In treaties concluded in 1880 and 1892, Shaykh ‘Īsā promised to consult the British authorities before entering into negotiations with any other state or

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<sup>102</sup> IOR: L/P&S/18/B9, Foreign Office memorandum on the separate claims of Turkey and Persia to sovereignty over the island of Bahrain, 25 March 1874 [mis-catalogued as 23 March 1874 in Contents], *Records of Bahrain*, Vol. 2, p. 343.

<sup>103</sup> IOR: L/P&S/18/B9, “Friendly Convention with Sheikh Mahomed ibn Khaleefah, Independent Ruler of Bahrein,” 31 May 1861, Foreign Office memorandum on the separate claims of Turkey and Persia to sovereignty over the island of Bahrain, 25 March 1874 [mis-catalogued as 23 March 1874 in Contents], *Records of Bahrain*, Vol. 2, pp. 343-345.

<sup>104</sup> IOR: L/P&S/9/15, Correspondence No. 165 of 1869, from Lieutenant Colonel Lewis Pelly, Political Resident, Persian Gulf, to the Secretary to Government, Political Department, Bombay, British Residency, Bushire, 11 September 1869, *Records of Bahrain*, Vol. 2, p. 199.

government, and that he would not sell, cede, or mortgage any part of his territory to any but the British government.<sup>105</sup>

We know little about how the local population fared during this period. We do know from Yūsuf al-Baḥrānī's *Lu'lu'at al-Baḥrayn* that from the time of the Omani invasion in 1717, many Shii businesses suffered first from heavy taxation by the Omanis, and that many Shiis left Bahrain for this reason. Later on, British records repeatedly refer to oppression of the local population by the 'Utūb tribes in the form of extortion, confiscation of property, and piracy. The pearling industry, which was run by Shii 'ulamā' during the Safavid period, was gradually taken over by members of the 'Utūb tribes. These developments had a negative effect on the Shii religious establishment of *madrasas* and centers of legal education. We do have the sources of some of the Shii 'ulamā' who remained in Bahrain during this period and continued to produce works of jurisprudence, such as Ḥusayn Āl 'Aṣḥūr (d. 1802) and 'Abdullāh al-Sitrī (d. 1864). However, there is a clear decline in, at the least, the quantity of Shii scholarship coming from Bahrain, if not also the quality.

While indigenous Shiis remained the majority of the population, there was an increase in migration of traders, merchants, and workers from India, Iran, Iraq and other areas to Bahrain during the late eighteenth and early nineteenth century. This demographic change resulted in a diversity of religious beliefs as well as religious practices, including in the realm of religious law. Fuad Khuri writes that by the end of

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<sup>105</sup> IOR: L/P&S/5/264, Correspondence No. 207 of 1869, from Lieutenant Colonel Lewis Pelly, Political Resident, Persian Gulf, to the Secretary to Government, Political Department, Bombay, British Residency, Bushire, 9 December 1869, *Records of Bahrain*, Vol. 2, pp. 272-277.

the nineteenth century, four major Islamic legal schools were represented. Along with the indigenous Shia whose origins are unclear but thought to be Safavid, Arab Shiis came to Bahrain from Eastern Arabia, especially the town of al-Ḥasā. All of these Shiis followed the Jaʿfarī school of law. The Āl Khalīfa and the other tribes of the ʿUtūb alliance followed the Mālikī *maddhab*. Other Sunnis from Arabia also began to arrive at this time from the area of the Najd, but these Sunnis were urban and non-tribal, and they followed the Ḥanbalī school of law. A Sunni group of Persian descent called the Hawala came to Bahrain when trade routes shifted from the eastern to the western coast of the Gulf, and also to work in the pearling and later the oil industry. Many Hawalas consider themselves to be descended from Arabian tribes, yet their family names and linguistic history are Persian. Hawala Sunnis are also distinguished from the Arabian Sunni tribes because they follow the Shāfiʿī *madhhab*.<sup>106</sup> Non-Muslim immigrants also comprise part of the population, therefore small communities of Hindus, Jews, and Christians begin to form during this period. Because there was a lack of political stability and centralization of rule, members of both the Muslim and the non-Muslim communities followed the dictates of their own religious traditions in matters of law.<sup>107</sup>

As Muḥammad Āl Khalīfa's behavior became more erratic and oppressive throughout the 1860's, British authorities became concerned for the welfare of their Indian subjects who had migrated there. As part of the "Friendly Convention" of 1861 mentioned above, Muḥammad was deprived of judicial competence over British

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<sup>106</sup> Khuri, *Tribe*, pp. 2-4. The Hawala are an example of non-Arab Muslims who imagine Arabian descent, a phenomenon common to Muslims surrounding the Indian Ocean. See Engseng Ho, *The Graves of Tarim: Genealogy and Mobility across the Indian Ocean*, Berkeley and Los Angeles: University of California Press, 2006.

<sup>107</sup> Radhi, *Judiciary*, p. 15.

subjects living in Bahrain. Any disputes involving British subjects of a civil, criminal, or commercial nature would now be handled by the Political Resident.<sup>108</sup> This agreement was the start of British involvement in Bahrain's judicial affairs.

### **The Modern Period**

#### **Āl-Khalīfa Rule and Bahrain as a British Quasi-Protectorate:**

##### **The Rule of Shaykh 'Īsā 1869 - 1923**

The rule of Shaykh 'Īsā lasted from 1869 until 1923. By making Bahrain a signatory to the treaties of 1820, 1880, and 1892, Britain legitimized Āl Khalīfa rule and established physical boundaries to the territory controlled by the ruling family. Foreign companies were granted concessions to operate in Bahrain in exchange for rents paid to the Āl Khalīfa. This influx of foreign wealth provided the ruling family with resources independent of local markets, thus abrogating the need to cooperate with Bahraini merchants.<sup>109</sup> The Āl Khalīfa operated a feudal-type estate system in which prominent members of the family were given a specific section of palm groves to manage. The head of each estate had his own staff consisting of a tax collector, guards, and an on-site manager who dealt directly with the laborers who were mostly Shii peasants. There was no central oversight or standardization by the ruler, so each Shaykh

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<sup>108</sup> "Friendly Convention," as cited above, f.n. 60.

<sup>109</sup> Khuri, *Tribe*, p.

levied taxes and rents as he saw fit, which were enforced by physical coercion. The cities of Manama and Muharraq were each ruled by an *amīr* and a group of *fidāwīs*,<sup>110</sup> which were similar to a police force that executed the will of the ruler and/or the Sunni *qāḍī*.<sup>111</sup>

For the Sunnis, justice was administered in most cases by tribal chiefs or by the ruler himself as a function of regularly held councils, *majālis* (sg. *majlis*). The councils discussed and issued decisions on many different kinds of matters – trade, prices, wages, treaties with foreign powers, marriages of political significance, as well as legal issues involving contracts, disputes, and criminal offenses. The ruler’s council was the highest authority in the country and issued decisions on matters of national political or economic importance, such as the management of the ports, the distribution of palm groves, pearl diving rights, and the recruitment of forced labor. It also acted as an appellate court when local councils could not resolve a particular conflict. There was no hierarchy among the local councils. Each managed the affairs of its respective tribe or branch of a tribe.<sup>112</sup>

When a dispute occurred involving a foreigner and a Bahraini, an informal joint court was held in which the British agent and Shaykh ‘Īsā or his representative together

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<sup>110</sup> The term *fidāwī* is thought to derive from *fidā’i*, which refers to members of the Nizārī Ismā‘īlīs who were sent to assassinate enemies of the sect. See Huart, Cl. “Fidā’ī.” *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W. P. Heinrichs. Brill, 2010. Brill Online. UNIVERSITY OF PENNSYLVANIA. 02 January 2010  
<[http://proxy.library.upenn.edu:3678/subscriber/entry?entry=islam\\_SIM-2355](http://proxy.library.upenn.edu:3678/subscriber/entry?entry=islam_SIM-2355)>

<sup>111</sup> IOR: R/15/2/83 or IOR: L/P&S/10/1039, Correspondence No. 304-S of 1922, From Lieutenant Colonel A.P. Trevor, C.S.I., C.I.E., Political Resident in the Persian Gulf, to D. de S. Bray, C.S.I., C.I.E., C.B.E., Foreign Secretary to the Government of India, 14 April 1922, enclosing letter from C.F. Daly, Major I.A., Political Agent, Bahrain, 11 April 1922, *Records of Bahrain: Primary Documents, 1820-1960*, Vol. 3: 1892-1923, Archive Editions, 1993, pp. 709-714.

<sup>112</sup> Khuri, *Tribes*, pp. 35-36.

decided the case. The British agent could also refer civil disputes between foreigners and Bahrainis to an arbitrator.<sup>113</sup> Other courts that operated at this time were the *Majlis al-‘Urf* and the *Salifat al-Ghawṣ*. The *Majlis al-‘Urf*, also called *Majlis al-Tijāra*, was a type of trade council that was comprised of three or four prominent merchants that met upon request to rule on cases involving foreign trade.<sup>114</sup> Khuri writes that the council’s decisions were based on a set of Kuwaiti laws called *qanūn al-safar* that was published around the turn of the nineteenth century. The *Salifat al-Ghawṣ* dealt with loan payments, debts, and disputes involving the pearling industry. It was established by the Āl Khalīfa, who appointed the judge of the court in agreement with the chiefs of the pearling tribes. Whereas cases involving debt were usually referred to *qāḍīs* to be dealt with under *sharī‘a*, which had developed extensive rules regarding this issue, the judges appointed by the Āl Khalīfa for this court reportedly had no background in Islamic law, and based their decisions simply on “conventional wisdom, political instincts, and personal whims, generally taking the side of the powerful to avoid conflict.”<sup>115</sup>

The last type of court existing at this time is the *sharī‘a* court. There are no known court records and little written material concerning the operations of the *sharī‘a* courts during the period preceding the rule of Shaykh ‘Īsā.<sup>116</sup> Most likely, the followers of each school of law referred their legal concerns to a local *qāḍī*. It was only during the rule of Shaykh ‘Īsā that formal appointments begin to be made. For Sunnis, two *qāḍīs*

<sup>113</sup> IOR: L/P&S/10/28 & 82, No. 188 of 1907, From Foreign Department, Government of India, to John Morley, O.M., Secretary of State for India, 14 November 1907, *Records of Bahrain*, Vol. 3, p. 419.

<sup>114</sup> IOR: L/P&S/10/248 and R/15/1/299, The Bahrain Order in Council, India Office to Governor General in Council, 12 August 1913, *Records of Bahrain*, Vol. 3, pp. 446-469.

<sup>115</sup> Khuri, *Tribe*, p. 65.

<sup>116</sup> John Gordon Lorimer, *Gazetteer of the Persian Gulf, ‘Oman, and Central Arabia*; Vol. I, Westmead, Eng., Gregg, 1970, p. 387.

were appointed, one for Muharraq and one for Manama, although the Manama judge seems to have been in a primary role. Both *qāḍīs* were of the Mālikī school. ‘Abd al-Raḥmān ibn Shaykh ‘Abd al-Latīf (b. 1837), originally from al-Ḥasā, served as Muharraq’s *qāḍī*, while Jasīm al-Mihza (d. 1927)<sup>117</sup> was appointed as the Manama judge. British sources also mention the latter’s brother, Aḥmad, as a Manama *qāḍī* who worked together with Shaykh Jasīm. The *qāḍīs* held court in their own homes and dealt with cases of family law and sometimes petty crimes. Cases involving both a Sunni and a Shii were referred to the Sunni judges.<sup>118</sup> Their decisions were ostensibly based on *sharī‘a*, although Khuri writes that the Sunni *qāḍīs* conceded to tribal law when possible. Their rulings on minor cases were final, but major cases could be appealed to the ruler. In fact, Khuri argues that the Sunni *qāḍīs*, and especially Jasīm al-Mihza, ruled in conjunction with the ruler, and calls their role “an accessory function” of tribal government.<sup>119</sup> British sources attest to the close relationship Shaykh Jasīm held with members of the Āl Khalīfa and repeatedly call his integrity into question.<sup>120</sup> The *qāḍīs* worked closely with the ruler, and their decisions were enforced by the ruler’s *fidāwīs*. There was no such relationship between the ruler and the Shii *qāḍīs*.<sup>121</sup>

<sup>117</sup> This *qāḍī*’s name appears as “Jāsīm” in some English sources and “Qāsim” in others. This can be explained by regional variations in the pronunciation of the Arabic letter *qāf*.

<sup>118</sup> IOR: R/15/186, Lieutenant Colonel E.L. Ross, Report, 1882, as referenced in Radhi, *Judiciary*, pp. 15-16.

<sup>119</sup> Khuri, *Tribe*, p. 68-69.

<sup>120</sup> IOR: L/P&S/10/81, Correspondence No. 421 From Major P.Z. Cox, C.I.E., Officiating Political Resident in the Persian Gulf, to The Secretary to the Government of India in the Foreign Department, 17 December 1904; and Enclosure No. 5: No. 272, dated 19 November 1904, From Captain F.B. Prideaux, Assistant Political Agent, Bahrein, to Major P.Z. Cox, C.I.E., Officiating Political Resident in the Persian Gulf, *Records of Bahrain*, Vol. 3, pp. 198-205.

<sup>121</sup> Khuri, *Tribe*, pp. 68-69.



The sources are unclear about the state of the *sharī'a* courts and the *qāḍīs* for the Shia during this period. Hassan Radhi notes that two *qāḍīs* were appointed by Shaykh 'Īsā for the Shia: Muḥammad 'Alī ibn Shaykh 'Abdullāh (b. 1826) and Aḥmad ibn Shaykh Salmān (b. 1841).<sup>122</sup> However, Khuri writes that there were many Shii *qāḍīs*, nearly one for every village or neighborhood. Unlike the Sunni *qāḍīs*, the Shii *qāḍīs*' rulings were not enforced by the ruler's *fidāwīs*, but rather by the consensus of the community. Their decisions were reportedly based entirely on *sharī'a*, and were final for all cases, with no appeal process linked with the ruler.<sup>123</sup>

Khuri contrasts the type of authority held by the Sunni *qāḍīs* with that held by the Shiis. Whereas the Sunni *qāḍīs* derived their authority from their appointment by the ruler, the Shii *qāḍīs* derived theirs from the community. While the ruler did reportedly appoint two Shii *qāḍīs*, it is to the local *qāḍīs* who emerged spontaneously from the community that people actually turned to have their issues resolved.<sup>124</sup> In addition to the local village *qāḍīs*, multiple sources attest that one Shii *qāḍī* rose to prominence above the others, and was regarded by Shiis as the highest religious authority on the islands.<sup>125</sup> This was none other than a member of the Āl 'Aṣḥūr family, Shaykh Khalaf Āl 'Aṣḥūr. Shaykh Khalaf's authority had not been sanctioned by the Āl Khalīfa. It was not until the British became involved in Bahrain's domestic affairs that he was recognized as the "head *qāḍī*," and formally appointed. When Charles Belgrave arrived in 1926 to take up

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<sup>122</sup> Radhi, *Judiciary*, p. 16.

<sup>123</sup> Khuri, *Tribe*, p.

<sup>124</sup> Khuri, *Tribe*, pp. \*

<sup>125</sup> Khuri, *Tribe*, p. 84; Charles Belgrave, *Personal Column*, London: Hutchinson of London, p. 27; Radhi, *Judiciary*, p. 54-56; IOR: R/15/2/112 5/22, Shaikh Khalaf ibn Ahmad al-Uṣfur, Shiite Qadi: Career and dismissal, 22 August 1928- 31 December 1931; Interview with Shaykh Muḥsin Āl 'Aṣḥūr, 9 March 2006.

the position of legal adviser to the ruler, he was struck by the reverence with which Shiis held Shaykh Khalaf: “He had a tremendous reputation among the village people. They used to fall on their knees and kiss the hem of his robe, and when he visited the villages they brought out the best of everything for his delectation.”<sup>126</sup>

There was a significant difference in the area over which the Sunni *qāḍīs* had control versus that of the Shii *qāḍīs*. The Sunni *qāḍīs* handled basic personal status issues such as marriage contracts, divorce settlements, and child custody agreements, while the tribal chief was the dominant authority figure who was consulted on nearly all issues. Even when the case was handled by the *qāḍī*, the final authority rested with the head tribal chief, the ruler. The ruler and the other tribal chiefs managed the economic resources held by the tribe, and their leadership arose from the consensus of the tribe. For Shiis, the *qāḍīs* played this role. They handled all manner of disputes, they controlled the economic resources of the Shii community in the form of *waqf* estates, and they advised the community on trade, commerce, and even political affairs.<sup>127</sup>

This arrangement necessarily determined the sources used in the adjudication of cases. Scholars have documented the fact that *sharī‘a* has never been the exclusive source of law used by Islamic societies. Adjudication of legal issues has always been a process of negotiation between local customary laws, tribal rules, ruler’s edicts,

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<sup>126</sup> Charles Belgrave, *Personal Column*, London: Hutchinson of London, p. 27.

<sup>127</sup> Khuri, *Tribe*, pp. 82-84. In summarizing Khuri’s work on the role of the Shī‘ī *qāḍī* in Bahrain, Mahdi Abdalla al-Tajir notes that while Khuri correctly demonstrates that Shī‘ī *qāḍīs* played a more active role in the community than did their Sunnī counterparts, not all Bahārnah (native Shī‘ite) leaders were *qāḍīs* or jurists. Al-Tajir specifically refers to Shī‘ī community leaders during the years 1920-1945 who were pearl merchants, landowners and others. Although the present discussion covers the period immediately prior to that to which al-Tajir refers, his point is worthy of consideration. See Mahdi Abdalla al-Tajir, *Bahrain 1920-1945: Britain, the Shaikh, and the Administration*, London, New York, Sydney: Croom Helm, p. 16.

Qur'anic principles, substantive laws recorded in *fiqh* manuals, and in the modern period, Western, secular codes.<sup>128</sup> The degree to which various sources are used is constantly in flux and changes with political and historical circumstances. Because court records are largely inaccessible in Bahrain up to the present day, it is nearly impossible to determine what the specific formula was for either of the sects in any specific time period. Khuri's work, which was completed from 1974-1975 and covers the period from 1869 to roughly Bahrain's independence in 1971, gives us the only detailed study on the sources of law used in any period of Bahraini legal history.<sup>129</sup>

His work reveals that for Bahrain during the late nineteenth and early twentieth centuries there was a significant difference in the degree to which the Sunni community referred to *sharī'a* versus the Shii community. At least until the British reforms of the 1920's, tribal or customary law appears to be the primary source of legal decisions for the Sunni community. The tribal chief, who was generally not a religious scholar, was the central figure who held wide jurisdiction over the tribe's affairs. Decisions in his council were made according to custom or tribal law: "rarely if ever did religious law take precedence over tribal dictates" for the Sunnis.<sup>130</sup> For issues involving trade or commerce, Sunnis were referred to the *Majlis al-'Urf*, and for disputes involving pearling, to the *Salifat al-Ghawṣ*. In neither case were those settling the disputes schooled in *sharī'a*. Pearling cases often also involved Shii petitioners, as nearly all

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<sup>128</sup> See Joseph Schacht, *An introduction to Islamic law*, Oxford: Clarendon Press, 1964; Noel J. Coulson, *A history of Islamic law*, Edinburgh: University Press, 1964; Wael B. Hallaq, ed., *The formation of Islamic law*, Aldershots, Hants, Great Britain; Burlington, VT: Ashgate/Variorum, 2004.

<sup>129</sup> To the author's knowledge, two collections of court records exist in personal libraries in Bahrain. One is thought to be dated from the early twentieth century, and the other collection holds relatively recent judgments, probably from the last twenty years. Neither of these collections have been studied.

<sup>130</sup> Khuri, *Tribe*, p. 8.

pearl divers were Shii, while most boat owners were Sunnis. Shii petitions to the British agency attest to the fact that these cases were not settled according to Islamic law:

Much oppression is done in the diving question in this town of Bahrain. Such proceedings are contrary to the Mohammedan Law. Although we are Shiah but we are in concurrence with all the Islamic religions agree to the decision of Sunni judges in this matter. When one of the divers complains to the Government and demands his dues from the *Nakhoda* [boat owner] they refer him to the diving *Salifah* Court, that is two wicked Arabs who do not distinguish right from wrong. Anyhow, they decide the case in favor of the oppressors – the diving *Nakhodas* – and by these reasons they damage the rights (of the divers).<sup>131</sup>

For the Shii community, the person who held a central position similar to that of the Sunni's tribal chief was the head *qāḍī*. For the period in question, this person was Shaykh Khalaf. Shaykh Khalaf, who was a religious scholar, acted as an appeals judge for local *qāḍīs* dealing with personal status issues as well as handling the other areas that for the Sunni community were handled by the tribal chief. Reportedly, all of these issues were dealt with according to *sharī'a* in the Shii community.

### 1904 Incidents – Dispute Over Jurisdiction

Britain's interest in Bahrain until this point had remained mostly commercial.

The port at Manama was a thriving stop on Gulf trade routes, although not run as

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<sup>131</sup> IOR: L/P&S/10/1039 and R/15/1/338, Translation of petition from 7 representatives of the Baharnah, handed to the Political Resident on 26<sup>th</sup> October 1923, *Records of Bahrain: Primary Documents 1820-1960*, Vol. 4, 1923-1932, p. 166.

efficiently as the British would have liked. The pearling industry was also seeing a successful return. The British had offered protection against foreign invaders, but pursued a policy of the least intervention necessary in domestic affairs.<sup>132</sup> Regarding judicial matters, the local British agent had jurisdiction over British subjects living in Bahrain and European foreigners as per the “Friendly Convention” of 1861. An informal joint court was convened to handle cases between British and Bahraini subjects. In the fall of 1904, two incidents occurred that both caused the British to reconsider the extent of their jurisdiction and raised the issue of religion in the determination of judicial competence. The incidents both involved clashes between Sunnis who were Bahraini subjects and Shiis who were Qajar subjects. Although these Shiis were technically “foreigners,” the Bahraini ruler claimed them as belonging to his jurisdiction by reason of their being Muslim. These incidents forced a redefinition of the relative spheres of judicial authority between Britain and Bahrain, and between Muslims and non-Muslims.

On September 29, 1904, a fight took place between the employees of a German trading firm and a number of *fidāwīs* in the employ of a member of the Āl Khalīfa family, Shaykh ‘Īsā’s nephew ‘Alī.<sup>133</sup> The Āl Khalīfa at this time regularly engaged in

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<sup>132</sup> IOR: L/P&S/7/138 & 164, Correspondence No. 85 of 1904, from the Foreign Department, Government of India, to the Hon. St. John Brodrick, Secretary of State for India, 21 April 1904, *Records of Bahrain*, Vol. 3, pp. 168-170.

<sup>133</sup> This description of the September 1904 incident is taken from the following correspondences, all found in IOR: L/P&S/10/81: No. 225 of 1904 from J.C. Gaskin, Esq., Assistant Political Agent, Bahrein, to Major P.Z. Cox, C.I.E., Officiating Political Resident in the Persian Gulf, 1 October 1904; From Herr Robert Wonckhaus to J.C. Gaskin, Esq., Assistant Political Agent, Bahrein, 29 September 1904; From Sheikh Isa ibn Ali Al Khalifa, Chief of Bahrein, to Major P.Z. Cox, C.I.E., Officiating Political Resident in the Persian Gulf, 20 Rajab 1322/1 October 1904; From Sheikh Ali ibn Ahmed Al Khalifa to Sheikh Isa ibn Ali Al Khalifa, Chief of Bahrein; No. 252 From Captain F.B. Prideaux, Assistant Political Agent, Bahrein, to Major P.Z. Cox, C.I.E., Officiating Political Resident in the Persian Gulf, 31 October 1904;

the forced labor of Bahrain natives and/or migrant workers from India, Africa, or other parts of the Gulf. At first a privilege of the ruler and tribal chiefs, as the Āl Khalīfa's power became more secure with British support, numerous members of the family began to engage in this practice. Whenever labor was needed for the completion of any project or task, members of the Āl Khalīfa would simply gather the required number of laborers and force them to do the work free of charge for whatever length of time was necessary. Shaykh 'Īsā's nephew 'Alī was known for his abuses of this system, as well as for practicing other forms of oppression of the native Shii population in particular. The September incident reportedly occurred when some of 'Alī's *fidāwīs* entered the German firm and attempted to commandeer some of the firm's own workers as forced labor. A Shii employee of the firm attempted to turn them away, explaining that the servants were already otherwise engaged. Fighting then broke out between the *fidāwīs* and the firm's employees. Hearing loud voices, a German employee who was working on the second floor came downstairs, and after attempting to break up the fight was severely beaten by the *fidāwīs*.

Immediately afterward, the incident was reported to the British Political Resident, Major Cox. Cox contacted Shaykh 'Īsā, and it was agreed that because the incident involved both Bahrainis and British-protected citizens, a decision would have to be arrived at jointly. After completing an investigation, Cox proposed that a fair settlement would entail the flogging and imprisonment of the *fidāwīs*, a sum of

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No. 248 From Captain F.B. Prideaux, Assistant Political Agent, Bahrein, to Herr Robert Wonckhaus, 28 October 1904; From Herr Robert Wonckhaus to Captain F.B. Prideaux, Assistant Political Agent, Bahrein, 30 October 1904, *Records of Bahrain: Primary Documents, 1820-1960*, Vol. 3: 1892-1923, Archive Editions, 1993, pp. 182-190.

compensation paid by ‘Alī to the German firm, and in consideration of the additional offenses reportedly committed by ‘Alī, his expulsion from Bahrain for a period of four years. Shaykh ‘Īsā agreed to the monetary part of the settlement, and promptly forwarded the compensation to the German firm. However, he resisted both the arrest of the *fidāwīs* and the expulsion of his nephew. When the *fidāwīs* were finally brought in, Shaykh ‘Īsā refused to allow any of his staff to administer the flogging, and a British subject was eventually instructed to do so. Understanding that the expulsion of a member of the ruling family was a sensitive matter, Cox engaged in a lengthy process of negotiation with Shaykh ‘Īsā over ‘Alī’s fate.

Shortly thereafter, another incident involving ‘Alī occurred on November 14.<sup>134</sup> A clash between Arab Sunnis, and Shii Qajar subjects and native Shiis broke out in the Manama bazaar. It was never determined decisively who threw the first blow, but the skirmish began when the servant of a Qajar trader passed one of ‘Alī’s *fidāwīs* in an alleyway. The two began fighting, and others quickly joined in. The end result was that two members of the Qajar trader’s family were beaten nearly to death, and seven other Shiis were badly injured. The case was reported to Cox and to Shaykh ‘Īsā. Cox immediately began interviewing witnesses and arranging for testimony to be given by those injured and the doctor who attended them. Within a few days, Shaykh ‘Īsā

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<sup>134</sup> The following description of the November 1904 incident was taken from the following correspondences all found in IOR: L/P&S/10/81. Quotations will be cited individually, and with specific pages numbers. From Herr Robert Wonckhaus to Captain F.B. Prideaux, Assistant Political Agent, Bahrein, 5 November 1904; No. 259, From Captain F.B. Prideaux, Assistant Political Agent, Bahrein, to Sheikh Isa ibn Ali Al Khalifah, 7 November 1904; From Sheikh Isa ibn Ali Al Khalifah to Captain F.B. Prideaux, Assistant Political Agent, Bahrein, 10 November 1904; No. 260, From Captain F.B. Prideaux, Assistant Political Agent, Bahrein, to Herr Robert Wonckhaus, 10 November 1904; No. 421, From Major P.Z. Cox, C.I.E., Officiating Political Resident in the Persian Gulf, to the Secretary to the Government of India in the Foreign Department, 17 December 1904, with enclosures, *Records of Bahrain: Primary Documents, 1820-1960*, Vol. 2: 1868-1892, Archive Editions, 1993, pp. 190-202.

submitted to Cox an *istishhād*, or written testimony, from Sunni witnesses and ‘Alī’s *fidāwīs* drawn up by the Sunnī *qāḍī* Shaykh Jāsim al-Mihza. The *istishhād* affirmed that the witnesses had seen the Qajar subjects attacking and beating Sunni Bahrainis. Cox replied that if the *istishhād* was to be admissible, the witnesses must also appear in court to be cross-examined. Shaykh ‘Īsā at first refused to call the witnesses, saying that the Sunnis would not appear in the presence of Shiis. Cox persisted, indicating to ‘Īsā that the *istishhād* held even less weight in this case because some of the Shii witnesses had reported seeing Shaykh Jāsim himself urging Sunni worshippers to leave his mosque and to “Kill, kill the moguls<sup>135</sup>!”<sup>136</sup> ‘Īsā relented and sent the Sunnis to Cox for cross-examination. Cox’s determination was that the Sunnis had been primed on what to say and that the Shiis were in the right. The neighborhood in which the clash took place was a Sunni neighborhood in which the Qajar Shiis were considerably outnumbered. The family that was attacked maintained a well-known and successful cargo-landing business, while ‘Alī and his *fidāwīs* were already notorious for their repeated acts of oppression and violence. The injuries of nine Shiis had either been witnessed by Cox himself or attested to by the physician, while ‘Īsā could not produce one Sunni who suffered any wounds. Cox told ‘Īsā that despite his own religious biases, he must see justice done for the Shiis. ‘Īsā responded that he would agree to send the case to the *sharī‘a* court to settle.

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<sup>135</sup> Shaykh Jāsim’s alleged use of the term “moguls” to refer to Shiis reflects a Sunni belief prevalent in the Gulf that Shiis were responsible for the sack of Baghdad in 1258.

<sup>136</sup> IOR: L/P&S/10/81, No. 270 From Captain F.B. Prideaux, Assistant Political Agent, Bahrein, to Major P.Z. Cox, C.I.E., Officiating Political Resident in the Persian Gulf, 17 November 1904, Enclosure No. 1 of No. 421, From Major P.Z. Cox, C.I.E., Officiating Political Resident in the Persian Gulf, to the Secretary to the Government of India in the Foreign Department, 17 December 1904, with enclosures, *Records of Bahrain*, Vol. 2, p. 202.



The Qajar subjects were then ordered to appear before the Sunni *sharī'a* court – presided over by Shaykh Jāsim himself. They refused, arguing that since the *qāḍī* himself was involved in instigating the violence against them, it was a foregone conclusion that they would be found guilty and sentenced to flogging or imprisonment. Being Qajar subjects, they also contacted their government in Tehran seeking assistance. Tehran contacted the British agent in Bahrain and requested that justice be done for their subjects. Cox again met with Shaykh 'Īsā and explained that sending the case to the *sharī'a* court was not a workable solution. The Qajar Shiis could not expect to receive justice from a Sunni *qāḍī*, especially Shaykh Jāsim. Furthermore, the British agent pointed out, no Muslim can be compelled to attend a *sharī'a* court if he did not wish to, and the Qajar Shiis absolutely refused. In a communication to Cox, the Assistant Political Agent Captain Prideaux wrote:

Sheikh Isa, I think, should be told emphatically that no disputes between Shiahs and Sunnis are henceforth to be referred to the Shara Court, any more than disputes between Hindus and Mahommedans are. The Shiahs, who are mostly Persians,<sup>137</sup> in the absence of the Shah's Consular representatives naturally look to us for protection, and as the British Government are interested in the welfare of all classes in Bahrein, they cannot view with equanimity the injustice even of making Bahrein Shiahs (who are all Persian by origin) submit to the jurisdiction of a religious Court other than their own. All such cases should be adjudicated upon by the Chief himself [Shaykh 'Isa] or by an impartial Mejlis.<sup>138</sup>

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<sup>137</sup> Prideaux refers to Shii Qajar subjects as "Persians."

<sup>138</sup> IOR: L/P&S/10/81, Correspondence No. 270, from Captain F.B. Prideaux, Assistant Political Agent, Bahrein to Major P.Z. Cox, C.I.E., Political Resident in the Persian Gulf, 17 November 1904, *Records of Bahrain*, Vol. 2, p. 204.

Ironically, it is the British who remind the Muslim ruler about the voluntary nature of Muslims' appearance in *sharī'a* court. 'Īsā remained obdurate, and told Cox that even if the British government seized Bahrain, which he knew they were capable of doing, he would not consent to the trial of the Qajar Shiis except in his own courts. In the meantime, 'Īsā's nephew 'Alī remained in Bahrain and continued to evade punishment for the incident at the German firm as well.

A discussion then ensued between Cox and the Foreign Office in India about how to resolve the deadlock. The British State Department advised the continued use of diplomacy. However, Cox reported that every tack had been tried, and 'Īsā would not budge. Meanwhile, Tehran continued to apply pressure on the British to see justice done. Finally a decision was reached by the British to present 'Īsā with an ultimatum: either he would punish the Sunni offenders as well as his nephew 'Alī, or British warships would take military action. The ultimatum was delivered on February 25, 1905, together with a show of naval force at the Manama port.

### **Bahrain Order-In-Council 1913/1919**

The British response to the incidents of 1904 initiated a new phase in Bahraini-British relations in which Britain took an active role in managing Bahrain's domestic affairs. The use of the threat of force demonstrated to the Āl Khalīfa that Britain meant to direct the course of the country's future. During negotiations over the punishment of 'Alī and his *fidāwīs*, Shaykh 'Īsā had been reminded by Cox that it was the British who

sought him out to rule, and that without their support he would not be in a position of leadership. Somewhat cowed after these events, ‘Īsā for a time became more tractable to British “advice.”<sup>139</sup>

Because the number of British subjects and other foreigners in Bahrain was steadily increasing, and in light of the difficulty of resolving the 1904 cases, the British saw the need to define more clearly their judicial authority. In 1907 the Foreign Office began to recommend the establishment of an Order-In-Council that would not only outline Britain’s jurisdiction over its own subjects, but would also determine procedure in Bahraini courts whenever a British subject or a foreigner was involved. Britain was still concerned to maintain an image to the international community of minimal involvement in Bahrain’s internal administration and therefore they did not want to appear to issue the Bahrain-Order-In-Council (hereafter, BOIC) unilaterally.<sup>140</sup> In 1909, the Foreign Office instructed the agent in Bahrain to acquire an official statement from Shaykh ‘Īsā asking the British to assume jurisdiction of foreigners. ‘Īsā wrote the statement, but after asking the British to exercise authority in all cases in which foreigners only are concerned, he added, “but not in other cases; and in cases that occur between foreigners and my subjects, it is necessary that you and I settle them jointly.”<sup>141</sup> In these last phrases, ‘Īsā wanted to maintain some control over cases such as those in

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<sup>139</sup> IOR: L/P&S/10/81, Memorandum of demands made by the Officiating Political Resident in the Persian Gulf upon Sheikh Isa ibn Ali, Chief of Bahrein, by order of the Government of India, Enclosure No. 1 of No. 119, From Major P.Z. Cox, Officiating Political Resident in the Persian Gulf, to The Officiating Secretary to the Government of India in the Foreign Department, 4 March 1905, *Records of Bahrain*, Vol. 2, p. 239.

<sup>140</sup> IOR: L/P&S/10/28 & 82, No. 188 of 1907, From Foreign Department, Government of India, to John Morley, O.M., Secretary of State for India, 14 November 1907, *Records of Bahrain*, Vol. 3, pp. 419-421.

<sup>141</sup> IOR: L/P&S/10/28 & 82, Correspondence from Sheikh Esa ibn Ali Al Khalifa to Captain C.F. Mackenzie, Political Agent, Bahrein, 16 July 1909, *Records of Bahrain*, Vol. 3, p. 431.

1904 in the context of the Joint Court. Thus, a dual-authority system was established in which the British agency and the Bahraini ruler shared authority.

The letter was considered sufficient to meet the need for which it was requested. However, the Foreign Office expressed concern that the term “foreigner” needed to be defined in the final draft of the BOIC.<sup>142</sup> ‘Īsā would not likely take issue with Britain handling cases of Europeans or subjects of Christian powers, but there was some ambiguity in the case of subjects of Muslim rulers such as those of the Qajar Shah or of Turkey, and especially in the case of subjects of other Arab rulers in the Gulf such as those of Oman, Kuwait, Qatar and Arabia. Britain considered itself responsible for the well-being of subjects of any country that it had friendly relations with while they were in areas under British protection. Because these subjects were Muslim and Arab, ‘Īsā believed he could claim jurisdiction over them in his own courts. Not only was it a political matter, it was also financial. Traditionally, a court fee (*khidma*) of approximately 10% of the amount involved was charged for each case. ‘Īsā claimed a right to these fees, and went so far as to convince King ‘Abd al-‘Azīz ibn Sa‘ūd to grant him jurisdiction over the subjects of the Najd and al-Ḥasā during their stay in Bahrain.<sup>143</sup> The lack of a clear definition of who falls under the term “foreigner” also allowed for this system to be abused by Bahraini subjects who could claim to be subjects of other rulers because of their heritage. Before the BOIC was completed in 1913, many Bahrainis did in fact take advantage of this situation. The British agent

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<sup>142</sup> IOR: L/P&S/10/28 & 82, No. 3134 of 1910, From Major P.Z. Cox, Officiating Political Resident in the Persian Gulf, to The Officiating Secretary to the Government of India, 27 November 1910, Enclosure No. 4 of No. 67 of 1911, From Foreign Department, Government of India, to The Earl of Crewe, K.G., Secretary of State for India, 8 June 1911, *Records of Bahrain*, Vol. 3, pp. 435-437.

<sup>143</sup> Radhi, *Judiciary*, p. 29.

freed slaves, protected women who had been accused by their families of committing “honor crimes,” and excused merchants who had committed acts that violated tribal custom, but did not violate Indian codes followed by the British.<sup>144</sup>

In the final draft of the BOIC, “foreigner” was defined as “any person not a British or Bahrein subject,” a definition which gave the British the widest possible jurisdiction over merchants, migrant workers, and arguably recent immigrants.<sup>145</sup> Although it was completed in 1913, World War I prevented the British from putting the required time and resources into enforcing the BOIC. It was not until 1919 and 1920 that the new courts outlined in the document were established.<sup>146</sup>

In cases that involved only British subjects and foreigners, the British Political Resident acted as a High Court Judge and the Political Agent as the Sessions Judge as if they were operating in a full British protectorate. Appeals in some cases could be made to the Governor General of the Foreign Department in India. If both the individuals were Muslim, the case could be referred to the Bahrain *sharī‘a* courts. However, the BOIC specifies that in such cases, a representative of the Political Agent must be present at the hearing to record the proceedings, the *qāḍī*’s decision must be ratified by the Political Agent, and final appeal rests with the Political Agent. The Order designates any insult to religion a criminal offense punishable by imprisonment and/or a fine. This article offered additional protection to Qajar and Arab Shiis from religious persecution by the Sunni tribes.

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<sup>144</sup> India Library Office, *Bahrain Administration Report* of 1907, p. 100; 1908, p. 92; 1911, p. 100.; India Library Office, *Bahrain Administration Report* of 1906, p. 67, See also IOR R/15/2/K/17; India Library Office, *Bahrain Administration Report* of 1910, p. 83; as referenced by *Khuri*, Tribe, p. 87.

<sup>145</sup> IOR: L/P&S/10/248 & R/15/1/299, BOIC, *Records of Bahrain*, Vol. 3, p. 446-469.

<sup>146</sup> Al-Tajir, *Bahrain 1920-1945*, p. 22.

Cases involving a British subject or a foreigner and a Bahraini subject were referred first to the Joint Court which consisted of the Political Agent and Shaykh ‘Īsā. Cases concerning questions of local custom could be referred to the *Majlis al-‘Urf*, while pearling disputes could be sent to the *Sālifa* Court. Civil cases could be referred to an arbitrator, or if they involved questions of inheritance, wills, or points of Islamic law, they could be referred to the *sharī‘a* court (under the supervision of a representative of the Political Agent). Any Muslim witness could be sent to the *sharī‘a* court for the administration of an oath. Appeals in cases that were sent to the *Majlis al-‘Urf* or an arbitrator could be made to the Political Agent, while appeals from the *Sālifa* court could be made to the Joint Court.<sup>147</sup>

The content of these reforms did not meet with the favor of the Āl Khalīfa or their tribal allies. One of Shaykh ‘Īsā’s sons, ‘Abdullāh, became a voice of protest against the reforms. ‘Abdullāh had been gaining prominence by working closely with his father to gain administrative experience. He earned the support of the tribal leaders, and at the same time he worked with the British agency to assist them on various projects. While Ḥamad had been named heir apparent in 1898, ‘Abdullāh desired to supplant his brother in that position. The British agency considered supporting him in this and even invited him for a visit to London in 1919 during which he was given an audience with the King. However, it became evident that ‘Abdullāh’s interests did not match up with those of the British. ‘Abdullāh had developed very close ties with the Sunni tribal leaders, and wished to maintain the system that ensured their – and the Āl

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<sup>147</sup> IOR: L/P&S/10/248 & R/15/1/299, BOIC, *Records of Bahrain*, Vol. 3, p. 446-469.

Khalīfa's – dominance.<sup>148</sup> During his meeting in London, he made a series of requests on behalf of his father that included the return of jurisdiction over non-Bahraini Arabs, and the ability to choose the Bahraini members of the *Majlis al-'Urf* without interference from the Political Agent. The latter request was prompted by a disagreement over some actions 'Īsā had taken earlier in the year when he appointed new members to the *Majlis* without consulting the British agency. He signed the request: "'Abdullāh ibn 'Īsā Āl Khalīfa, The Successor.'"<sup>149</sup> All of the requests were denied. The first was denied because the British had concluded agreements with the other Arab rulers of the Gulf which granted them the right to protect Arab subjects while in Bahrain. The second was denied because it contradicted the rulings of the BOIC.<sup>150</sup>

### **Administrative Reforms of the 1920's**

#### ***Municipal Councils***

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<sup>148</sup> IOR: R/15/2/83 & L/P&S/10/1039, "Note on the Political Situation in Bahrain, November 1921," Major C.K. Daly, I.A., Political Agent, Bahrain, *Records of Bahrain*, Vol. 3, pp. 668-675; No. 24-S of 1922, From Lieutenant-Colonel A.P. Trevor, C.S.I., C.I.E., Political Resident in the Persian Gulf, to D. de S. Bray, C.I.E., C.B.E., Foreign Secretary to the Government of India, 6 January 1922, *Records of Bahrain*, Vol. 3, pp. 675-677.

<sup>149</sup> IOR: R/15/2/26, Correspondence from Shaikh Abdullah ibn Isa to Sir Arthur Hirtzel, *Records of Bahrain*, Vol. 3, p. 591.

<sup>150</sup> IOR: R/15/2/26, No. 246-S of 1919, From Deputy Political Resident, Persian Gulf, to Civil Commissioner and Political Resident, Persian Gulf, 28 December 1919, *Records of Bahrain*, Vol. 3, pp. 600-602.

While the institution of new laws regarding jurisdiction over foreigners, however defined, limited the Āl Khalīfa's sovereignty, these changes were insignificant compared to those that occurred beginning in 1920. By this time, Shaykh 'Īsā had become no more than a figurehead while Ḥamad had assumed the responsibilities of ruler. Despite the continued resistance of 'Īsā and 'Abdullah, Ḥamad was crowned by the British in 1923 in front of an assembly of tribal leaders, prominent merchants, and religious officials.

In 1920, the British brought an end to the *amīr-fidāwī* system and replaced it with municipal councils which managed major towns and cities. The head council, that of Manama, was made up of eight members – four appointed by Shaykh 'Īsā and four by the Political Agent, and a president nominated by Shaykh 'Īsā. The municipality structure was vastly different than the previous system under the *amīrs* in which the *amīrs* were appointed by Shaykh 'Īsā, hired their own *fidāwīs*, taxed at will, and were responsible to no one for their expenditure. The *amīrs* were exclusively chosen from either the Āl Khalīfa family or the Sunni tribes. The appointment to these positions, which were recognized by the British as well, served only to institutionalize the limitless authority the 'Utūb enjoyed over the native population since the time of their invasion in 1783. As such, the weight of taxation fell heavily on the native population and hardly at all on the tribes. The new system was modeled exactly on the British structure in which each municipality was a self-contained financial entity. The revenue required to maintain the town was collected in the form of taxes from residents. All residents were taxed equally, and every resident had a voice in determining how the



taxes were spent as well as the right to demand to examine the municipality's accounts at any time.<sup>151</sup> This system drastically altered the position of the native Bahrainis *vis à vis* the ruling authority. Instead of being subjects of a feudal and largely arbitrary power, residents now became something more like citizens, to whom some rights were granted. Native Shiis were now placed on par with the Sunni tribes. All would be taxed equally and would be equally subject to the now bi-national courts of justice.

### ***Domestic Courts***

British reforms of Bahrain's domestic courts also shifted relations toward more equality between the Sunni tribes, native Bahrainis, and foreigners. The *Majlis al-'Urf* was restructured to include an equal number of Bahraini and foreigners – five of each. The Political Agent chose the foreigners, and while 'Īsā chose the Bahraini members, his choices had to be approved by the Political Agent. The *Sālifa* Court was left under the charge of 'Īsā until 1923 when it was abolished. The *Majlis al-'Urf* was enlarged to eleven, and then to twenty-two members in order to take over the pearling cases.<sup>152</sup> The result was a dual-authority system in which neither the Āl-Khalīfa nor the British had full control, but all major decisions were made jointly, and power was constantly being negotiated.

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<sup>151</sup> IOR: L/P&S/10/249, Rules and Regulations under Article 70 of Bahrain Order in Council, Municipal, Municipal Bye-Laws, and Municipalities, No. 1 of 1921, Lieutenant-Colonel A.P. Trevor, Political Resident, Persian Gulf, *Records of Bahrain*, Vol. 3, pp. 648-658.

<sup>152</sup> IOR: R/15/1/343, No. 1822/9A of 1357 (1938), From C. Dalrymple Belgrave, Adviser to the Government of Bahrain, Bahrain, to Political Agent, Bahrain, 9 December 1938, *Records of Bahrain: Primary Documents 1820-1960*, Vol. 5, 1932-1942, 1932-1942, pp. 629-636.

Regarding the *sharī'a* courts, the Sunni courts were not greatly affected. British agents at times offered suggestions regarding the appointment of specific *qāḍīs*.<sup>153</sup> However, the Āl Khalīfa still had ultimate control over the appointments, which is as it had been before the British were involved. The Sunni *qāḍīs* began to receive “official” salaries from the government, but this also was not a significant departure from their pre-British position in which their well-being resulted from their close ties with the Āl Khalīfa. Either way, their loyalties lay with the rulers.

The Shii *sharī'a* courts, on the other hand, were considerably affected. As oppressive as the ‘Utūb tribes had been when they first conquered Bahrain, they did not interfere with the native Shii community’s ability to choose and maintain their own local *qāḍīs* (except, of course, that they taxed Shii landowners and businesses so heavily that the flow of income to the *madrasas*, mosques, and religious scholars from these sources was nearly cut off). When the British began to advise Bahrain’s rulers on domestic affairs, for the first time in Bahrain’s recent history, or perhaps ever, the Sunni authorities, together with the British, took control over the appointment of Shii *qāḍīs*.

A report filed by British Lieutenant Colonel E. L. Ross in 1882 described the state of the *sharī'a* courts at that time.<sup>154</sup> The ruler had appointed two Sunni *qāḍīs*, one for Manama and one for Muharraq. The Manama judge was Shaykh Qāsim Āl Mihza, born in 1849, whom we met above in reference to the 1904 incident. Shaykh Qāsim adjudicated cases according to the Mālikī *madhhab*, which is the *madhhab* of the Āl

<sup>153</sup> IOR: R/15/1/343, No. 1438/26 of 1937, From C. Dalrymple Belgrave, Adviser to the Government of Bahrain, Bahrain, to Political Agent, Bahrain, 1 December 1937, *Records of Bahrain*, Vol. 5, pp. 625-626.

<sup>154</sup> IOR R/15/186 Lieutenant Colonel E.L. Ross, Report, 1882, as referenced in Radhi, *Judiciary*, pp. 15-16.

Khalīfa. The Muharraq judge was Shaykh ‘Abd al-Raḥmān ibn Shaykh ‘Abd al-Laṭīf, born in 1837 in al-Ḥasā, from which he fled to Bahrain. He also followed the Mālikī *madhhab*. The Sunni *qāḍīs*’ decisions on minor cases were final. On major cases, however, their decisions were appealable to the ruler. For Shiis, Lt. Colonel Ross writes that two *qāḍīs* were appointed by the rulers: Shaykh Muḥammad ‘Alī ibn Shaykh ‘Abdullāh, born in 1826 in Jidd ‘Alī, and Shaykh Aḥmad ibn Shaykh Salmān, born in 1841. Although the two *qāḍīs* are said to have been appointed by the rulers, the report states that they did not receive salaries, but relied solely upon gifts and donations from Shii petitioners. Although the British understood this monetary compensation to be informal, the Shii petitioners as well as the *qāḍīs* most likely considered it as *al-khums*, a Shii institution according to which a percentage of one’s income is paid as a tax to religious scholars who will spend it on behalf of God. Also, there was no appeals process for the Shiis. All decisions by the Shii *qāḍīs* were final.

Whether or not the two Shii *qāḍīs* mentioned in Ross’s report actually carried authority within the Shii community is not clear. Other sources refer repeatedly to Shaykh Khalaf Āl ‘Aṣṣūr’s prominence during this period, and his very high standing among Shiis. A rivalry apparently developed between the Shii *qāḍī* and Shaykh Ḥamad Āl Khalīfa. The “bad relations” between the two were described in a letter from Lieutenant-Colonel L.B.E. Haworth, Political Resident in the Persian Gulf, to the British Foreign Secretary, dated March 1927. Haworth writes that Ḥamad met with him, requesting the removal of Shaykh Khalaf from the island. Ḥamad swore that he himself had no problem with Shaykh Khalaf, but that the Shii community did. He produced a

petition which had apparently been signed by hundreds, in which the Shii community protested the injustice of Shaykh Khalaf's activities, and requested that cases be referred to a different *qāḍī*, whom they named (Sayyid 'Adnān al-Musāwī). Haworth then called Shaykh Khalaf in for a meeting. Rather than exile the *qāḍī*, he recommended that the *qāḍī* go on an extended pilgrimage. Shaykh Khalaf agreed, and Haworth instructed Ḥamad to treat him with honor and friendship until his departure. The *qāḍī* that had been named in the petition then assumed Shaykh Khalaf's position. Haworth admits that he himself has doubts about the new Shii *qāḍī*, "as I have yet to meet an honest [Shii cleric]," but writes that, "He is at any rate the choice of his sect."<sup>155</sup> It is difficult to determine whether the "hundreds" of Shiis who signed the petition were truly representative of the entire Shii community, given that they numbered almost 100,000 at the time.<sup>156</sup> That Ḥamad endorsed the new *qāḍī* is also no indication that the Shii population agreed. Evidence that mitigates against Ḥamad's claim is first, that the new *qāḍī* died unexpectedly in January of 1928, shortly after his appointment,<sup>157</sup> and second, in May of 1929 Shiis lodged another petition with the British agency, this time *protesting* the exile of Shaykh Khalaf.<sup>158</sup> Whether the new *qāḍī* was or was not indeed the Shiis' choice, what is clear is that the community now required the sanction of the Sunni-British government to "elect" their judges. Indeed, the *qāḍīs* were warned at the

<sup>155</sup> IOR: R/15/2/127 & L/P&S/10/1043, No. 86-S of 1927, From Lieutenant-Colonel L.B.H. Haworth, Political Resident in the Persian Gulf, to The Foreign Secretary to the Government of India, 27 March 1927, *Records of Bahrain*, Vol. 4, pp. 378-379.

<sup>156</sup> IOR: R/15/1/343, No. 1438/26 of 1937, From C. Dalrymple Belgrave, Adviser to the Government of Bahrain, Bahrain, to Political Agent, Bahrain, 1 December 1937, *Records of Bahrain*, Vol. 5, p. 626.

<sup>157</sup> IOR: R/15/2/129, R/15/1/350 & L/P&S/10/1044, Notes on Expenditure 1347, *Records of Bahrain*, Vol. 4, p. 460.

<sup>158</sup> IOR: R/15/2/296 as referenced by Radhi, *Judiciary*, p. 53.

gathering during which British Political Resident Lieutenant-Colonel S.G. Knox announced Shaykh 'Īsā's abdication and Ḥamad's crowning that he who interferes with the maintenance of justice will be dismissed from his appointment. Knox also warned against the constitution of spontaneous authority: "Attempts by unauthorized persons to usurp executive or judicial authority will be resented and punished, particularly attempts by persons who constitute themselves leaders of any community as has been done in the past."<sup>159</sup>

The result of these changes was that religious legal authority became subsumed under the authority of the state, and hence, Sunni and Shii religious legal authority became politicized in a way that it had not been in the past. The role of the *qāḍī* was no longer limited to local communities, but was now a function of the centralized state. The relationship between the Shii layperson and his/her *qāḍī* was no longer a direct one, in which the *qāḍī* was chosen by the community, and the petitioner paid the *qāḍī* directly for his services. In the new configuration, the primary relationship is between the litigant, who was now a citizen, and the state. The *qāḍī* had become a representative of the state, speaking and acting on its behalf. If an individual wanted to register a marriage, the only choice open to him was to go to the state's *qāḍī*. And of course, the *qāḍī* receives his salary from the state, not from the petitioner.

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<sup>159</sup> IOR: L/P&S/10/1039, R/15/1/336 and R/15/2/73, Speech made by Lieutenant-Colonel S.G. Knox, C.S.I., C.I.E., Political Resident in the Persian Gulf, at the majlis convened in Bahrain on the 26<sup>th</sup> May 1923, *Records of Bahrain*, Vol. 4, p. 11.

## *Waqf*

As the British agency set out on its course of pursuing domestic reforms, local agents examined Bahrain's infrastructure and public works. They ascertained that the country was in great need of a number of improvements in the way of, for example, schools, roads, bridges, hospitals. Having analyzed 'Īsā's management of funds and discovering that not only had he been "squandering" it on "unnecessary luxuries" as well as giving handouts to Āl Khalīfa family members and Bedouins, but that his wife had also been literally burying a percentage of the ruler's revenue in the ground for several years, the agency determined that a thorough overhaul of the country's finances was in order.<sup>160</sup> One area that was considered a potential source of funding for public works was that of *waqf* endowments. The *waqf* endowment is the formal immobilization of property from a donor and the assignment of its dividends to specific purposes. Two main types of *waqf* distinguish between those that benefit the Muslim community in general or groups of an indeterminate number and continue perpetually, such as in the form of mosque construction (*waqf 'āmm*); and those which are designated for specific, named individuals such as family members, who will eventually pass away (*waqf khāṣṣ* or *waqf ahlī*).<sup>161</sup> *Waqf* endowments in Bahrain, as in most

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<sup>160</sup> IOR: R/15/1/331, 336 & 338, R/15/2/127-28, L/P&S/10/1039, No. 250 of 1923, From Lieutenant-Colonel S.G. Knox, C.S.I., C.I.E., Political Resident in the Persian Gulf, to D. de S. Bray, Esq., C.S.I., C.I.E., C.B.E., Foreign Secretary to the Government of India, 31 May 1923, *Records of Bahrain*, Vol. 4, pp. 25-40.

<sup>161</sup> Astrid Meier, "Wakf," *Encyclopedia of Islam*, Brill Online; and Said Amir Arjomand, "Philanthropy, the Law, and Public Policy in the Islamic World before the Modern Era," *Philanthropy in the World's Traditions*, ed. Warren F. Ilchman, Stanley N. Katz, and Edward L. Queen II, Indiana University Press: Bloomington, 1998.

Muslim societies, were traditionally managed by the *qāḍīs* and were administered according to *sharīʿa*. During the 1920's and 1930's, the British completed a cadastral survey which showed that of the three major types of agricultural land holdings, Shii *waqf* held 33.6%, 17.9%, and 19.2%, while Sunni *waqf* held .7%, .7%, and 2.2%, respectively.<sup>162</sup>

There is no formal documentation of how *waqf* revenues were used by the *qāḍīs*, but the expenses they submitted to the British agency included maintenance of mosques and their grounds, salaries of muezzins, and salaries of property administrators. Arguing that this revenue could, first, be better managed by an executive committee, and second, be better spent on what the British considered to be “public works” (as opposed to “religious uses”), in 1925 Political Agent Major Daly attempted to remove *waqf* endowments from the control of the *qāḍīs* and subsume them under the central authority of the government.<sup>163</sup> This idea was completely antithetical to the system under which Bahrainis had been operating for centuries. The idea that the Bahrain government, which in the 1920's was not just a Muslim government, but a government ruled jointly by the Sunni Āl Khalīfa and a foreign, *non-Muslim* power, would assume control over what many saw as a religious right aroused furious opposition from the population.

Daly decided not to press on with this particular reform, at least not for the moment. *Waqf* endowments continued to be administered by the *qāḍīs*. For the Sunnis, this was Shaykh Jāsim, and then in 1926, “the three ‘Abd al-Latīfs.” For the Shia, it was

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<sup>162</sup> Khuri, *Tribe*, pp. 41-42.

<sup>163</sup> IOR: R/15/2/129, R/15/1/350 & L/P&S/10/1044, Notes on Expenditure 1347, *Records of Bahrain*, Vol. 4, p. 461.

Shaykh Khalaf until he was replaced by Sayyid ‘Adnān, again, in 1926. After Sayyid ‘Adnān died in 1928, no Shii *qāḍī* was appointed for some months, and the *waqfs* were temporarily entrusted to his executor, Shaykh Muḥammad ‘Alī al-Madānī. Finally, it seems al-Madānī himself was appointed as the *qāḍī* for the villages, and Shaykh ‘Abdullāh ibn Muḥammad Ṣāliḥ was appointed for Manama. Shaykh ‘Alī, as al-Madānī was called, specified that as *qāḍī*, he wanted nothing to do with the *waqfs*. Shaykh ‘Abdullāh on the other hand asked to be put in charge of them. British Adviser Charles Belgrave persuaded Shaykh ‘Abdullāh to settle for being named president of a committee that would administer the *waqfs*. He agreed to this, but the “country people” apparently objected to his presidency. Finally, British sources say that “government decided” that neither *qāḍī* would control the *waqfs*, but that a committee of six villagers and four Manama residents would take charge,<sup>164</sup> although the *qāḍīs* were given the authority to appoint these members. A *Waqf* Department was also created to oversee both Sunni and Shii *waqfs*, which was headed by the ruler’s brother, Shaykh ‘Abdullāh.<sup>165</sup> British sources praise Belgrave’s actions in transferring the Shii *waqfs* to a government committee and write that great progress was made thereafter: “the new arrangement has proved so satisfactory that there is little doubt that the Sunnis will soon bestir themselves and take over their Waqfs from the three Qadhis. When this is done it should be possible to open many primary schools all over the island at no extra cost to

<sup>164</sup> IOR: R/15/2/129, R/15/1/350 & L/P&S/10/1044, Notes on Expenditure 1347, *Records of Bahrain*, Vol. 4, *Records of Bahrain*, Vol. 4, pp. 460-461.

<sup>165</sup> IOR: R/15/2/130, p. 88 as referenced by Radhi, *Judiciary*, p. 51.



the State.”<sup>166</sup> Despite the fact that the Shii community had so strenuously objected to the removal of the *waqfs* from the *qāḍīs*, British sources record that there were repeated accusations against the *qāḍīs* of misappropriation of *waqf* property. By 1930, sources say the Shii community came to accept the fact of the new committee overseeing the *waqfs* because they could now see the efficiency and impartiality with which it handled the resources.<sup>167</sup>

The bureaucracy that was planned by the British agents and the Āl Khalīfa was built slowly due to continuing local political struggles. Sectarian clashes continued intermittently throughout the twentieth century. For a time, the spread of Arab nationalism gave village Shiis and Sunni anti-imperialists groups a common cause. Especially in the 1950’s, Sunni groups and Shiis stood together against British occupation and the tribal rule of the Āl Khalīfa. However, the groups that constituted the opposition lacked formal organization and internal cohesion. Ultimately, they were not successful in attaining any significant political authority for themselves, and the Āl Khalīfa maintained its rule.

As for the *sharī‘a* courts, they remained under the control of the *qāḍīs*. Britain appointed Charles Belgrave in 1926 to be the ruler’s political advisor. Among Belgrave’s many tasks was the management of the country’s courts. Belgrave focused on continuing the reforms of the criminal, commercial, and diving courts, while allowing the *sharī‘a* courts to continue much in the same manner as before. In his

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<sup>166</sup> IOR: R/15/2/129, R/15/1/350 & L/P&S/10/1044, Correspondence No. 93-C of 1929, Capt. C.G. Prior, I.A. Political Agent to Secretary to the Political Resident in the Persian Gulf, Bushire, 20 July 1929, *Records of Bahrain*, Vol. 4, p. 478.

<sup>167</sup> Khuri, *Tribe*, pp. 112-113,

memoir, Belgrave writes that the ruler left the matter of appointing *qāḍīs* almost entirely in his [Belgrave's] hands, and that the ruler's policy was to "conform as much as possible to the wishes of the people."<sup>168</sup> Periodically, Belgrave and the ruler instituted certain regulations for the qadis to follow, such as the number of days per week they must hear cases, and the hiring of clerks.<sup>169</sup> The actual process of deciding cases, however, was left to the discretion of the judges. In this way, the Shii community retained autonomy over some of their own affairs.

## **CONCLUSION**

The character of political rule in Bahrain did not remain constant throughout the islands' history. Power was held variously by Shii and Sunni sovereigns. The Banū Jarwān set up Shii institutions which they staffed with Imamis from the shrine cities of Iraq. When control of the Gulf was seized by the Sunni Hormuz, Shii officials in Bahrain retained their positions because the Hormuz were content to have the local governors pay tribute. This situation changed, however, when the Sunni tribe of the Banū Jabr captured Bahrain. The Banū Jabr dismissed Shii officials and replaced them with Mālikī Sunnis. Shiism was discouraged, and many Shiis fled Bahrain. Meanwhile,

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<sup>168</sup> Belgrave, *Personal Column*, p. 55.

<sup>169</sup> IOR: R/15/1/343, No. 26/1357 Adviser to the Government, Government of Bahrain. Notice. Shia Kadhis, 4<sup>th</sup> Ramadhan 1357/27<sup>th</sup> October 1938. *Records of Bahrain*, Vol. 5, pp. 627-628.

the Safavids came to power and eventually captured Bahrain in 1602. This initiated an era of great intellectual and financial prosperity for the Shiis of Bahrain during which the Āl ‘Asfūr family produced one of the greatest Shii legal scholars the region has known. In 1783, this idyllic time ended when the ‘Utūb federation of Arabian Sunni tribes invaded and conquered Bahrain. Not only were Shii legal and religious institutions dismantled, but heavy taxes and extortion destroyed Shii businesses and commerce, and the local pearl trade which had been built and maintained by native Shii merchants and scholars was taken over by the Sunni tribal chiefs. However, despite these unfortunate events, Shiis remained somewhat autonomous with regard to their legal and religious life. While a Shii no longer served in the positions of *muhtasib* and *shaykh al-Islām*, Shiis could still choose their own *qāḍīs*. They could still pay him a tithe for concluding a contract or settling a dispute. Shii *qāḍīs* still controlled endowed properties (those that were not confiscated). Throughout this period, Sunnis and Shiis in Bahrain retained separate institutions to deal with communal legal and religious issues. The islands existed under one or another patrimonial state in which sectarian communal prerogatives remained discrete.

The changes that took place leading up to and during the 1920’s effected a transition of Bahrain from a pre-modern, patrimonial state to a modern nation-state. For family law, this meant different things for the Sunnis than for Shiis. With the exception of the removal of *waqf* endowment from their control, Sunni *qāḍīs* operated in much the same manner after the reforms as they had before: their jurisdiction did not change significantly and their role *vis a vis* the ruler remained the same. The role of the Shii

*qāḍī* on the other hand underwent a total transformation. Before the reforms, the Shii *qāḍī* served not only as judge and religious expert, but also as municipal administrator, business consultant, political advisor, and general community leader. His jurisdiction included everything but foreign affairs. After the reforms, *qāḍīs* were appointed by the Sunni-British state rather than being chosen by the Shii community, they were paid salaries by the state instead of receiving tithes from the Shii petitioners, their jurisdiction was reduced to a fraction of what it had been, and their control over *waqf* endowments was stripped. Unlike the Sunni *waqf* which retained a negligible amount of land holdings, the Shii *waqf* holdings were significant. The *qāḍī* managed these, and therefore controlled the maintenance of mosques, wells, and other public works that were enjoyed by the Shii community. The role of the *qāḍī*, and thus the structure of the Shii community was drastically altered such that by the time the reforms were complete, the only thing Shiis still had agency over was family law. Given this state of affairs, it is not surprising that today they would so stridently resist the removal of this last communal prerogative.

### **CHAPTER 3: THE SHII ‘ULAMĀ’**

Since the government’s first attempt at establishing a codified family law (for all citizens) in 2003, Bahrain’s Shii ‘*ulamā*’ have opposed the government having any hand in the drafting of rules governing the family. Like ‘*ulamā*’ in many other Muslim-majority states, Bahrain’s clerics argue that the state has no authority over matters that are, they argue, the province of God. However, unlike ‘*ulamā*’ in other countries, Bahrain’s Shii ‘*ulamā*’ are also arguing against having their family law determined by government officials who are of a different sect. The ‘*ulamā*’ have declared that the only way they would accept a government-sponsored family law is if an amendment was made to the constitution prohibiting anyone but the highest Shii religious authority, the *marja*‘, the right to approve and subsequently amend that law. The *marja*‘ currently followed by the majority of Bahraini Shiis is Ayatollah ‘Alī al-Sīstānī, who resides in Iraq. Therefore, the ‘*ulamā*’ are not only claiming religious authority over family law, but they are looking to a secular authority, the constitution, to safeguard it. In addition, while the Bahraini constitution defines political authority that is limited to a specific territory, the religious authority the ‘*ulamā*’ would like it to protect extends beyond those borders. So far, this demand has not been met.

Adding to the complexity of the issues surrounding Bahrain’s family law is the fact that not all Shii ‘*ulamā*’ reject the government’s proposed law. The islands’ Shiis adhere to two different schools of legal Shii thought; Usuli and Akhbari. Usulis are the

majority, and reject the law, while the minority Akhbaris actually support the law. One possible explanation for Akhbaris' support of the law is their close political relationship to the ruling family. However, another explanation is that Akhbaris and Usulis each have sound doctrinal reasons for taking the positions they have. Akhbaris have traditionally argued for the exclusive authority of the religious texts and for strict reliance on the reports (*akhbār*) of the Prophet and the Imams. Usulis, on the other hand, insist on the need to refer to a qualified legal scholar (*mujtahid* or *marja'*). It is crucial, Usulis argue, that this scholar be living. Given these doctrinal positions, the Bahraini Usulis' insistence on preserving the control of the *marja'* over family law seems to be rooted in their concept of religious-legal authority. Until now, the Shii '*ulamā*' have enjoyed nearly exclusive control over the *sharī'a* courts. It has only been in the last six years that the possibility that this prerogative will be removed from them has become real. Therefore, it is only recently that they have had to legitimate their authority over this area. By examining *khuṭab* (Friday sermons), written statements in the press, and on-line publications, the following chapter looks at the ways in which the Shii '*ulamā*' define religious-legal authority. It also demonstrates that through their insistence on a constitutional guarantee, the '*ulamā*' are constructing an authority that is a hybrid between secular political and religious authority.

## **AUTHORITY BASED ON TRADITION**

Throughout the eight years during which the Bahraini government endeavored to pass a codified family law, the majority of the country's Shii Usuli '*ulamā*' consistently opposed this move. Primarily, members of the '*ulamā*' object to individuals who are not religious specialists having a role in drafting and maintaining the law. Part of the argument of Bahrain's Shii Usuli '*ulamā*' is similar to that of '*ulamā*' elsewhere in that they claim legal authority based on their participation in an Islamic tradition that includes the adherence to a particular course of study, method of legal reasoning, and acquisition of certain personal characteristics that specifically link '*ulamā*' in the present with authoritative figures of the past. While this conscious linking with the past has at times been understood as a move that is in opposition to modernity, scholars have pointed out that, on the contrary, tradition often serves as a modality of change.<sup>170</sup>

Faced with the possibility of losing control over family law issues, Bahrain's Shii '*ulamā*' are struggling to define their role against that of the state in a way that situates them squarely within a religious framework that legitimates that role and grants it authority. In his study on contemporary '*ulamā*', Muhammad Qasim Zaman writes that this process of definition is on-going: "The '*ulamā*'s tradition is not a mere inheritance from the past, even though they often argue that that is precisely what it is. It is a tradition that has had to be constantly imagined, reconstructed, argued over, defended, and modified."<sup>171</sup> In the written statements analyzed below, Bahrain's Shii '*ulamā*'

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<sup>170</sup> Marilyn Robinson Waldman, "Tradition as a Modality of Change: Islamic Examples," *History of Religions*, Vol. 25, No. 4, Religion and Change: ASSR Anniversary Volume (May, 1986), pp. 318-340.

<sup>171</sup> Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), pp. 10-11.

review and reassert their place within the Islamic legal tradition in order to justify their exclusive control over family law.

In response to the formation of the 2003 drafting committee, which consisted of the Minister of Justice, the head of the Legislative Committee, and three women lawyers, as well as judges of the *sharī'a* courts (three Sunni and three Shii), 'Abdullah al-Ghurayfī, a prominent religious scholar and imam of the *Masjid al-Imām al-Ṣādiq* in Manama, published an essay rejecting the law in the May 23<sup>rd</sup> issue of his weekly newsletter. Speaking on behalf of other leading Shii '*ulamā*', al-Ghurayfī rejected the transfer of jurisdiction over matters of personal status from the *sharī'a* judges to the Parliament. Although the law was drafted in part by religious scholars, it would be ratified and enacted by the legislature. It would also then be subject to amendment by the same body. Members of Parliament, al-Ghurayfī said, do not possess the necessary qualifications to give an opinion on matters *fiqh* and *sharī'a* that are the province of the *fuqahā'* (jurists) and the *mujtahids* (jurists qualified to exercise independent reasoning):

It would be Parliament who would decide for us the legality of rules in our marriages, divorces, and our personal status matters. And they would decide for us the *ḥalāl* and *ḥarām*, what is permitted and what is forbidden, what to accept and what to reject. They would be the ones to apply one *fiqh* opinion and reject others, and to give weight to one judgment of *ijtihād* and dismiss others. They...do not possess the competence to do so: "Say: Was it God who gave you permission, or do you invent falsehoods About God?" [10 (*Yūnus*):59].<sup>172</sup>

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<sup>172</sup> 'Abdullah al-Ghurayfī, *Ḥadīth al-Jum'a* (May 23, 2003), p. 1.



Even if Parliament passes a law that is consistent with *sharī'a* today, he argues, they will have the ability to amend it in the future so that it may someday contradict *sharī'a*.

While the Shii '*ulamā*' had made clear their position on the family law, the government sought the opinion of the general public prior to its 2005 initiative. In 2004, the SCW commissioned a study to be done on the public's knowledge of and position on the family law debate. Of the 1300 respondents, 73.7% said that a codified family law is needed in Bahrain. However, a full 98% believed that such a law should be drawn from *sharī'a*.<sup>173</sup> In responding to the poll results, as well as to the Shii clerics' arguments, the ruler staffed the 2005 drafting committee exclusively with religious scholars, however, as mentioned above, he did not consult with the '*Ulamā*' Council. The exclusion of the UIC from the drafting process, as well as the fact that the SCW campaign assumed the responsibility to teach the public about family law angered Shii authorities.

In a lengthy interview with al-Mīthāq, a Bahraini weekly, Shaykh 'Īsā Qāsim, the head of the UIC, attacked the campaign. He said that while SCW officials assured the public that the proposed family law would be derived from *sharī'a* and that its statutes (*aḥkām*) would be based on *sharī'a* principles (*mabādi'*), they are using these technical legal terms as if they understand them, but they do not have a grasp of these terms. He explained that:

There is a considerable difference between basing

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<sup>173</sup>“*Istiqlāl li-l-ra'y hawl taqnīn aḥkām al-usra fī Mamlakat al-Baḥrayn*,” *Markaz al-Baḥrayn li-l-dirāsāt wa-l-buḥūth* for The Supreme Council for Women (2005), pp. 46-47.

a law on *mabādi'* and basing it on *aḥkām*. *Aḥkām* are a type of detailed explanation (*tafṣīl*) that is based on the foundation of *mabādi'*. *Mabādi'* are groupings broader than the matter of *aḥkām* found in a particular topic (*bāb*). *Mabādi' al-Sharī'a* are principles that govern every chapter of *fiqh*, and every chapter of *fiqh* is a secondary grouping that is based on the foundation of the *mabādi'* of Islam. This confusion of terms greatly obscures the truth.<sup>174</sup>

Qāsim said that it is not from general principles such as justice, charity, and honor (to which the SCW seem to be referring when they say the law will be based on *mabādi'*) that specific rulings (*aḥkām*) are derived. It is through the process of *ijtihād*, which can only be carried out by those who are authorized and upon whom it is incumbent (*al-mukallaḥīn*), that rulings are deduced.

The UIC also published a lengthy statement on their website penned by a leading member of the council, Shaykh Muḥammad Ṣunqūr on January 26, 2006 that offered religious and legal justifications for the UIC's opposition to the new law. Ṣunqūr writes that Islam has already detailed rules for every legal exigency that could befall a person. It has covered marriage, divorce, spousal support, child custody, child support, paternity, inheritance, and many other issues. He refers to the sixth Shii Imam and putative founder of the Imami school of law, Ja'far al-Ṣādiq, saying that there is no matter that has not been addressed:

Islam encompasses all of life, the great and the small,  
and offers a judgment for every occurrence: {Nothing  
have we omitted from the book} [6 (*al-An'ām*):38], and

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<sup>174</sup> “*al-Shaykh 'Īsā Qāsim: Ma'ik, ma'ik yā Islām*,” *Al-Mithāq*, (October 22, 2005).

} We have sent down to you the book explaining all things { [16 (*al-Nahl*):89]. Thus Islam has rules related to the administration of justice, for instance it has rules related to markets and human relations, rules for war and peace, personal relationships, society, and nation. It has rules for *al-ḥudūd* (capital crimes), *al-qīṣāṣ* (retaliation), *al-diyya* (indemnity for bodily injury), and “even the penalty for a scratch,” as Imam al-Ṣādiq taught.<sup>175</sup>

Considering all of this, Ṣunqūr argues, it would seem superfluous to import and apply a completely different system of law, especially a system that was neither developed by Muslims nor based in religious belief of any kind. Furthermore, this proposed Western code does not even remain faithful to its own society’s beliefs, but rather it responds to politics and short-term interests. This kind of law does not have any relation to Islam, which is not just a system of law, or a set of beliefs, but an entire way of life. Ṣunqūr admits that Bahrain has already adopted some civil laws, such as penal and commercial law, for instance, but that this is no justification for accepting yet another civil law. This is especially true when, “this law would consider Islam [the *sharī‘a*] only one source of legislation among many, because □ God is the only reality, and because whatever else they invoke besides Him is falsehood □ [31 (*Luqmān*):30]. Thus, we do not accept that there are tributaries of legislation in Bahrain that are a mixture of truth and falsehood under any guise.”<sup>176</sup> Ṣunqūr stresses that this is not just a matter of choosing one law over another. God revealed His law, and it is not for humans to pick and choose which parts suit him and which do not, as is expressed in the

<sup>175</sup> Shaykh Muḥammad Ṣunqūr, “*Ru‘iyatnā hawl qānūn aḥkām al-usra*,” [www.olamaa.net](http://www.olamaa.net) (26 January 2006).

<sup>176</sup> Ibid.

following Qur'an verse: □ Then is it only a part of the book that you believe in, and you reject the rest? But what is the reward for those among you who behave like this? And on the Day of Judgment those of you who act thus will be rewarded with disgrace in this life and with grievous punishment on the Day of Resurrection □ [2 (*al-Baqara*):85]. “Thus as Muslims,” Şunqūr writes, “we cannot hold any view except that which enjoins adherence to what is set forth in the *sharī'a*.”

Not only is it essential to limit the law to what is found in the *sharī'a*, but it is also crucial that a qualified individual interpret the religious texts. Şunqūr argues that the texts' meanings are not clear, and that only a person with extraordinary mental, spiritual, and moral capabilities can comprehend them. That individual is the *mujtahid*. A *mujtahid* must be knowledgeable about the Arabic literary sciences such as *naḥw* (grammar); '*ilm al-ṣarf*' (morphology); '*ilm al-bayan*' (rhetorical language), '*ilm al-ma'anī*' (semantics), '*ilm al-badī'*' (figures of speech, rhetoric, and the art of style); and logic; in addition to the sciences of the Qur'an, *tafsīr*, and the study of *uṣūl al-fiqh* (legal theory) and the manner of textual authentication. The *mujtahid* must also follow a specific process of deduction. His examination must be limited to *sharī'a* sources:

It is not for him to derive judgments from himself.  
No judgment possesses the character of religious  
legitimacy unless it is based on the Qur'an and Sunna,  
and provided that this is done by means of the methods  
and tools that establish definitive proofs on the condition  
that the methods are connected with the Qur'an and Sunna.  
Unless he has attained that level of aptitude, and unless he  
is, in addition to all of that, at the highest level of piety,  
devotion, and fear of Allah, only then is there a guarantee  
that he will not issue *fatwās* by following whims or under

some other pressure or by using some other evidence. Unless he possesses all of that, he is not competent to deduce *sharī'a* judgments from its sources.<sup>177</sup>

In this way, Şunqūr illustrates the contrast between the qualified legal scholar carefully deducing judgments, and the elected (or appointed) politician who assures the public in a cavalier manner that the codified law will be consistent with *sharī'a*. To the government's pledge that the legislative council will only ratify the law if the '*ulamā*' approve, Şunqūr responds, "God's law does not require anyone's approval." In the legislative council, God's law would also be subject to revisions, additions, and deletions. Although the council will supposedly be assisted by religious scholars, after the council members have heard what the scholars have to say, they can still choose, using whatever background they want, whether or not to follow the scholars' advice. "And then what happens if the members of the council disagree on what to choose?" Şunqūr asks, "Will they subject the laws of God to a majority vote?" It is not the specialization of politicians to deal with religious law. It is foolishness for anyone other than the physician to attempt to cure the illness. Implying that the council's real intention is to contravene *sharī'a*, Şunqūr writes, "*Ijtihād* is the use of methods of definitive proofs with the intention of understanding the divine text, not opposing it."<sup>178</sup>

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<sup>177</sup> Şunqūr, *Ru'iyatna*.

<sup>178</sup> Ibid.

## AUTHORITY BASED ON SECT

When Bahrain's Shii '*ulamā*' argue that they are the rightful possessors of authority over family law because of their participation in the Islamic legal and religious tradition, implied in this argument is the corollary that if authority derives from knowledge of and expertise with a certain set of texts and methodologies, then not only are laypersons excluded from that authority, but so are those who engage with a different set of texts and methodologies. By this, of course, is meant Sunnis. Bahrain's native population has historically been predominantly Shii. The current ruling family, the Āl Khalīfa, only arrived in Bahrain in 1783. Together with other Sunni tribal allies from central and eastern Arabia, the Āl Khalīfa conquered Bahrain by force. The British, arriving in 1829, took the Āl Khalīfa for the rightful rulers of the islands, and as such concluded their treaties with and gave their political and military support to the heads of the Sunni family. More than two centuries later, the Āl Khalīfa still rule Bahrain, despite the fact that the Shiis remain a majority of the population. The manner in which the Āl Khalīfa have dealt with the Shii population and the issue of sect is and has been the major political concern for Bahrain's Shiis for over a century.

In the January 26, 2006 statement, the '*ulamā*' make clear that not only is the survival of the *sharī'a* court at stake, but so is the very preservation of their sect. As well as taking the side of those who advocate secularism, the government is also threatening to impose Sunni laws on the country's Shiis: "Just as the Sunnis would not accept the Shiis to impose the specific rules of their sect upon them, we will not accept

the government or the Sunnis to impose on Shiis the particular laws of their *madhhab* through this Parliament.”<sup>179</sup> This is the true goal of those who support the government’s law, to eliminate Shii law altogether:

These people made clear their ambition to work towards a secular law, or one that is a mixture of secular and religious teachings. They expressed this goal at the beginning of their movement, and called for a unified law that covers both Shiis and Sunnis. This means the promotion of one sect at the expense of the other. Sunnis and Shiis differ in some provisions concerning marriage, divorce, custody, living expenses and others. Thus, we refuse to stand by and keep silent. Our faith is more valuable to us than our blood.<sup>180</sup>

In an earlier version of the same document, the UIC addressed an argument that supporters of the law had made, that Iran, a Shii-majority country had a codified family law. The UIC responded that there are great differences between Iran and Bahrain. First, the Parliament:

Iran has a completely elected Parliament that represents the people. Here, half of the assembly is appointed by the ruler and passes whatever laws it wishes. As for the other

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<sup>179</sup> “*Al-Bayān al-Khatāmī li-l-masīrat al-Jamāhīriyya*,” *al-Majlis al-Islāmī al-‘Ulamā’ī*, [www.olamaa.com](http://www.olamaa.com) (November 9, 2005).

<sup>180</sup> Ibid. The Shii’s accusations seemed to have been confirmed in September of 2006, when Dr. Ṣalāḥ Al Bandar, British Political Advisor to the Ministry of Cabinet Affairs published a report that detailed the activities of a secret network headed by the Minister of Cabinet Affairs. The goal of the network was to alter the demographic balance in Bahrain to produce a Sunni majority. The 240-page report contained documentary evidence that the network had spent more than one million Bahraini dinars (\$2.5 million) to influence government employees, members of Parliament, Parliamentary candidates, election officials, members of the press, civil societies, lawyers, bank employees, a Jordanian intelligence team, and a Shūrā Council member. Payments had also been made to Sunni religious organizations for the establishment of Shii-to-Sunni conversion programs, and to Shii families for converting to Sunnism.

half, called the *Majlis al-Nuwwāb*, it does not reflect the reality of the will of the people. The electoral districts are sectarian in that they make one thousand people in some neighborhoods equal to thirty-three thousand in others.

Second, the constitutional court: “There is a council [in Iran] called the Council for the Protection of the Constitution that has the power to repeal any law that was passed by Parliament that contradicts *sharī‘a*. Here, there is nothing which guarantees the Islamic nature of the laws, and the evidence testifies to this;” and third, the source of law: “In Iran, the Islamic *sharī‘a* is the only source of legislation. Here, it is only one of the primary sources besides other sources. Because of this, many laws are contrary to *sharī‘a* and they are unjust.”<sup>181</sup> To develop a codified law under such circumstances, namely circumstances in which those who are developing the law both represent the will of the people, and are legally obligated to derive that law exclusively from the *sharī‘a*, means that the resulting law would not likely compromise either Islam in general, or inappropriately blur sectarian distinctions.

### **Substantive Differences**

Beyond the threat of the loss of general autonomy Shii judges currently hold over *sharī‘a* court proceedings is the issue of the specific rules themselves, as well as the methodology used to develop them. Ṣunqūr explains that there are significant

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<sup>181</sup> Ibid.



differences between the types of sources that are used to derive law in the Sunni schools and the Ja‘farī school. Although both sects agree that the primary sources of law are the Qur’an and the Sunna, they differ with regard to other sources that can be used. In cases in which no text exists that addresses the case at hand, the Sunni schools accept reliance on *qiyās* (analogical reasoning), as well as *al-istiḥsān* (juristic preference) and *al-maṣlaḥa* (ruling in the interest of the public good), and other methods that use subjective reasoning. Ṣunqūr says that the Shiis have rejected these methods categorically. More than five hundred accounts exist from Imām al-Ṣādiq and others that refute these bases. The extent of the divergence in actual rulings that is produced by these differences in methodology cannot be underestimated.

Even though the Sunni and the Shii schools agree that the Qur’an and Sunna are the two primary sources of law, their theories on what counts as authoritative reports making up the Sunna conflict. When determining the soundness or weakness of a particular report, one of the main criteria is the legitimacy of the transmitter. In this, the Sunnis do not accept those considered authoritative by Shiis, and vice versa. These reports are often the bases for deriving *sharī‘a* rulings and *fatāwā*, therefore generating greatly diverging results between the sects: “Shiis use the sayings of the twelve imams as proofs because these sayings are immune to error (*ma‘ṣūma*), and they are the most important means of learning the noble path and its meaning... This basis is not accepted by the *Ahl al-Sunnā*.” After discussing these differences in legal theory, Ṣunqūr gives several examples of the discrepancies in rulings that are produced by these differences.

He compares the views of the Sunnis schools to that of the Ja‘farī, and then discusses what is found in the new family law draft.

### **Guardianship (*Wilāya*)**

Regarding the subject of guardianship (*wilāya*), Şunqūr explains that the Sunni schools of Imām Shāfi‘ī and Imām Mālik (the two schools followed by most Bahraini Sunnis) grant guardianship to the father of the bride, then to the paternal grandfather, then to the full brother, then to the brother’s son, and on to the son (of the bride). This is different from the Ja‘farī school, he says, in which the father and the paternal grandfather are the only acceptable guardians. The Ja‘farī also distinguish between a virgin and a woman who has previously been married (*thayyib*). Guardianship only holds for the virgin. For the woman previously married, she is the guardian of herself and requires no one’s permission, and no one can interfere in her contract. In the draft of the family law, Şunqūr points out that Article 16 stipulates that the consent of a guardian is not necessary. Then he says that in Article 11, the guardian is specified as the father, then the paternal grandfather, then the full brother. Neither article, he says, specifies the difference between a virgin and a *thayyib*. Şunqūr only notes these discrepancies, and does not comment on them. However, as he offers them as examples of irreconcilable differences, we have to assume that they are significant enough to stand as proof that the Sunni and the Ja‘farī schools require completely separate laws to address their adherents’ personal status issues.

### **Child Custody (*Ḥiḍāna*)**

Şunqūr says that for the majority of Sunnis, after a divorce, custody of the young child goes to the mother. They disagree as to what happens when the child reaches the age of majority. As for the Ja‘farī school : “According to the Imāmiyya, the most accepted view is that the mother has the right of custody of the children, male or female, in the interim [during the waiting period], and after that the mother has the right of custody of the girl up to the age of seven, unless she marries again. As for the boy, the father gets custody after the interim.” Şunqūr again does not emphasize or analyze what the exact differences between the schools are that are of concern.<sup>182</sup> Even when he addresses the draft law, he does not express why the law is inappropriate. In discussing the opinions of the Sunni and Ja‘farī schools, he talks about the right of custody before and after the age of majority. In the following in which he looks at the draft law, he only mentions the right of custody before the child reaches the age of majority (in which there is little dispute that it goes to the mother). This section of the draft law only addressed what happens if the mother is not available:

It is stated in Article 119 of the draft of the family law:

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<sup>182</sup> The Sunni schools vary widely on rules regarding child custody. For instance, the Hanbalis do not distinguish between girls and boys. They give custody to the mother until the child turns seven, at which point the child chooses the parent he or she wishes to stay with. The Malikis, on the other hand, rule that the mother has custody of boys until puberty, and girls until marriage. For a discussion of the rules of all Sunni schools, as well as specific applications of these rules in the personal status laws of Muslim-majority countries, see Jamal J. Nasir, *The Islamic Law of Personal Status*, London; Boston: Graham & Trotman, 1990, pp. 158-172.

“In the case of separation custody goes to the mother, then to the maternal grandmother, then to the paternal grandmother, then to the father.” The appearance is that this arrangement is based on [the assumption that] it [custody] does not revert to the second arrangement [to the grandmother] except if the first is not possible [for example, if the mother is dead] or if she does not have legal capacity. Otherwise, according to the continuance of the stipulation, the right of custody is fixed to the first arrangement.<sup>183</sup>

The mention of the grandmothers in the draft law could be what Ṣanqūr finds unsuitable because according to majority Ja‘farī opinion, custody goes to the father if the mother dies, remarries, or is legally incompetent. If the father dies or becomes incompetent, it then goes back to the remarried mother, and then to the paternal grandfather. The grandmothers are only then reached.<sup>184</sup>

### **Divorce (*Ṭalāq*)**

Ṣunqūr points out that while Ja‘farī law stipulates that a divorce cannot occur while the wife is menstruating, for Sunnis, divorce can occur whether or not the wife is menstruating. As for the divorce pronouncements, Ja‘farī law requires that the words “She is divorced” be pronounced three times, and that the husband may not return to the wife in between the pronouncement of these sentences. Saying the words “She is irrevocably divorced” is not sufficient to effect the divorce. Regarding the Sunni schools, Ṣunqūr simply states, “The majority of the Egyptian *fuqahā*’ of the Sunnis hold

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<sup>183</sup> Ṣunqūr, “*Ru‘iyatna*.”

<sup>184</sup> Nasir, *Islamic Law*, p. 162.

the view that the divorce by the three pronouncements effect a definitive divorce.” He does not explain whether this means that for Sunnis, the statement “She is irrevocably divorced” is effective or not, or whether Sunnis hold that the husband can return to the wife in between the three statements or not.<sup>185</sup> Şunqūr does not address the family law draft on this matter.

### **Inheritance (*Turāth*)**

A critical difference between Sunni and Shii law involves inheritance due to the children of the deceased, especially to daughters when there are no sons. Şunqūr explains that in this situation, Sunni law prescribes that the brothers of the deceased inherit along with the daughters. For instance, if there is one daughter, she will receive half, and her uncle will receive half. If there are two daughters, they will each receive one third, and their uncle will receive one third, and so on.<sup>186</sup> This differs greatly from Shii law which does not recognize the right of the ‘*aşaba*, or the closest male blood relative to the deceased, to inherit along with the children of the deceased. In the above example, Şunqūr writes, “the single daughter will receive half as her lawful share, and the second half by return (*bi-al-radd*).” This discrepancy regarding the rights of the ‘*aşaba* originates in the respective schools’ approach to the interpretation of the Qur’an

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<sup>185</sup> Sunni rules allow the husband who has not yet pronounced the third statement to return to his wife and resume the marriage if he so choose. However, once the third statement has been pronounced, the divorce is irrevocable. If the two choose to remarry, they may do so only after the wife marries and divorces another man. For a full discussion, see Tucker, *Women, Family, and Gender*, pp. 86-92.

<sup>186</sup> The existence of a son or sons would then cut the daughter(s)’ share again, as girls receive a half share to that of boys. This is why the Sunni system is particularly hard on daughters.

verses that address inheritance. The rules of succession existing prior to Islam privileged the *‘aṣaba* over the immediate family and direct descendents of the deceased. The Sunni schools held that the Qur’an verses were revealed in order to mitigate this system by allocating definite shares to the spouse and children (often termed the “Qur’anic heirs”), but *not* to fundamentally change it. Shii scholars, on the other hand, did conclude that these verses constituted the establishment of a new system that favored close relatives (and women) over the extended family. Noel Coulson argued that the Shii view “reflects a fundamentally different idea of family ties and responsibilities,”<sup>187</sup> and Joseph Schacht saw in the Shii interpretation “the consequences of their dogmatic-political doctrines.”<sup>188</sup> By this is meant the ideology of succession that initially and essentially set Shiis apart from Sunnis, that the succession of leadership of the Muslim community should devolve based on bloodlines rather than community consensus. The practical effect of this divergence can be as radical as one group of relatives inheriting the whole of the estate, while others get nothing at all.<sup>189</sup> For this reason, Bahraini Sunnis have been known to convert to Shiism toward the end of their lives, particularly those having only daughters.<sup>190</sup>

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<sup>187</sup> Noel Coulson, *Succession in the Muslim Family*, (Cambridge: Cambridge University Press, 1971), 125.

<sup>188</sup> Joseph Schacht, “*Mirāth*,” *Encyclopaedia of Islam*, Second Edition, vol. 7, 110.

<sup>189</sup> Lucy Carroll analyzes such a case in nineteenth century South Asia in which the deceased left a brother, a sister, and two sons of a predeceased daughter. The deceased’s siblings claimed that he was Sunni, therefore they should receive the entire estate. The husband of the predeceased daughter argued that his sons should receive the estate because the deceased was Shii. The court ruled on behalf of the siblings, thus the grandsons got nothing. See “Application of the Islamic Law of Succession: Was the Propositus a Sunni or a Shi’i?” *Islamic Law and Society*, Vol. 2, No. 1 (1995), 25.

<sup>190</sup> Interviews with Hadiyya Faṭḥallāh, Political Specialist, US Embassy, Manama (20 April 2005), and Attorney Ḥasan ‘Alī Rāḍī, Manama, (12 February 2006).

These few examples of disparities between Sunni and Shii law, Şunqūr writes, “are only the tip of the iceberg. The differences between the *madhhabs* on personal status are many and significant. No one among the *Ahl al-Sunn* (Sunnis) accepts obligations that their *madhhab* rejects, just as the Shiis would not accept this.”<sup>191</sup> Therefore, a unified law would necessarily deny one sect’s rights to live according to its principles.

## THE CONSTITUTIONAL GUARANTEE

A UIC statement published on November 9, 2005, the day of the Seef highway demonstration, clarified that codification of the law, per se, is not what the ‘*ulamā*’ oppose. Rather, it is that the process of codification will be carried out by individuals who have not attained the level of piety and legal-religious education required to deal with these sensitive and complex issues. Even if the draft committee is comprised of religious scholars, the law will thereafter be subject to amendment, revision, and/or eradication by Parliament. In addition, the UIC argues that simply enacting a codified law will not solve all the difficulties plaguing the *sharī’a* courts. Egypt and Lebanon have codified law, but they still have many problems, among them high divorce rates.

The UIC offered the government a solution to the problem of codification. They agreed to support the new law as long as, first, it is drawn exclusively from *sharī’a*, and

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<sup>191</sup> Şunqūr, “*Ru’iyatna*.”

second, an article is added to the constitution stipulating that the enactment of the law, as well as any future changes to the law, must first be approved by the Shiis' highest religious authority, the *marja'*. The UIC suggested the following wording for the article: "He who has the right to enact and amend articles of the law is the *marja'*."<sup>192</sup> For members of the UIC, that authority is Āyatollāh 'Alī al-Sīstānī who resides in Iraq. If enacted, the constitutional guarantee would radically change Shii legal authority in Bahrain. As the system exists today, the Āl Khalīfa appoint the judges to the *sharī'a* court who then make rulings according to their own personal examination of *sharī'a* sources. Although the judges are Shii, they are individuals who have a positive relationship with the Sunni rulers. The UIC has made no formal demand regarding the process of the appointment of judges (although they have certainly criticized it). However, if the constitutional guarantee were to be enacted, those judges would be constrained by Bahraini law to apply only those statutes that have been approved by Āyatollāh 'Alī al-Sīstānī, an Iraqi national.

Some observers have stated that the constitutional amendment is an impossibility. MP 'Abd al-Nabī Salmān described the ruler's unwillingness even to discuss the constitution: "This by-law [the UIC's proposed constitutional guarantee] cannot be changed by Parliament, or even the king. This won't happen. It is a sensitive issue. Once we start talking about changing the constitution, the king closes his ears."<sup>193</sup> Salmān and others have suggested that the UIC is using the amendment regarding the family law as a pretext to open up the constitution for further reform. "What they really

<sup>192</sup> "al-Ghurayfī: *Ḥamlāt al-'Alā li-l-mar'a' tadlīl li-l-ra'i al-'umūm*," *al-Mithāq* (October 27, 2005).

<sup>193</sup> Interview with MP 'Abd al-Nabī Salmān, Manama (30 March 2006).



want is to affect constitutional law,” stated Sunni *sharī‘a* scholar Nizām Ya‘qūbī who served on the 2005 draft committee and helped to write the Sunni component of the family law.<sup>194</sup> The UIC has discovered an issue that strongly resonates with the Shii population; one with which they have been able to mobilize that population against the Āl Khalīfa in a manner that not even the repression of the 1990’s did. There can be no doubt that the UIC, as well as most Bahraini Shiis, would like to see the reinstatement of the 1973 Constitution, or at least some readjustment of the current document.

Despite the great amount of support the UIC enjoys, not all Bahraini Shiis are in agreement. Some Shiis such as Shaykh Muḥsin Āl ‘Aṣḥūr support the family law, and do not back the UIC’s demand for the constitutional guarantee. The next section explores possible explanations for this divergence.

## THE USULI-AKHBARI DIVIDE

Within Imami Shiism, two schools<sup>195</sup> of legal thought have historically competed for dominance. One of the key disagreements between them concerns the

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<sup>194</sup> Interview with Shaykh Nizām Ya‘qūbī, Manama (5 April 2006).

<sup>195</sup> Whether or not Akhbarism can be called a school in the sense of the formal *madhhab* has been debated. Robert Gleave notes that scholars have been reluctant to name it as such, and instead have referred to it by terms such as “movement” (Ahmad Kazemi Moussavi, *Religious authority in Shi‘ite Islam: from the office of Mufti to the institution of Marja‘*, Kuala Lumpur: International Institute of Islamic Thought and Civilization, 1996, 92) and “trend” (Devin Stewart, *Islamic Legal Orthodoxy: Twelver Shi‘ite Responses to the Sunni Legal System*, Salt Lake City: The University of Utah Press, 1998, 92). Stewart argues that those Shii jurists who accepted and developed the use of reason modeled Sunni methods with the aim of creating a Shii *madhhab* that could rival those of the Sunnis. The Akhbaris, on the other hand, Stewart sees as having opposed this movement, specifically because the *madhhab* was a Sunni institution based upon a concept of authority they saw as thoroughly incompatible with Shii principles, namely that jurists could provide religious guidance as proxies of the Imam. Robert Gleave, *Inevitable doubt: Two theories of Shi‘i jurisprudence* (Leiden; Boston: Brill, 2000), 5-6.

proper sources of law. Both agree that the primary sources are the Qur'an, and the hadith, or *akhbār*. For Imami Shiis, the hadith includes not only the reports of the Prophet Muhammad, but also those of the twelve Imams. For scholars referred to as Akbaris, these are the only valid sources of law. Akhbaris do not accept *ijma'*, or the consensus of legal scholars. They also reject the use of reason in deducing rules, such as *qiyās* (analogical reasoning), *istiṣlāḥ* (reasoning dictated by consideration of public interest), and *istiḥsān* (juristic preference based on practical considerations). One or more methods of legal deduction in which the jurist uses reason have been referred to by Muslim scholars, as well as non-Muslim scholars of Islam, broadly as *ijtihād*, although the term has become imprecise and requires some qualification. Akhbaris generally reject all methods of *ijtihād*, and therefore also reject the role of the jurist who performs these actions, the *mujtahid*. The other group of scholars, referred to as Usulis (taken from the phrase "*uṣūl al-fiqh*," or legal theory), do accept some methods of legal reasoning as well as the consensus of legal scholars as legitimate sources of law. Usulis not only accept the role of the *mujtahid*, but have institutionalized the process of referring to the *mujtahid* for all legal questions. This process is called *taqlīd*, and dictates that every lay person must seek the opinion of a qualified *mujtahid* in all legal matters. A *mujtahid* who has attained a superior status then acquires the title of *marja'*. Members of the laity can decide which *marja'* to follow, or can follow more than one.<sup>196</sup>

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<sup>196</sup> For a thorough treatment of the development of the *Marja' iyya*, see *The Most Learned of the Shi'a: The Institution of the Marja' Taqlīd*, Linda S. Walbridge, ed., (New York: Oxford University Press, 2001).

Currently, most Bahraini Shiis are Usuli. The members of the UIC are Usuli and follow the preeminent *marja'* of Najaf, Iraq at this time, Āyatollāh 'Alī al-Sīstānī. But not all Bahraini Shiis are Usuli. In fact, from the eighteenth century until very recently (the 1980's), Bahrainis have been predominantly Akhbari.<sup>197</sup> The country has produced some of the most well-known Akhbari scholars such as Yūsuf al-Baḥrānī (d. 1186/1772), and has been considered an Akhbari stronghold by scholars of Islamic law.<sup>198</sup> Bahraini sources interviewed for this project attributed the upsurge in Usuli thought during the 1980's to the 1979 Iranian revolution which inspired many Bahraini Shiis.

Scholars of Islamic legal reform in the Middle East and South Asia have noted that there is a relationship between the school of legal thought, or *madhhab*, and the degree to which Western codified legal systems have been resisted by members of the '*ulamā'*'.<sup>199</sup> Where legal scholars are given wide latitude in the ability to perform *ijtihād*, codified systems are strongly opposed. On the contrary, schools that require conformity to the existing legal tradition tend to concede rather easily to the imposition of a

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<sup>197</sup> In practice, Akhbaris did and do practice *ijtihād*. The terminology can be somewhat confusing and/or misleading. Bahraini Akhbaris themselves and others refer to Akhbari scholars as *mujtahids*, and even *marj'as*. Similarly, Bahraini Usulis have differentiated themselves from the Sunnis by arguing that they, Shiis, use the Qur'an and the Sunna as their two basic sources, while the Sunnis rely on various subjective methods such as *qiyās*, *al-istiḥsān*, and *al-istiṣlāḥ*. This argument obfuscates the Usulis' reliance on the use of reason, although there are several techniques that use reason that tend to be subsumed under the heading of *ijtihād*. It is true that *qiyās*, analogical reasoning, is strenuously objected to in the Imams' reports. For more on these distinctions, see Robert Gleave, *Inevitable Doubt: Two Theories of Shi'i Jurisprudence* (Leiden: Brill, 2000). The crossing over of terminology between Usulis and Akhbaris in Bahrain underscores the presumption that the distinction between them has become less significant in recent years. During the course of the research period, neither the term "Usuli" nor the term "Akhbari" were used by any of the informants unless they were specifically prompted to do so.

<sup>198</sup> See Moojan Momen, *An introduction to Shi'i Islam: the history and doctrines of Twelver Shi'ism* (New Haven: Yale University Press, 1985), 118, 127, 225.

<sup>199</sup> See Sherman A. Jackson, *Islamic Law and State: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: New York: E.J. Brill, 1996); Vogel, *Islamic Law and legal system: studies of Saudi Arabia* (Leiden; Boston: Brill, 2000); and Zaman, *Ulama*.

codified law. For instance, in Saudi Arabia where Hanbali scholars are at liberty to interpret the texts freely to derive rulings, codification has been vehemently opposed. In contrast, the Hanafi '*ulamā*' of Pakistan accepted codification without incident. The reason for this, it has been argued, is that the act of codifying law is not terribly dissimilar from the method of deriving rules used by schools such as the Hanafi. Both processes select rules from already extant sources. Muhammad Qasim Zaman, whose work centers on Pakistan remarks: "Modern initiatives toward codification, then, can be thought of as continuing the already well-established practice of adhering to the texts and doctrines recognized as authoritative in one's school of law."<sup>200</sup>

According to this theory, the Akhbaris' emphasis on the texts of the *akhbār* and their rejection of *ijtihād* would make them more amenable to codification. As long as the rules being chosen for codification are derived from established texts that have been inspired by the Imams, the authority of those texts, and therefore the Imams, is not threatened. For the Usulis', however, authority rests with the *mujtahid* and especially, the *marja'* who is believed to represent the Twelfth Imam. The practice of *taqlīd* dictates reference to these experts in any religious or legal matter (it is crucial that they be *living* experts). Codification would therefore involve the transfer of the authority enjoyed by the experts to the text. Usulis, then, have a strong doctrinal basis for rejecting efforts at codification.

These assumptions are borne out in the respective Usuli and Akhbari positions on the family law. Discussed at length above were the Usulis' objections to the law and

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<sup>200</sup> Zaman, *Ulama*, 97.

their efforts to protect the authority of the *marja'*. When asked about the UIC's demand for the constitutional mandate for Sīstānī's approval, Shaykh Muḥsin Āl 'Aṣḥūr of a prominent Akhbari family replied, "Why should we look to Najaf (Iraq)? We have two hundred years of experts here in Bahrain that are of a higher standard than those from Najaf."<sup>201</sup> Shaykh Muḥsin described the quality of the scholarship of those in his family, including Shaykh Yūsuf al-Baḥrānī, mentioned above, and Shaykh Ḥusayn Āl 'Aṣḥūr (d. 1216/1801). Shaykh Muḥsin said that over half the Shiis in Bahrain use the works of Yūsuf and Ḥusayn. Two theses in particular are used regularly: *Ḥadā'iq al-nāḍira fī aḥkām al-itrāh al-tāhira* written by al-Baḥrānī, and *Sadād al-'ibād wa rashād al-'ubbād* written by Ḥusayn Āl 'Aṣḥūr. "Even the Usulis use Shaykh Yūsuf and Shaykh Ḥusayn," Shaykh Muḥsin said. His comments are corroborated by Attorney Ḥasan 'Alī Raḍī in his study of the judiciary in Bahrain. He cites the same two works of the Āl 'Aṣḥūr along with a third, *Mu'tamad al-sā'il* by 'Abd Allāh al-Sitrī, and writes, "The Shia in Bahrain still rely on the remaining books of their jurists, particularly the books of the above mentioned three jurists."<sup>202</sup> Shaykh Muḥsin himself has compiled a collection of rulings on family law using the authoritative Akhbari sources, and especially those of his family members. He offered this collection to the government to use in the Shii *sharī'a* court, but they have not expressed an interest in doing so. Still, Shaykh Muḥsin supports the family law initiative.

<sup>201</sup> Interview with Shaykh Muḥsin Āl 'Aṣḥūr, Manama (9 March 2006).

<sup>202</sup> Hassan Ali Radhi, *Judiciary and Arbitration in Bahrain* (London: Kluwer Law International, 2003), 7, also f.n. 21, 8.

Apart from these ideological bases for Akhbari support for codification, there are political motives as well. The Āl ‘Aṣḡūr family has had a close and agreeable relationship with the Sunni ruling family. The benefits of this relationship have been mutual. Members of the Āl ‘Aṣḡūr have received prestigious and lucrative appointments, while the Āl Khalīfa have been guaranteed a government-friendly Shii *sharī‘a* court, and token Shii support for its initiatives. This situation has begun to unravel of late due to the work of the women activists described below in the following chapter.

## CONCLUSION

Bahrainis have been debating the enactment of a codified family law since the early 1980’s. Currently, there are two divisions in the nation’s courts: a civil court that takes criminal, commercial, and civil cases, and a *sharī‘a* court that handles cases related to the family and personal status. The *sharī‘a* court is further divided into Sunni and Shii sections, treating the kingdom’s two major sects separately, as each sect follows its own school of legal thought. Activists have charged that both *sharī‘a* sections are in need of reform; that the courts are inefficient, inconsistent in their rulings, that judges are not properly trained and that some are corrupt. Bahrain’s

previous king, ‘Īsā b. Salmān Āl Khalīfa, disregarded these charges, and was reluctant to change the system. It has only been since his son, Ḥamad, was crowned in 1999, that the rulers have taken serious steps toward the implementation of such a law. Although the government is an authoritarian regime, Ḥamad has twice suspended his plans to promulgate a new law, once in 2003 and again in 2006. From all accounts, it was because of the opposition generated by the Shii ‘*ulamā*’ that the government halted its plans.

As members of the UIC, Shii clerics argued that the state does not have the authority to oversee family law. If the state were to issue a codified law, this law would be drafted and promulgated by men who are not trained in Islamic jurisprudence; legislators and government officials. Even if the government allowed religious scholars to draft the law, it would still have to be promulgated, and could be amended in the future, by these secular authorities. These are “God’s laws,” they argue, and not to be tampered with by those who are not “men of religion.” A second, not insignificant issue is that Bahrain’s ruling family is Sunni, and has demonstrated an interest in furthering Sunni (minority) domination over the kingdom’s majority Shii population. Sunni and Shii family laws have many elements in common. However, Shii ‘*ulamā*’ are concerned that the government would not preserve those elements that are specific to Shii law, since government representatives have expressed approval for a unified law which would be used for all Bahrainis irrespective of sect.

In public statements, the ‘*ulamā*’ clarify that it is not codification itself that they oppose, but only the involvement of secular authorities in the codification of the

*sharī'a*. They offer that they would accept a codified law under three specific conditions: first, that the law would be drafted exclusively by religious scholars; second, that it would be submitted to the Shiis' highest religious authority, the *marja'*, before promulgation, namely Āyatollāh 'Alī al-Sīstānī, who resides in Najaf, Iraq; and third, that the Bahraini constitution be amended to include a guarantee that the law could not be altered in any way without prior approval of the *marja'*. Thus, at the same time they are claiming the superiority of the religious authority of the *marja'* over the secular authority of the state, the '*ulamā*' are looking to that same secular authority to safeguard the authority of the *marja'*. By issuing these demands, the '*ulamā*' claim the predominance of religious authority over that of the state and at the same time seek to safeguard that authority by enshrining it in the very (secular) authority it claims to supersede. In addition, they ask that the state's authority, one that is limited to its geographic and political borders, be used to sanction a religious authority that extends beyond those borders, in this case to Iraq. Through the debate over the new law, the Shii '*ulamā*' are redefining the meaning and scope of religious authority by proposing an extra-territorial jurisdiction that is challenging the sovereignty of the Bahraini state.



#### **CHAPTER 4: Women Activists Claiming Women's Rights**

Bahrain's Shii '*ulamā*' have claimed that they have authority over the *sharī'a* court and, specifically, over the family law. They base this claim on their participation in an Islamic tradition of a particular course of study and the cultivation of a prescribed type of piety. They also argue that the authority of their highest Shii religious official, the *marja'*, supersedes that of the state in matters of Islamic law. Therefore, the Shii '*ulamā*' oppose the state-sponsored law. They prefer instead either the maintenance of the current system in which *sharī'a* judges have exclusive authority to issue rulings based on individual consideration of Islamic jurisprudence, or the establishment of a codified law that is drafted, maintained, and amended solely by Shii religious authorities.

Standing opposed to the Shii '*ulamā*' are Muslim women activists. The activists contend that the *sharī'a* courts are not giving Bahraini women their legitimate rights under the *sharī'a* in matters of marriage (*nikah*), divorce (*ṭalāq*), child custody (*ḥaḍāna*) and maintenance (*nafaqa*). They believe that the government's codified law, while admittedly not perfect, would give women the best chance of receiving some, if not all of these rights. Although the administration of Islamic law has been almost exclusively conducted by men, contemporary Bahraini women activists claim authority to play a part in determining the future of the *sharī'a* court. The grounds upon which they do so differ from those of the '*ulama*'. As Muslims, they claim rights that are granted to them in the sacred Islamic texts, the Qur'an and hadith. By engaging with the texts

themselves, the activists show that the *sharī'a* courts have been denying women their legitimate Islamic rights. As citizens, they claim rights found in the Bahraini constitution, which declares all citizens equal in regard to legal rights and protections. As members of a global Muslim community, they draw upon contemporary global, as well as local or regional (Arab) Islamic ideals of justice. As humans, the activists assert that the denial of their rights in the aforementioned areas constitutes a human rights violation, citing international human rights documents such as the United Nations Universal Declaration of Human Rights and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

The strategies by which Bahraini Women activists pursue their goal of attaining women's rights are similar to those of the '*ulamā*': they engage in public debate, give press interviews, hold discussion sessions in the salons (*majālis*) of prominent members of society, organize and submit petitions to the government, hold conferences and seminars, lobby the government, hold public demonstrations, and engage in other forms of political activism. Through analyzing the strategies of two women's NGOs, *Lajnat al-Aḥwāl al-Shakhṣīyya*, The Personal Law Committee (hereafter PLC), and *Lajnat al-'Arīḍa al-Nisā'iyya*, The Women's Petition Committee (hereafter WPC), this chapter examines the ways in which Bahraini women are challenging the authority of the male religious elite as well as that of the state. In answering the central question of the dissertation, namely, how is religious authority determined in contemporary Bahraini society, the chapter assumes a Foucauldian view of power in which power is relational rather than exerted exclusively from above. Drawing on the work of Leila Abu-Lughod,

this chapter considers the activity of the two NGOs as a “diagnostic of power;” as activity that reveals shifts in relations of power.<sup>203</sup> The Bahraini NGOs’ activity reveals, first, increased involvement of lay people in a discourse, that of Islamic law, once restricted to religious specialists. This was made possible in part by the opening not only of a public sphere in which ordinary individuals participate in debate about public issues,<sup>204</sup> but also of a “religious public sphere” in which those individuals participate in religious discourse.<sup>205</sup>

Second, the NGOs’ activities demonstrate Muslim women’s agency in a male-dominated arena. While contemporary Bahraini women are by no means the first Muslim women to seek their legitimate rights in the *sharī’a* court, the activists examined here are the first in the modern history of Bahrain to engage in the process of legal reform in an organized manner. Their activities have yielded demonstrable effects on policy-making with regard to the judiciary and legal procedure. Lastly, as a result of specific demands made by the NGOs, the state has begun to provide wives with certain rights that Islamic jurisprudence dictates are the responsibility of the husband, such as proper *nafaqa* and *sakan*. In this, the activists have caused the state to play a more significant role in the “Islamic” family.

In the course of striving toward their goal of a codified family law, Bahraini women activists pursue strategies of political activism: calling for their rights as

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<sup>203</sup> Lila Abu-Lughod, “The Romance of resistance: Tracing transformations of power through Bedouin women,” *American Ethnologist*, 17 (1), pp. 41-55.

<sup>204</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Berger, Cambridge, Massachusetts: The MIT Press, 1991.

<sup>205</sup> Fariba Adelkhah, *Being Modern in Iran*, trans., Jonathan Derrick, London: Hurst & Company, 1999, pp. 105-138.

citizens, petitioning and lobbying the government, etc. In analyzing the relationship between Islam and politics, Dale Eickelman points out that political struggles are not just struggles over power. They are also struggles over the meaning of symbols.<sup>206</sup> The *sharī'a* court has become an iconic symbol of Islamic authenticity, therefore those who determine the role that court plays also help to determine the meaning of Islam in society. Also, as Saba Mahmood has demonstrated, it is not just women's overt resistance to existing power structures that results in the shifting of power relations. Women's performance of piety in activities that serve to re-inscribe religious norms can be just as transformative as performing those activities which are deliberately political, and at times even more so.<sup>207</sup> As much as the '*ulamā*' may accuse them of being so, most Bahraini women activists are not secularists seeking to imitate the West by throwing out religion. They are committed Muslims who believe that the solution to the problems in the *sharī'a* courts exists not in eliminating religion, but rather in *enforcing* it.

### Claiming rights as Muslims

*"Islam gave us and preserved for us all of our rights. All of our rights are found in the Holy Qur'an"*<sup>208</sup>

<sup>206</sup> Dale F. Eickelman, "Islam and the Languages of Modernity," *Daedalus*, Vol. 129, No. 1, Multiple Modernities (Winter, 2000), pp. 122-123.

<sup>207</sup> Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject*, Princeton: Princeton University Press, 2005, pp. 34-35.

<sup>208</sup> Ghāda Jamshīr, Interview on "*al-Idā'āt*," *Al-Arabiyya*, December 21, 2005.

In a speech delivered to the members of the Executive Women's Society in April of 1986, lawyer and member of the PLC, Lūlwa al-‘Awaḍī explained that the growing crisis in the country's *sharī'a* courts was caused predominantly by one thing: the religious courts' failure to follow the rules of religion. The rules of *sharī'a* allow a woman to divorce her husband on several grounds including his failure to support her, and his mistreatment of her.<sup>209</sup> Despite these rules, which al-‘Awaḍī claimed are accepted as majority opinions in all schools of Islamic law, Bahraini judges force women to pay their husbands in order to acquire the divorce, as if they are at fault (i.e., to avail themselves of a *khul'*<sup>210</sup> divorce): “Regarding our Sharia courts, we have never seen any judgment which has adopted any of these reasons as a cause for divorce.”<sup>211</sup> Regarding the wife's maintenance after divorce, al-‘Awaḍī said that the courts generally award women too small an amount, a practice that she said violates the principles of Islam.

Al-‘Awaḍī and the other committee members studied hundreds of *sharī'a* court decisions.<sup>212</sup> The committee analyzed decisions in cases relating to twelve specific issues:

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<sup>209</sup> The schools vary on the specific grounds upon which wives can be awarded a divorce. For instance, the four major Sunni schools as well as the Ja'fari school all consider desertion grounds for a woman to divorce her husband. However, Malikis first require that the husband be missing for a period of four years; the Hanbali and Ja'fari schools require four years, four months, and ten days; while the Hanafi school considered the wife married to her husband until she received confirmation of his death, or until enough time has passed that he can safely be presumed dead, a period that ranges from 99 years, 120 years, or until all male members of his peer group are deceased. For a summary of the major schools' positions on this issue, see Judith E. Tucker, *Women, Family, and Gender in Islamic Law*, Cambridge: Cambridge University Press, 2008, pp. 92-95.

<sup>210</sup> Details of the *khul'* divorce will be discussed below.

<sup>211</sup> Belinda Seward, “Change divorce laws – women's campaigner,” *Gulf Daily News*, April 23, 1986.

<sup>212</sup> PLC, “*Dirāsāt ḥawl qānūn al-aḥwāl al-shakhṣiyyat li-l-usra*, (Study on the laws of Personal Status for the Family)” July, 1986.

- 1) *al-wilāya fi ‘aqd al-zawāj* (guardianship in the contracting of marriages)
- 2) *ta‘addud al-zawjāt* (polygamy)
- 3) *nafaqat al-zawja* (wife’s maintenance)
- 4) *al-ṭā‘a* (wife’s obedience of the husband)
- 5) *sinn al-zawāj* (minimum age of marriage)
- 6) *ṭalāq al-mukrah wa al-hāzil wa al-sakrān* (divorce [initiated by the husband] under compulsion, in jest, and while drunk)
- 7) *al-ṭalāq al-thulāthī bi-lafẓ wāḥid* (triple divorce in one pronouncement)
- 8) *al-ṭalāq bi-l-ḥukm al-qadā’ī* (judicial divorce)
- 9) *mut‘at al-zawja al-muṭlaqa* (temporary marriage of the divorced woman)
- 10) *khul‘* (divorce at the insistence of the wife in which she pays compensation)
- 11) *ḥiḍānat al-awlād* (child custody)
- 12) *nafaqat al-awlād* (child maintenance)<sup>213</sup>

The rulings were examined according to two basic criteria: whether they agreed with Qur’anic injunctions and/or majority *fiqh* opinions, and whether they were similar to rulings of the courts of other Muslim countries. The committee summarized their results and submitted their findings to the Ministry of Justice and Islamic Affairs along with a set of specific recommendations for reform. They argued that despite the fact that there are many valid interpretations (*al-ijtihādāt*) to choose from, judges in Bahrain’s courts generally choose the ruling that is hardest on women.<sup>214</sup> One example is the unusually frequent use of the *khul‘* divorce by Bahraini judges. The report references Qur’an 2:229 which reads: “It is not lawful for you to take back any of your gifts [from your wives] except when both parties fear that they would be unable to keep the limits prescribed by God. There is no blame on either of them if she give [him] something for

<sup>213</sup> PLC, “*Dirāsāt*,” pp. 1-2.

<sup>214</sup> Kokila Jacob, “Family Law Plea Rejected,” *Gulf Daily News*, November 30, 1987.

her freedom.”<sup>215</sup> The report then explains that a majority of jurists have found it permissible to grant women a divorce in cases in which she simply does not love her husband, and prefers to pay him in exchange for her freedom, either by returning the marriage gift (*mahr*) or by offering him a specified sum of money. In support of the widespread contemporary agreement on the matter, the report cites laws of other countries that allowed the *khul’* divorce: Iraqi Article 46, Article 102 of the Jordanian law, Articles 95 to 103 of the Syrian law, Laws 61 to 65 of Morocco. The committee then explains that in the case of Bahrain, the *khul’* divorce appeared to be used in most cases in which the wife initiated the divorce, even when her grounds included being beaten by her husband or his mistreatment of her, and criticizes this practice: “This is not legal. It contradicts the most widely accepted rules of *sharī’a*.”<sup>216</sup> The committee reported that out of 360 total divorce cases examined from the year 1982, 139 of them were *khul’*, an unusually high number.<sup>217</sup>

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<sup>215</sup> PLC, “*Dirāsāt*,” p. 13.

<sup>216</sup> Ibid. Studies of the use of *khul’* in practice have found significant differences between the *sharī’a* version prescribed by jurists and that which is implemented by judges. Aharon Layish found that *khul’* cases in Libya involved the transfer of the wife’s *mahr* directly to her new husband upon her re-marriage. Layish argued that this reflected customary practices (which considered the woman property of the concerned males, rather than a legally competent person herself, as in *sharī’a*), and reasoned that the *qāḍīs* approved what was clearly a contradiction as legitimate because it was usually proven that both parties entered into it willingly. In studying the court records of Egypt and Jordan, Amira El-Azhary Sonbol found a discrepancy between the way in which *khul’* was applied in the pre-reform Ottoman period, and the post-independence nation-states. The key issue she encountered was that Ottoman judges tended to grant wives the *khul’* regardless of whether they had legitimate grounds, and regardless of whether the husbands agreed or not, while modern courts require the husband’s consent. See Layish, “Customary ‘*Khul’*” as Reflected in the “*Sijill*” of the Libyan “*Sharī’a*” Courts,” *Bulletin of the School of Oriental and African Studies*, University of London, Vol. 51, No. 3 (1988), pp. 428-439 and Sonbol, “*Tā’a* and Modern Legal Reform: a rereading,” *Islam and Christian-Muslim Relations*, Vol. 9, No. 3, 1998, pp. 285-294.

<sup>217</sup> Ibid. It is interesting to note that while Bahraini women activists revealed the negative impact of the overuse of the *khul’* divorce in their country, activists in Egypt lobbied for the enactment of a law allowing women to divorce by *khul’*. Until the spring of 2000 when the *khul’* law was passed, Egypt’s laws did not provide women any legal avenue for divorcing their husbands without specific grounds such

The PLC therefore advocated a unified law that would standardize which interpretations would be used and that could be applied in both the Sunni and the Shii *sharī'a* court. Undersecretary of the ministry Shaykh 'Abd al-Raḥman ibn Rashīd Āl Khalīfa rejected the committee's recommendations, and denied the claim that women are dealt with in an unjust manner: "Judges presently apply Sharia rules which make no distinction between men and women and do not discriminate in favor of the former."<sup>218</sup> Shaykh 'Abd al-Raḥman instead accused the activists of misunderstanding the *sharī'a*, or of trying to introduce legislation that contradicts Islam. He maintained that the judges are strictly bound by the Qur'an, the Sunna, and the interpretations of the Imams,<sup>219</sup> and that the fact of differing interpretations is the logical result of such a process: "The words of the Qur'an and the teachings of the Sunna are clear and without contradiction, and any differences that may exist between the interpretations of the Imams are natural and such as exist in all authoritative and vital legal traditions."<sup>220</sup>

Despite the fact that the PLC continued to base their recommendations on the Islamic texts, their support for a single law that would apply to both sects aroused the opposition of the Shii '*ulamā*'. In 2003, after Ḥamad announced the formation of a family law drafting committee, the fear that this law would be the destruction of the *madhhabs* became a familiar refrain. Members of the Shii '*ulamā*' accused the government and the women activists alike not only of importing secular codes from the

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as abuse or abandonment. See Leila Al-Atraqchi, "The Women's Movement and the Mobilization for Legal Change in Egypt: A Century of Personal Status Law Reform," dissertation, Concordia University, March 2003.

<sup>218</sup> Jacob, "Plea rejected."

<sup>219</sup> It is my belief that here, Shaykh 'Abd al-Raḥmān is referring to both the group of twelve Shii Imams as well as the four putative founders of the Sunni *madhhabs* (Imam Mālik, Imam Shāfi'ī, etc.).

<sup>220</sup> Jacob, "Plea rejected."



West, but also of seeking to eradicate differences between the *madhhabs*. As was discussed in Chapter 1, the king's 2003 decree came shortly after the wave of sectarian violence of the 1990's. Sectarian tensions were thus especially pronounced at this time. In addition, the government agency charged with Bahraini women's affairs, the Supreme Council for Women, announced their support for a unified law.

Although the government eventually conceded to the '*ulamā*' on the point of keeping Sunni and Shii law separate, the PLC maintains that a unified law for both sects would not only ease the suffering of Bahraini families better than separate laws could do, but that a unified law would also reduce sectarian tension, and be fully Islamic at the same time. When asked what the PLC's position is on how interpretations should be chosen for such a unified law, a PLC representative issued the following statement:

It is necessary in my opinion to choose for the personal status law the most lenient [rulings] that the *madhhabs* arrived at, because the foundation of the *sharī'a* is the easing [of burdens], not the amplification of them. The [rulings] arrived at by the master *mujtahids* of the *madhhabs* were derived in consideration of the time and place in which they lived. If they had lived in our time, they would have arrived at [rulings] that befit our time and circumstances. For there is no text but the Qur'an, and *ijtihād* does not lend power *to it* [my italics].<sup>221</sup>

The members of the PLC speak with authority and confidence about their understanding of the way in which Islamic texts are to be used. Their perspective is modernist in that they consider past rulings and jurisprudence inappropriate for specifically modern social and historical circumstances, viewing them as inapplicable to their own context. They

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<sup>221</sup> Personal Law Committee statement, correspondence from member Nādia al-Maskaī, March 18, 2006.

argue that applying a centuries-old ruling to a modern case which involves completely changed social conditions is not only inappropriate and a cause of unnecessary suffering, but also contrary to the intention of the Qur'an. They urge an unyielding focus on the Qur'an, its purpose, and its principles, and continuous reappraisals of such in light of ever-changing social, economic and political conditions. As the word of God, the Qur'an is the only enduring authority needed to pursue a way of life that accords with God's will. In the last line of the above statement, the PLC is implying that by placing such a high value on past *fiqh* rulings, which are *human* interpretations (as well as *male* human interpretations), the '*ulamā*' are revering human scholars above God.

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Family law activist and founder of the Women's Petition Committee Ghāda Jamshīr also shares a modernist approach to the question of the sources of Islamic law. In December of 2005, Jamshīr appeared on the talk show "*al-Idā'āt*," which airs on the Dubai-based network al-Arabiyya, to discuss the work of her organization toward the goal of a codified family law.<sup>222</sup> Jamshīr had recently received a great amount of media attention, both in Bahrain as well as regionally, due to three cases lodged against her in the Bahraini criminal court. In May of 2005 judges in the *sharī'a* court accused Jamshīr of defaming them in remarks she made in person, in materials distributed to the public,

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<sup>222</sup> Al-Arabiyya, "*al-Idā'āt*," December 21, 2005.

and in one case, during a private telephone conversation.<sup>223</sup> While the case was eventually dismissed and all charges against her were dropped, the publicity her case received served to re-ignite public debate over the state of the *sharī'a* courts and the possibility of the codification of family law.

During the course of the interview, Jamshīr made several claims concerning the current practice of Islamic law. She argued that those who represent Islam, or the “leaders of Islam” (*al-qā'imīn al-Islām*) pretend to uphold Islam, but their actions are contrary to Islam in one of two ways.<sup>224</sup> Either they engage in practices that are dishonest, such as when judges accept bribes, or they follow jurisprudence that no longer applies to contemporary life and that, on the contrary, creates hardships, especially for women. The first part of the argument is rather straightforward: a judge who accepts bribes would be considered unjust by any standard. The second part of the argument, disputes the judicial philosophy used by the judges. Like the PLC, Jamshīr's approach is modernist in that she denies the applicability of past rulings to the contemporary era, and advocates a re-reading of the primary Islamic texts in light of changed social and economic circumstances.

The host of the show, Turkī al-Dakhīl, focused on asking Jamshīr to respond to the assumption that those who defend women's rights are opposed to Islam. Jamshīr

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<sup>223</sup> The Bahrain Center for Human Rights (BCHR), “Urgent Appeal – Bahrain: Woman rights activist to face trial and imprisonment using restrictive laws and biased judiciary,” May 25, 2005.

<sup>224</sup> Al-Arabiyya, “*al-Idā'āt*.” Jamshīr did not elaborate on who exactly she was referring to as “*al-qā'imīn*” except to say that these individuals claim to represent Islam, but they are just pretending, but it is likely she was referring to some members of the Shii ‘*ulamā'*. Later in the interview Jamshīr discusses the way in which Shii ‘*ulamā'* such as Shaykh ‘*Isā Qāsim* have insisted on a constitutional guarantee for the family law to be handled exclusively by religious scholars, a move that some supporters of the law see as merely an attempt to open the constitution for political reform.

stated that this assumption is exactly what she aims to correct. She takes to task those who make this assumption for their definition of Islam: “people attribute [certain] customs to Islam incorrectly, while Islam is innocent of this.”<sup>225</sup> Specifically, Jamshīr argues that it is male scholars who are invested with the responsibility of maintaining Islamic institutions, such as the *sharī‘a* court judges, that are misrepresenting Islam: “Islam honors women. The Prophet, peace be upon Him, said, ‘No one honors women except the honorable, and no one humiliates them except the dishonorable.’ He also said, ‘Be merciful with fragile women.’ Where is all of this? I see nothing of it.”<sup>226</sup> Asserting that these male scholars grant men their rights, while ignoring those of women, she stated, “The Holy Qur’an was not revealed to the Prophet (PBUH) only for men... We are equal in rights and obligations.”<sup>227</sup>

Al-Dakhīl asked if Jamshīr could provide specific examples of the judges denying women their rights. She then brought out a stack of documents which were presumably *sharī‘a* court decisions and proceeded to describe four actual cases. In the first case, from the Ja‘farī court, a couple signed a marriage contract after which the wife discovered that the husband suffers from Hepatitis B. She then sought to divorce him on the grounds that he would endanger her health and the health of any children that would issue from the marriage. According to the Ja‘farī school, these are adequate grounds for awarding the wife a divorce; one in which she would retain her right to *nafaqa*.<sup>228</sup> Instead of granting the wife the divorce, Jamshīr explained that the Ja‘farī

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<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> See Tucker, *Women, Family and Gender*, pp. 92-95.

court suspended the case and reportedly sought to classify the divorce as a *khul'* divorce.

In the fourth case, also a divorce case from the Ja'fari court, the judge awarded custody of the couple's five daughters to the husband upon the girls' reaching age seven. Because the husband was judged to be at fault, the wife was granted *nafaqa* and *sakan*. However, the wife surrendered these rights in exchange for permanent custody of her daughters. Jamshīr expressed outrage at the conditions that would force a woman to abandon her basic rights in order to keep her children, explaining that now this woman has no money, has begun to beg in the streets, and has applied for welfare housing from the government. This custody ruling, it should be noted, accords with standard practice in the Ja'fari as well as some of the Sunni schools.<sup>229</sup> The mother is granted temporary custody until the child reaches a specified age, usually on or near the age of puberty, after which the husband is given permanent custody. Jamshīr considers this ruling exceedingly unjust, contrary to Islamic principles, and simply the result of biased male interpreters: "The mother is the one who conceives, delivers, raises [the children] and suffers. The Prophet (PBUH) said, 'Your mother, your mother, your mother, and then your father.' When a child is seven years old, they deprive him of his mother and give him to the father for what reason? Did the Qur'an say so? There is no *sūra* that stipulates this. There are only the results of *ijtihad* and *fatwās*." The interviewer then interrupted to take issue with this last comment, and Jamshīr

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<sup>229</sup> Laleh Bakhtiar, *Encyclopedia of Islamic Law: A compendium of the major schools*, Chicago: Kazi Publications, Inc., 1996, pp. 471-472; and Tucker, "Women," p. 29.

continued, “We are not bound by *ijtihād* and *fatwās*...we are only bound by the Qur’an and the Sunna. We should only choose those rulings which fit our era.”<sup>230</sup>

What is perhaps Jamshīr’s most distinctive strategy for advocating for the government’s codified family law is the organization of public demonstrations outside the *sharī’a* court buildings. Like women activists in other Muslim countries, Bahrain’s women activists hold demonstrations in which the activists proclaim their positions on legal reform. What make Jamshīr’s demonstrations unique is that they are comprised mostly of the court litigants themselves, both Sunni and Shii women who were ruled against in divorce or child custody cases. A factor that has made it difficult for women activists to prove their claims is that Bahrain’s *sharī’a* court rulings are not published. There is no public record to which Bahrainis can refer to compare judgments or assess the performance records of judges. While being interviewed on legal procedure in the *sharī’a* courts, lawyers I spoke with expressed frustration at this fact. Attorney Jalīla al-Sayed maintained that the foremost problem in the *sharī’a* courts is inconsistency in rulings.<sup>231</sup> She described the process lawyers go through upon taking a case. She said that first, the jurisdiction to which the case belongs must be determined, Sunni or Shii. This depends on two factors: the husband’s sect, and the court that endorsed the marriage certificate. Then the lawyer must find out which judge will be hearing the case. Cases are distributed to judges at random. Then the lawyer must examine that judge’s precedents if he/she is able to gain access to them.

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<sup>230</sup> Al-Arabiyya, “*Idā’āt*.”

<sup>231</sup> Interview with Jalīla al-Sayed, Manama, March 12, 2006.

Attorney Muhammad al-Muṭawwa‘ explained that lawyers must be familiar with all the *madhhabs*. In the Shii court, the judges follow several different religious authorities (*marja*‘s): Āyatollāh Khomeinī, Shīrāzī, Sayyid Muḥammad Ḥusayn Faḍlallāh, ‘Alī al-Sīstānī and Muḥammad Bāqir al-Ṣadr.<sup>232</sup> Al-Sayed said that, “They [the lawyers] can go online and look at statements the *marja*‘ made and print them out and use them as a *fatwā*. People have also done this by letter. Mostly lawyers do this (as opposed to litigants).”<sup>233</sup> Al-Muṭawwa‘ explained that the litigant’s own *marja*‘ is irrelevant: “The lawyer cannot force the judge to accept a ruling from a *marja*‘ just because that is who the litigant follows. As lawyers, they know the judges after working with them extensively, so once they find out which judge the case is going to, they can prepare their case based on that judge’s ideology.”<sup>234</sup> It is the same for the Sunni court. There are judges from all four of the major Sunni *madhhabs*, therefore lawyers must research texts from all four schools.

As al-Muṭawwa‘ said, after working in the *sharī‘a* courts for a long period of time, each lawyer accumulates his/her own records, but otherwise, he/she is dependent upon other lawyers for sharing information. Al-Sayed said that some lawyers do not consider sharing information about specific judges’ inclinations to be appropriate, and thus keep their experiences confidential. Finally, once the lawyer has assembled the judge’s previous rulings, he/she faces the difficulty that there is inconsistency even with regard to the same judge’s rulings on the same issue:

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<sup>232</sup> Interview with Muhammad al-Muṭawwa‘, Manama, March 19, 2006.

<sup>233</sup> Interview with Jalīla al-Sayed, Manama, March 12, 2006.

<sup>234</sup> Interview with Muhammad al-Muṭawwa‘, Manama, March 19, 2006.

They don't feel obliged to follow precedents, even from their own court, or their own decisions. They make decisions at their own discretion. For instance, in the case of a battered woman who is seeking divorce using battery as the grounds, there may be a case in which she presented a medical certificate stating that she suffered such and such injuries, and that may be enough in one case. However, in the next case, the judge may require two witnesses to the battery. Obviously if it happened in their home, it will be difficult to get witnesses. Because maybe in the other case, the neighbors heard the woman say "don't hurt me- don't break my arm," and then heard the man say "I will break your arm," and then the certificate says that she did indeed suffer a broken arm.<sup>235</sup>

In addition to the problem of inconsistency, there is the issue of impartiality:

"Judgments are to some extent subjective. Objectivity is not enough. Rulings depend on who the litigant is, who the judge is, the social rank of the litigant, and their gender. The case of a woman is harder to be substantiated than that of a man."<sup>236</sup>

After listening to the heartbreaking stories of hundreds of women who lost custody of their children, were thrown out of their homes, or who had been waiting up to a decade for their divorce cases to be resolved, Ghāda Jamshīr took matters into her own hands. In 2002, she began organizing demonstrations in which those women who were able and willing stood in front of the department of justice buildings holding signs that displayed the name of their judge, the case number, and the decision received.<sup>237</sup>

The decisions were frequently accompanied by the litigants' own assessments of the

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<sup>235</sup> Interview with Jalīla al-Sayed, Manama, March 12, 2006.

<sup>236</sup> Ibid.

<sup>237</sup> Ghāda Jamshīr, *al-Jallād wa al-Ḍaḥīya fī-l-Maḥākīm al-Shar'īyya* (The Executioner and the Victim in the *Shar'īyya* Courts), Beirut: Dār al-Kanūz al-Adabiyya, 2005, p. 48.



rulings in which they qualified the rulings as unjust, procedurally incorrect, or incompatible with Islam.

While attending one such demonstration on June 4, 2005, I photographed some of the signs held by the demonstrators. Photo 1 shows two signs that refer to the same case, case #142 of 2005. The signs are being held by the litigants' children, and were ostensibly written by them.



**Photo #1****SANDY****RUSSELL JONES**

The sign on the left gives the case number at the top and then reads: “Does this woman who sacrificed her life and her youth on behalf of her children deserve to be kicked out of her house? Who will see that justice is done for this woman?” The second sign also gives the case number and then reads: “From the children of this oppressed woman: We demand the re-consideration of my mother’s right to full support (*nafaqa*) and housing (*sakan*) from the Ja‘farī court of first instance. Where are our rights?” What is interesting to note about the second sign is the way in which the mother’s rights are expressed. The term *nafaqa* refers to a husband’s support of his wife, and is a standard element of the Islamic marriage contract. It includes what are considered to be reasonable expenses for food, housing, clothing, and related items required to maintain the wife in a manner consistent with that of her own family. Following a divorce in which the wife was not judged to be at fault due to disobedience (*nushūz*) or because she initiated the divorce without cause (*khul’*), all schools of law agree that the husband should continue to provide the wife with *nafaqa* for a specified time period.

As mentioned above, housing, *sakan*, is considered a normal and in most situations the most essential component of *nafaqa*. These are considered a Muslim woman’s basic rights within Islam. The woman involved in Case #142 was reportedly denied these rights, and the words referring to them are highlighted on the second sign by being enclosed in what appears to be embellished parentheses. When Qur’anic text is

included in most Arabic documents whether they be religious documents or otherwise, the text is usually enclosed by such embellished brackets to indicate the sacred nature of the quotation. It is quite possible that the person who wrote the second sign sought to emphasize the sacred nature of these rights, therefore making the statement that the judge who decided the case did not comply with Islamic law.

These demonstrations received a great amount of media attention, and threw a national spotlight on what had been an exclusive arena to which only male *sharī'a* officials were privy. One case in particular received so much attention that it elicited a surprising response from the king. Jamshir publicized the custody case of Badriyya Rabī'a, a mother who lost custody her two children to her husband, who had reportedly bribed the court. The case was so embarrassingly mishandled by the Sunni *sharī'a* court that the king dismissed six judges who had been granted lifetime appointments.

Despite receiving a great amount of criticism and even threats for her actions, Jamshīr passionately believes in her right *as a Muslim* to fight injustice. In the introduction to her book, *The Executioner and the Victim*, Jamshīr explains that her committee has taken upon itself the task of defending the many women who suffer injustice in the *sharī'a* courts. The committee has assumed this task despite the fierce opposition it has encountered. Jamshīr writes that although it has been a dangerous endeavor, the committee feels it must continue for the sake of the victims, and that its work is supported by the hadith of the Prophet (Peace Be Upon Him): "He amongst you who sees something abominable should change it with the help of his hand. If he does not have enough strength to do it, then he should do it with his tongue. If he does not

have the strength to do that, then he should abhor it in his heart, and that is the least of faith.”<sup>238</sup> Since creating the WPC in May of 2002, hundreds of women have come to Jamshīr for help: for legal assistance, for advice, or just for someone to hear their stories. One of those women had a story like many others: Fāṭima al-Ḥasan<sup>239</sup> lost custody of her daughter during her divorce. She is only allowed to see her during short visits three times a week, and even then she sometimes shows up at her husband’s residence to find that he sent their daughter to his sister’s house, conveniently “forgetting” about Fāṭima’s visit. While losing custody of one’s child is already a heart-rending state of affairs for any mother, Fāṭima’s situation is made even worse by the fact that during one of her visits with her daughter, the girl told her mother that during the times her father sends her to her aunt’s house, a male relative there abuses her. At the time of the interview, Fāṭima had been through three lawyers, none of whom had been able to help her. She implied that her husband has some connection with the court which has allowed him to manipulate the case in his favor.<sup>240</sup> In Jamshīr’s view, if a mother losing her child and then being prohibited from taking action while that child is being abused does not qualify as “something abominable,” surely nothing does.

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<sup>238</sup> Jamshīr, *al-Jalad*, p. 11. This hadith is found in Sahih Muslim, Book 1, Number 79. For a discussion on the intellectual history of this idea, see M. A. Cook, *Commanding right and forbidding wrong in Islamic thought*, Cambridge, U.K.; New York: Cambridge University Press, 2000.

<sup>239</sup> Personal interview with Fāṭima al-Ḥasan, Budāya, March 23, 2006. The litigant’s name has been changed in the interest of protecting her privacy.

<sup>240</sup> Ibid.

### Claiming rights as citizens

*“Citizens are equal before the law in rights and duties. There shall be no discrimination between them because of gender, origin, language, religion, or creed.”*<sup>241</sup>

During the almost three decades that women activists in Bahrain have been fighting for a codified family law, they have run up against notions of femininity that frame their public activism as dishonorable, disobedient and unsightly. A telling question put to Ghāda Jamshīr by the al-Arabiyya interviewer was the following: “Don’t you think the results would be better if your voice was a bit lower?”<sup>242</sup> While it can surely be said that Jamshīr has held nothing back (see Chapter 1, section on Jamshīr and the PLC), The Personal Law Committee, which has taken a much more moderate approach, has received nearly as much condemnation by those who would silence women who speak in public on the issue of Islamic law. After voicing their support for King Ḥamad’s 2003 initiative to form a family law drafting committee, members of the PLC were treated to a tirade of angry criticism from religious scholars. Farīda Ghulām Isma‘īl, a member of the PLC, expressed sadness and anger at some of the *‘ulamā*’s responses to her organization’s efforts: “They say we want to get rid of the men of *fiqh*, that we are lovers of the Tunisian experiment”<sup>243</sup> ...that we are lost and feverish, panting

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<sup>241</sup> Bahraini constitution, Article 18.

<sup>242</sup> Al-Arabiyya, “*Idā’āt*.” Al-Dakhīl may not have been aware that many observers attribute all of the most significant recent changes in the court to the work of Ghāda Jamshīr, among them Secretary-General of the Supreme Council for Women Lūlwa al-Awādhī, Interview, March 26, 2006.

<sup>243</sup> This is a reference to the Tunisian Law of Personal Status, passed in 1956. Many religious scholars believe the law contravenes Islam because it indirectly prohibits practices widely accepted by jurists as permitted, such as polygamy and extra-judicial divorce.

for Western ignorance...that we are sick and confused.”<sup>244</sup> She explained that despite the activists’ repeated assurances that they were committed to preserving the *sharī‘a* and the doctrinal specificities of both sects, the ‘*ulamā*’ accused them of being secularists and of attempting to destroy the sects. On the contrary, she said, “we agree with the ‘*ulamā*’ that *sharī‘a* needs further study and discussion, but we disagree that they are the only ones who can legislate on it.” Like Ghāda Jamshīr, members of the PLC believe that ordinary Muslims, lay people, have the right to engage in legal discourse and participate in steering the course of legal reform. Initially a small committee of lawyers and NGO officials, the PLC grew to become a broad organization in which women from all socio-economic strata, and both sects, participate. As well as grounding their claim to rights in Islamic texts, the PLC also looks to the modern political authority of the Bahraini state as a source of rights.

While the PLC has engaged in public demonstrations, their approach is characterized by a dogged persistence in proceeding through existing legal and political channels. Since their founding in 1982, the Committee has continued to pursue their cause through standard NGO strategies such as gathering petitions for submission to the government, meeting with government officials to discuss their demands, formally submitting specific recommendations to the ruler, garnering the support of religious scholars sympathetic to reform, and forming coalitions with other Bahraini NGOs as well as networking with women’s NGOs in other Arab and Muslim countries (see Chapter 1, section on the PLC).

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<sup>244</sup> Interview with Farīda Ghulām Ismā‘īl, Manama, Bahrain, September 13, 2003.

A key strategy used by the PLC especially in the context of its communications with the government is to claim the right to equality which is granted to them as citizens by the Bahraini constitution. In a statement submitted to the king in 2003, the PLC writes:

We, the civil organizations, turn to you with a call, Honorable King Ḥamad ibn ‘Īsa ibn Salmān Āl Khalīfa of the Kingdom of Bahrain, to carry out your constitutional responsibility to protect the rule of law, the constitution, human rights and institutions and their freedoms. We hope that Your Honor will enact what is in Article Five of the constitution: “The family is the basis of society, and it is founded on religion, morality, and patriotism. The law preserves its legal status.”

and in Article Eighteen:

“People are equal in human dignity, and citizens (*al-muwāṭṭinun*) are equal before the law in rights and duties. There shall be no discrimination between them because of gender, origin, language, religion, or creed.”<sup>245</sup>

Looking at Article Eighteen first, on its face, the wording would seem fairly straightforward: citizens are equal before the law. Like most Arab countries, upon independence from colonial powers, Bahrain wrote and promulgated a constitution. Although there is no necessary relationship between constitutions and democracy,<sup>246</sup> the constitution came to symbolize progress, democracy, and liberalism. As a legal instrument that provides a basic framework for governing, it was widely assumed that

<sup>245</sup> Personal Law Committee, “*Nidā’ mu’assasāt al-mujtama’ al-madanī li-iṣḡār qānūn aḥkām al-usra fī Mamlakat al-Baḥrayn*” (Call of civil community organizations for the promulgation of the family law in the Kingdom of Bahrain), 2003.

<sup>246</sup> See Nathan J. Brown, *Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government*, Albany: State University of New York Press, 2002, pp. xiii-13.

the purpose of the constitution was to limit state power and to establish the relationship between the state and its legal subjects. The citizen, according to early twentieth century Western political theory was the individual who freely entered into a contract with the state. This citizen, who was represented as a generic, universal person, enjoyed a variety of political, civil, and social rights in exchange for certain specified duties: obedience to the laws of the state, submission of taxes, etc.<sup>247</sup> Termed “the social contract,” after Rousseau’s 1762 treatise of the same name, this relationship was considered a triumph in that it freed individuals from the tyranny of oppressive forms of government. In *The Sexual Contract* published in 1988, Carole Pateman demonstrated that while the social contract did in fact provide the individual with more rights and freedoms *vis a vis* the state, that individual was a gendered one. Because women were defined as the legal property of either their fathers or their husbands, women did not share in equal rights as citizens.<sup>248</sup> In her work on women, kinship, and the state in Lebanon, Suad Joseph takes that analysis even further, and details the specific ways in which Middle Eastern states act to qualify the citizen as male.

The state defines the rights and duties of its citizens in part through legislation. There are many examples of state laws and policies in the Middle East that privilege men, such as those that permit men to pass citizenship on to their wives and children, but prohibit women from doing the same. Such laws exist despite states’ claims to treat all citizens equally. The Bahraini state has recently acknowledged the difficulties faced

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<sup>247</sup> T.H. Marshall, *Citizenship and Social Class and Other Essays*, Cambridge: Cambridge University Press, 1950.

<sup>248</sup> Carole Pateman, *The Sexual Contract*, Stanford, Calif.: Stanford University Press, 1988.



by Bahraini women who marry foreign men by granting citizenship to over 370 children of Bahraini mothers and noncitizen fathers in September 2006.<sup>249</sup> However, this was an ad hoc decision made by the king, and no law has been passed since then to amend the existing law, Article 7 of the Bahraini Law of Citizenship of 1963, which permits only male Bahrainis to pass on their citizenship to their foreign wives and children.<sup>250</sup>

Another reason that citizenship in Middle Eastern countries is gendered is that the “social contract” is not often between the state and the individual, but between the state and members of subnational communities, meaning collectivities based on religion, kinship, ethnicity, or tribe. In the case of Bahrain, citizenship is constituted in part through membership in a religious community. There are several ways that religious identity is instituted as political identity. Although Bahrain’s ruling family is Sunni, and nearly all top government posts are filled by officials who are Sunni, the forty-seat elected Parliament is more representative of the population. Currently seventeen out of those forty seats are held by Shiis. Several of the Parliamentary blocs are organized by religion. Thirty out of the forty Parliamentary members are part of religious blocs. Citizens’ official documents, such as the identification card, indicate the bearer’s religion. The country itself is defined as a religion-ed (comparable to “gendered”) body. Article 2 of the constitution declares Islam as the official religion of the nation. Most significant for our purposes, the article also names the *sharī‘a* as a “primary source of legislation” (*masdar ra’īsī li-l-tashrī‘*).<sup>251</sup> When a state grants legal

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<sup>249</sup> Habib Toumi, ‘Children of foreign fathers get Bahraini citizenship,’ *Gulf News*, September 20, 2006.

<sup>250</sup> Freedom House, “Women’s Rights in the Middle East and North Africa, Gulf Edition,” Bahrain Report, February 11, 2009.

<sup>251</sup> Kingdom of Bahrain, *Dustūr Mamlakat al-Baḥrayn*, February 14, 2002.

authority to a religious institution, such as the *sharī'a* courts, it mandates compliance with the rules of religion. The rules of religion in the case of the Ja'farī Shii and the Maliki Sunni schools of law in force in Bahrain assign women rights and obligations that differ from those they assign men.

Further implementing the differentiated treatment of women and men is Article Five, which declares the family as the basic unit of society. Thus, the state establishes its primary relationship with the family rather than the individual. The family is regulated by religious laws which in turn declare the husband/father the head of the family. Therefore, the social contract exists only between the state and the male heads of families. Women's rights, then, flow not from the state, but through their relationships with fathers, husbands, sons, etc. The result is that they suffer from "double jeopardy"<sup>252</sup> in that they bear the limitations that accompany full civic and political participation, while also being denied full legal status by being defined as dependents of their male relatives in matters related to the family.

Another way that citizenship becomes gendered is through the production and re-inscription of "civic myths" that lend the idea of the citizen with a historicity that seems to precede the state.<sup>253</sup> Such civic myths "naturalize" what it means to be a citizen, and "regulate forms of inclusion and exclusion that inevitably transport all manner of inequalities – gender, racial, ethnic, class."<sup>254</sup> An example of this is the employment of images of the woman as the symbol of the nation. Much has been

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<sup>252</sup> Deniz Kandiyoti's phrase in Deniz Kandiyoti, "Foreward," in *Gender and Citizenship in the Middle East*, ed. Suad Joseph, Syracuse, N.Y.: Syracuse University Press, 2000, p. xiv.

<sup>253</sup> Rogers M. Smith (1997) as described in Suad Joseph, *Gender and Citizenship*, p. 8.

<sup>254</sup> Joseph, *Gendering Citizenship*, pp. 8-9.

written about the way in which both liberal nationalist groups as well as conservative Islamists utilized the role of women in society as a marker of authenticity during the transition to modern nation-states.<sup>255</sup> In the face of colonialism, cultural imperialism, and internal political struggles, women became a tool for the deployment of one's ideal "imagined community."<sup>256</sup> While women have at times engaged in the production of woman-as-nation imagery as much as men have, it has not, in general served women's interests particularly well.<sup>257</sup> In the case of the family law debate in Bahrain, participants in the debate have used the image of the woman and the family in similar ways. The PLC calls upon the king to defend and protect the family, though the way in which the family is defined is greatly contested.

In the 2005 family law campaign, it was rumored that the Supreme Council for Women spent a vast amount of funds on promotional materials: beautifully designed, glossy pamphlets, colorful posters, and even T-shirts and pens. These showy materials raised the ire of some long-time women activists because they created the illusion that the SCW was chiefly responsible for family law reform. While other activists had worked diligently for decades, the SCW was only established in 2001. Furthermore, some activists charged that the SCW would not allow the activists to participate in the decision-making process of the campaign: "They say they want to work as partners with us, but they won't allow us to make any decisions... They want workers, not

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<sup>255</sup> Deniz Kandiyoti, "Introduction," in *Women, Islam, and the State*, ed. Deniz Kandiyoti, Philadelphia, P.A.: Temple University Press, 1991, pp. 3-9.

<sup>256</sup> Benedict Anderson, *Imagined Communities: reflections on the origins and spread of nationalism*, London; New York: Verso, 1991.

<sup>257</sup> Beth Baron, *Egypt as a Woman: nationalism, gender and politics*, Berkeley: University of California Press, 2005.

partners.”<sup>258</sup> Most of the promotional materials carried an image of a happy Bahraini family, with father, mother, girl and boy all in traditional dress. The image was accompanied by the slogan: “A Secure Family = A Secure Nation.” (see Photo #2).



**Photo #2**

**SANDY RUSSELL JONES**

One of the controversial elements of the image was that the mother is not wearing a headscarf (*hijāb*). Since the 1990's, a majority of Bahraini women have adopted the *hijāb*, while very few wore the head covering in the 1970's and early 80's. May Seikaly

<sup>258</sup> Interview with Laylā Rajab, family law reform activist, 'Isā Town, March 15, 2006.

notes that during the time she served as a faculty member at the University of Bahrain, 1983 - 1993, the number of students who wore the *hijāb* climbed from 5 percent to 95 percent.<sup>259</sup> She attributes this change to the local social, economic and political effects of the authoritarian rule of the Āl Khalīfa. The rise of unemployment, the widening gap between the upper and lower classes, the perceived moral degradation caused by a Saudi presence on Bahraini soil (mainly for entertainment purposes<sup>260</sup>), and the complete lack of legal or political channels through which to express grievances created a vacuum which Islamic revivalism could exploit. She notes that, “While the Gulf society generally had always been a more genuinely religious and conservative one, when compared to other parts of the Arab world this modern return to tradition was shocking in its intensity and assertiveness.”<sup>261</sup>

Having been made aware of the government campaign, the Shii ‘*Ulamā*’ Islamic Council (UIC) quickly produced a competing illustration. In the UIC version, a similar family is shown, but with a mother and little girl who are in *hijāb*, as well as a father with a full beard rather than the fashionable goatee the father in the SCW poster wears. The UIC slogan counters that of the SCW: “No Security Without doing one’s utmost for Religion” (see Photo #3).

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<sup>259</sup> May Seikaly, “Bahraini Women in Formal and Informal Groups: The Politics of Identification,” *Organizing Women: Formal and Informal Women’s Groups in the Middle East*, ed. Dawn Chatty and Annika Rabo, Oxford: Berg Publishers, 1997, p. 144, f.n. 5.

<sup>260</sup> The 22 kilometer causeway between the two countries was built in 1986. Bahrain offered Saudis many recreational opportunities that because of the kingdom’s restrictive laws were not available to them at home, chief among them being the legal sale of alcohol and the existence of movie theaters (as well as various illegal activities which are rumored to be available).

<sup>261</sup> Seikaly, “Bahraini Women,” pp. 134-135. See also May Seikaly, “Women and Social Change in Bahrain,” *International Journal of Middle East Studies*, Vol. 26, No. 3 (Aug., 1994), pp. 415-426.



Photo #3

SANDY RUSSELL

JONES

The two images are accurate symbols of the self-understandings of the opposing sides in the family law debate. The Shii *'ulamā'* present themselves as authentic Muslims, in opposition to the (Sunni) government and women activists, cast as secularists aping the West. Alternatively, the government presents their family as progressive and modern, suggesting that the lack of a law allows for a lack of security, which could mean national security, or security for women within the family. While the Shii *'ulamā'* frequently trot out the accusation that supporters of the codified law have been infected

by the West, the juxtaposition of the two sides' slogans exposes a more entrenched divide, that between the ruling minority (the Sunnis) and the oppressed majority (the Shiis). While the SCW could have chosen many other elements to emphasize in their slogan (justice, equality, impartiality), they chose to emphasize security. Given the recent sectarian conflict of the 1990's, perhaps it was hoped that the promise of healing the country-wide rift would appeal to Bahrainis' desire for a resolution to domestic political tensions. Kandiyoti argues that although the West is often portrayed as "the Other" in narratives about cultural authenticity, this move can mask different, underlying problems: "The term representing the threatening and invasive Other can, in fact, take very different forms. Anti-imperialistic pronouncements about the West are often a thinly disguised metaphor to articulate disquiet about more proximate causes for disunity,"<sup>262</sup> It has also been suggested that a Bahraini emphasis on security reflects a wider, regional concern with unremitting political instability in the Gulf.<sup>263</sup>

### Claiming rights as Arabs

*"What characterizes these [legislative trends] are the effects of nationalism which are similar in each of these societies and countries. They are thus bound by heritage and by historical, cultural and religious factors."*<sup>264</sup>

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<sup>262</sup> Kandiyoti, "Introduction," p. 8.

<sup>263</sup> Toby Jones, Assistant Professor of History, Rutgers University, and past Gulf Analyst for the International Crisis Group, 2003-2004, personal conversation, January 15, 2010.

<sup>264</sup> Ḥasan 'Alī Rāḍī, "Naẓra fī ittijāhāt al-tashrī'āt fī qawānīn al-aḥwāl al-shakhsīa fī-l-dūwal al-'arabīyya," December 6, 1987.

In the two years following Bahrain's attendance at the 1985 United Nations Conference on Women in Nairobi, Bahraini women's NGOs greatly increased their efforts toward legal reform. The Nairobi conference reviewed the achievements of the U.N. Decade of Women (1976-1985), and created an action plan for advancing women's rights during the following ten years. In 1986 and 1987, members of the newly formed PLC spoke at conferences, initiated a study of *sharī'a* court cases, and organized a three-day conference on women's legal rights. While the main focus of these activities was local, namely, the reform of Bahraini law, the activists' approach made use of an increasingly common discourse about rights, and reflected an international perspective in which Bahrainis saw themselves as part of a larger community of Muslim nations, as well as a global community of women. Not only did they adopt reform strategies that had proven to be successful elsewhere, they also began to examine specific codes that had been enacted in the laws of other countries. Having met and formed networks with women's groups from other countries in the region and around the world, Bahraini activists began to share in a common language regarding women's rights and human rights. While the use of a common lexicon was a necessary step in a cross-cultural exchange of ideas and the creation of common plans of action, the terms used in such discourses cannot always be assumed to mean the same thing when different parties use them.

In her study on women in Iran, Arzoo Osanloo discusses the way in which the term "rights" is often assumed to have a universal meaning; one that is contrasted with



“culture.”<sup>265</sup> For instance, those who advocate human rights often find themselves in opposition to “cultural” practices that resist the encroachment of “universal” ideals such as equality and freedom. Osanloo argues that it is important to understand that these “universal” ideals as well as the discourse about them have themselves been constructed in particular historical circumstances. “Rights, in general, and rights talk in particular,” she explains, “are cultural practices emerging from a European-American historical and political trajectory that includes colonialism, and thus are shaped by global power relations.”<sup>266</sup> So, wherever rights discourse is used, it is embedded with certain Western, liberal values. However, when it is used in non-Western contexts, it does not remain untouched by local circumstances: “In local contexts...international human rights talk takes on a vernacular language, mindful of indigenous values, consisting of a layering of social concerns.”<sup>267</sup>

In Bahrainis’ discussions of human rights and women’s rights, many local concerns are present. Bahrain has a specific history of gender relations that has been affected by custom, tradition, religion, and especially sectarian relations and domestic political issues. Bahrainis’ use of rights discourse has also been shaped by the local appearance of Islamic revivalism from the mid-1980’s onward. Islamist activists are aware of the Western origins of discussions of individual rights, thus women’s rights activists have been viewed as promoting secular, liberal values. In the 1990’s and later, Bahraini women activists begin to alter their strategies and terminology in order to

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<sup>265</sup> Arzoo Osanloo, *The Politics of Women’s Rights in Iran*, Princeton, N.J.: Princeton University Press, 2009.

<sup>266</sup> Osanloo, *Rights*, p. 1.

<sup>267</sup> Ibid, p. 6.

accord with the Islamic idiom. The name of the PLC itself that was created in the eighties, *Lajnat al-Aḥwāl al-Shakhṣiyya*, The Personal Status Law Committee, is derived from the Western term “personal status law.” In PLC press statements and organizational material, the law that the committee advocates is referred to as a “personal status law.” In the late 1990’s, the PLC begins to refer to the law as the “family law,” *qanun al-usra*. While the term *al-aḥwāl al-shakhṣiyya* has been in use in Arab countries for most of the latter twentieth century, it is generally associated with the West and a focus on the individual rather than the community or the family. The PLC’s change in terminology reflects a growing preference for finding an indigenous solution to the problem of legal reform, and especially, one that is based in Islam. To speak about a law for the “family” counters the focus on the individual in “personal status law.”

Bahraini activists’ understanding of rights has also been shaped by regional discussions of legal reform. Bahrain’s independence (1971) came later than that of many other countries in the region (Egypt, 1922; Kuwait, 1961; Lebanon, 1943). Egypt especially has had more time to develop a legal system in the context of the modern nation-state, and its legal system has served as a role model for other Arab and Muslim-majority countries. Bahrain’s activists have studied the laws of Egypt as well as the reform strategies used by Egyptian activists in order to create a model for its own process of reform. The fact that Egypt, Kuwait, and the other countries Bahrainis have used as models are predominantly Muslim countries make them legitimate sources of conceptions of justice and definitions of rights. The section below details the ways in

which Bahraini activists see themselves as part of a larger Muslim and Arab, and post-colonial community; a community that supports particular ideals of justice which Bahrainis use as a source of the rights they claim.

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In 1982, one of the first practicing women lawyers in Bahrain (and member of the royal family) Shaykha Hayā bint Rashīd Āl Khalīfa told the press that Bahrain needed a code of civil rights, and that “in the absence of such a law, there is no surety for women’s rights.”<sup>268</sup> Shaykha Hayā was among the Bahraini delegates to the Nairobi conference, and a charter member of the PLC. Upon her return to Bahrain, she and the other members of the PLC, together with several concerned individual volunteers, formulated a plan for legal activism. One of their strategies was to produce a study of *sharī’a* court rulings, “Study on the laws of Personal Status for the Family.”<sup>269</sup> As mentioned above, for each type of case examined the committee compared the rulings of Bahraini judges with the laws of other Islamic countries including Iraq, Algeria, Yemen, Egypt, Syria, Jordan, Morocco, Tunisia, Somalia, and Kuwait. One of the group’s recommendations was the enactment of a personal status law that would be similar to Kuwait’s Code of Personal Status, promulgated on July 7, 1984. The spokeswoman for the committee, Shaykha Maryam Āl Khalīfa, explained that Kuwait’s law served as an appropriate model because it laid down a unified interpretation of

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<sup>268</sup> “Lawyer Calls for Women’s Rights,” *Gulf Mirror*, December 19, 1982.

<sup>269</sup> PLC, “*Dirāsāt*.”

*sharī'a*: “There is no specific law in Bahrain that guarantees a woman her rights. There are several interpretations of the Sharia law... In Bahrain, the one which is hardest on women is applied.”<sup>270</sup> Like Bahrain, Kuwait has a population that is divided between Sunnis and Shiis, although in Kuwait Sunnis are the majority.

By comparing their own legal system with those of other Arab and Islamic countries, the Bahraini activists saw themselves as part of a larger Muslim world, a transnational Muslim community that offered them an alternative Islamic paradigm. Ḥasan ‘Alī Rāḍī, a lawyer who has volunteered his efforts to the PLC since its inception, spoke to the press on the occasion of the PLC’s submission of the study to the Ministry of Justice and Islamic Affairs. Rāḍī explained that in light of the laws of other Arab countries, Bahrain’s *sharī'a* judgments appear to be governed more by tradition than by strictly religious principles: “The general principles which govern Islamic law are sound but their interpretation depends on the judge concerned. That is where the problems come [in].”<sup>271</sup> In a recent interview, Rāḍī gave an example of how Bahraini judges relied on custom when the Islamic texts did not warrant it. He described the issue of the “*bayt al-tā'a*” in which a disobedient wife is restricted to her husband’s house by force. While Islamic texts do prescribe a wife’s obedience (*tā'a*) to her husband, there is nothing that requires her imprisonment in her husband’s house if she does not want to remain there. She would simply be considered disobedient (*nāshiza*) and would lose certain marriage rights, but she would not be held against her will. However, Rāḍī said, this custom still persists: “until recently they used to use the police

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<sup>270</sup> Jacob, “Plea Rejected.”

<sup>271</sup> Geraldine Bedell, “Bahrain group hoping for new deal in courts,” *Gulf Daily News*, July 7, 1986.

to enforce the *bayt at-ṭā'a*. It was ridiculous – the police would go and get the wife from, say, her father's house and bring her back to her husband's house, and as soon as they drove away she would leave again.”<sup>272</sup> By casting themselves as part of a larger Muslim world and appealing to a wider shared cultural framework, Bahraini activists can challenge local tradition and constraints, and appeal to a more purely Islamic form of religion against local practices.

While the Ministry of Justice and Islamic Affairs denied the PLC's charge that Bahraini judges are improperly applying *sharī'a*, spokesman Shaykh 'Abd al-Raḥmān ibn Rashīd Āl Khalīfa admitted that codification could be beneficial in that it could “facilitate the uniformity of justice.”<sup>273</sup> He mentioned that the Arab world was considering a draft law that was drawn up by a special committee established by the Council of Arab Justice Ministers, an international coalition of Arab justice officials. Generated during a series of conventions held between 1981 and 1985, the draft was reportedly derived entirely from *sharī'a*, and was created in the interest of providing Arab countries with a standardized, though fully Islamic personal status and family law.<sup>274</sup>

The PLC was also aware of the Council's draft and analyzed it during their own conference, entitled “Perspective on the position of women in the issue of personal status law,” hosted by the Bahraini Young Ladies Association on December 5-7, 1987.

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<sup>272</sup> Interview with Hasan 'Alī Rāḍī, Manama, February 12, 2006. In researching Ottoman court records, Sonbol found that it was only after the introduction of the modernist reforms of the 1880's that the *bayt-ṭā'a* was put into effect. See Sonbol, “*Ṭā'a*.”

<sup>273</sup> Jacob, “Family law.”

<sup>274</sup> Attorney Salmān Ābdu'llah Sahwān, “*Ru'ya naqdīa fī mashrū' al-qānūn al-'arabī al-muwahḥad li-l-aḥwāl al-shakhṣīyya*,” December 6, 1987.

In the conference materials, the introduction explains that there has been an increased awareness of women's issues in society, and that the question of the personal status law is now being discussed in every Muslim country. The PLC sees these developments as confirmation of its crucial role in raising awareness in Bahraini society, and doing the work of assessing the suitability of the codified personal status law for Bahrain.<sup>275</sup> The conference participants included representatives from ten different organizations dealing with women and family issues and legal affairs. The four primary goals of the conference were:

- 1) to study the necessity of a personal status law for Bahrain
- 2) to compare and contrast the differences and similarities among the personal status laws of Arab countries
- 3) to support the activities of the PLC
- 4) to summarize the results and basic indications gleaned from the conference<sup>276</sup>

Papers presented at the conference addressed topics such as the effects of social and economic changes on the family in Bahrain, divorce in Bahrain, the role of the women's organizations in advancing women's rights, the comparison of the personal status laws of Arab countries, and a critical examination of the draft unified personal status law issued by the Council of Arab Justice Ministers.

### **Claiming rights as humans under international law**

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<sup>275</sup> "Ru'yā," pp. 2-3.

<sup>276</sup> Ibid, p. 5. The conference materials most frequently refer to the other countries studied as "Arab countries," rather than "Islamic countries," even though some in the countries studied may not consider themselves ethnically Arab.

*“The lack of a codified law obscures the many rights of the litigants and violates those rights, which are guaranteed to them by Islam, the constitution, and international agreements which Bahrain has signed.”*<sup>277</sup>

The substantive legislation of other Muslim-majority countries is a source that Bahraini women activists draw upon to counter the rulings of the kingdom’s *sharī‘a* courts. In the studies detailed above, the activists examined very specific issues to see how these issues were dealt with in the laws of other countries, for example, use of the *khul‘* divorce, or limits on the minimum age of marriage. The fact that their examples are all taken from Muslim-majority countries, or as the activists frequently refer to them, “Arab” countries, is designed to lend them legitimacy in the eyes of a public that resists external interference in local affairs. The activists also understand women’s rights to derive from another source that possesses less legitimacy for the public, but nevertheless provides them with a yardstick by which to measure the Bahraini woman’s status, and offers real legal grounds for their claims.

Since the United Nations issued the Universal Declaration of Human Rights in 1948, the document has been translated into 370 languages. By its own definition, the Declaration claims to be universal, and to specify “the equal and inalienable rights of all members of the human family.”<sup>278</sup> As Osanloo has demonstrated, the idea that there are *a priori* principles regarding the rights of humans that preexist and override local values and ideologies derives from the West. Originating in the thinking of Western revolutionaries of the late eighteenth century, the term “human rights” emerged in the

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<sup>277</sup> PLC, “*Nidā’ li-l-taḍāmūn ma’a al-juhūd al-ahliyyat al-dā’ima li-iṣḍār qānūn aḥkām al-usra fī Mamlakat al-Baḥrayn*,” 2004.

<sup>278</sup> United Nations, “Preamble,” Universal Declaration of Human Rights, December 10, 1948.

context of specific historical and geo-political circumstances, and embodies its creators' own ideals, values and beliefs. Nevertheless, the United Nations' Declaration of Human Rights as well as its subsequent documents and treaties have been recognized worldwide as ideals for governments to strive for. Whether or not they have in fact complied with them, many governments have become signatories of these treaties, and have at least professed to uphold the norms and principles contained therein.

Bahrain is a signatory to various U.N. conventions on basic human rights, the rights of women and children, and treaties against some forms of discrimination. In assessing the rulings of Bahrain's *sharī'a* courts, activists have found that they often conflict with the guidelines established in the U.N. treaties. Founder of the PLC Ghāda Jamshīr worked closely with the Bahrain Center for Human Rights (hereafter, BCHR) during the course of fighting the defamation charges brought against her by the *sharī'a* court judges in 2005. Jamshīr's alleged crime was accusing the judges of corruption, in public and in private. The BCHR defended Jamshīr, publicizing the case and declaring that a guilty verdict would constitute an infringement on her freedom of speech. The BCHR also appealed to the international community to support Jamshīr's and all Bahrainis' human rights.

The publicity involving Jamshīr's own personal rights served to generate more exposure for her organization's cause. NGOs such as Amnesty International and Women Living Under Muslim Laws were made aware of Bahraini women's status in the *sharī'a* courts. Jamshīr established relationships with international rights



organizations, and issued formal statements to the U.N. Human Rights Commission, exposing specific incidents of concern. Jamshīr clearly spelled out the legal grounds of her complaint as resting on domestic and international law:

We turn to you on the basis of the principles of equity and human dignity, as stipulated by the Bahraini constitution in Article 18 which declares all citizens equal before the law and equal in all civil and legal rights and obligations, including being equal before the court in all its forms, such as the *sharī'a* courts. It is worth mentioning that this principle is strengthened by the international declarations, treaties and agreements on human rights, among them the Convention on the Elimination of Discrimination Against Women (CEDAW).<sup>279</sup>

First, she calls upon the authority of the Bahraini constitution, and then that of the U.N. treaties. She also invokes a recommendation made by the U.N. to Bahrain, specifically: “We also encourage the implementation of the recommendation by the U. N. Human Rights Committee made in May 2005 to enact a personal status law.”<sup>280</sup> During a session of the Committee Against Torture held on May 12, 2005, U.N. representatives asked Bahraini officials to respond to concerns regarding the treatment and rights of prisoners. Among the issues addressed was the issue of violence against women, as prisoners, but also in general. The Committee was made aware that wives who had presented medical evidence of physical abuse at the hands of their husbands were ignored by judges. The Committee expressed a formal concern with: “The overbroad discretionary powers of the Shariah court judges in the application of personal status

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<sup>279</sup> Ghāda Jamshīr, Kingdom of Bahrain, “*Shakwa muqaddima min ‘Lajnat al-‘Arīdat al-Nisā’iyya’ bi-Mamlakat al-Bahrayn – bi-ri’āsāt al-sāida Ghada Jamshir*,” April 26, 2006, p. 2.

<sup>280</sup> Ibid.

law and criminal law, and in particular, reported failures to take into account clear evidence of violence confirmed in medical certificates following violence against women.”<sup>281</sup> In its final conclusions and recommendations, the Committee urged the enactment of a codified family law to prevent violence against women.<sup>282</sup>

The PLC also draws upon international human rights principles in their recommendations for reform. Although the Committee’s efforts in the 1980’s focused on locating Arab legislation that could be used as a model for Bahrain, the PLC came to refer more often to international rights treaties between 2003 and the present. In a 2003 interview, member Farīda Ghulām described the PLC’s renewed approach in light of King Hamad’s recent announcement of the formation of the draft committee. Ghulām explained that the ‘*ulamā*’ were telling the public that the government’s attempt to codify the family law replicates the legal hegemony of the Ottomans and the British, and that it sought to erode religion. The ‘*ulamā*’ referred to Iran’s as a more legitimate form of government. Ghulām argued that, “our national council are not *mujtahidīn*! We are supposed to be governed by democratic principles.”<sup>283</sup> She said that the ‘*ulamā*’ do not take the injustices women suffer seriously: “The only way to solve these problems is to cleanse the judicial system...law is the basic vehicle through which this can be done. Only through the rule of law can you eliminate injustice and chaos.”<sup>284</sup>

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<sup>281</sup> United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Committee against Torture, Thirty-fourth session, 2-20 May 2005, CAT/C/CR/34/BHR, 21 June 2005, p. 4.

<sup>282</sup> Ibid.

<sup>283</sup> Interview with Farīda Ghulām, Manama, September 13, 2003.

<sup>284</sup> Ibid.

PLC demands made to King Ḥamad include many references to assumed, presumably universal standards of equality, transparency, and professional competency (of judges). In their 2005 statement, four of five recommendations make reference either to international standards or to principles described as “scientific (*al-‘ilmīyya*)” or “enlightened (*mustanīr*)” words which I argue are used here as euphemisms for Western, liberal notions:

Our Demands:

- 1) An initiative to promulgate a unified and enlightened (*mustanīr*) law to govern the family based on the rules and principles of the Holy Islamic *Sharī‘a* that would also fulfill Bahrain’s commitment to comply with international agreements and treaties, especially that of the Universal Declaration of Human Rights, CEDAW, and the agreements on the rights of children.
- 2) The participation of legal specialists, rights activists, and NGOs in the discussion of the specific articles of this law and their review; the consideration of their opinions [on the aforementioned articles], therefore [resulting in] the basing of the law on a scientific standard of equality (*mi‘yār al-kafā’a al-‘ilmīyya*) and scientific experience.
- 3) An initiative to put a rapid plan in place to reform and develop the *sharī‘a* courts, the court administration, and all related administrative [structures]; a review of judges’ training and qualifications, making them subject to compulsory refresher courses in *sharī‘a* and jurisprudence to raise their level of competence to perform the duties of the job; the use of standards of transparency, equality, education, professionalism, and impartiality in the appointment of new judges, and the dismissal of lifetime appointees for inadequacy or lack of competence.
- 4) To pursue the creation of legislation specific to Bahraini women using international and human rights standards; to pass resolutions and procedures that guarantee the

speed of transactions in the petition of lawsuits before the *sharī'a* courts.

The last demand focuses on the institution of state support in cases in which husbands are not satisfying their marital responsibilities, or not complying with judgments issued against them:

5) To set up the appropriate procedures to make use of an alimony fund; to work on opening centers for family and legal guidance, and shelters for victims of domestic violence in every district.<sup>285</sup>

Both the PLC and Ghāda Jamshīr's WPC ground their demands for rights in the international treaties to which Bahrain is a signatory. Perhaps the most relevant agreement to the women's concerns is the Convention on the Elimination of All Forms of Discrimination against Women, or CEDAW as it is commonly referred to, that entered into force in 1981. The Convention defines the meaning of equality for men and women, and explains how it can be achieved. As "an international bill of rights for women," the document serves as universal reference for countries interested in promoting women's rights and correcting disparities between men and women.<sup>286</sup>

Bahrain acceded to CEDAW on June 18, 2002, however, it entered several reservations. Specifically, Bahrain took issue with Articles 2 and 16 of the Convention, insofar as they are incompatible with the Islamic *sharī'a*. Article 2 instructs all member states to affirm equality between men and women in constitutions and all legislation involving

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<sup>285</sup> PLC, "*Nidā'*," p. 2.

<sup>286</sup> Convention on the Elimination of All Forms of Discrimination against Women, "Introduction," viewed on February 3, 2010 at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

the rights of citizens. It also directs member states to abolish or amend any and all existing legislation which constitutes discrimination against women. More specifically, Article 16 orders that states take all appropriate actions to establish equality between men and women in the realm of marriage, divorce, child custody and all other matters related to the family. These recommendations conflict with the *sharī'a* in basic ways: the *sharī'a* prescribes different roles for men and women in marriage in that the husband is responsible for providing financially for the wife while she in turn is obligated to defer to his judgment; it assigns them different grounds upon which they can initiate divorce; in most situations it requires that the woman's marriage be contracted by a male guardian, while men of the age of majority may contract their own marriages; etc.

So, if Bahrain cannot comply with major directives of the agreement, why sign it? Ann Elizabeth Mayer has studied the relationship between Arab or Muslim-majority countries and the CEDAW treaty. She suggests that there could be several reasons why these countries would sign the CEDAW agreement, including the growing prestige of international human rights, the desire to correct or assuage stereotypes of Arab countries as being anti-woman, or specific political goals that may be easier to attain if countries cast themselves as cooperative players in the global community.<sup>287</sup> Mayer offers the example of Saudi Arabia which ratified CEDAW in 2000. At the time, Saudi Arabia was attempting to qualify for membership in the World Trade Organization.<sup>288</sup>

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<sup>287</sup> Ann Elizabeth Mayer, "Internationalizing the Conversation on Women's Rights: Arab Countries Face the CEDAW Committee," in *Islamic Law and the Challenges of Modernity*, ed. Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, Oxford: Altamira Press, 2004, pp. 136-137.

<sup>288</sup> *Ibid.*, p. 137.

Judging Arab countries' intentions to actually enact the provisions offered in the agreement as false, Mayer refers to the phenomenon as "the New World Hypocrisy," and demonstrates that Western countries should not be excluded from this indictment, analyzing the United States' interactions with the CEDAW committee and its continued rejection of the Equal Rights Amendment.<sup>289</sup>

With regard to Bahrain's reservations to CEDAW, women's rights activists are not naïve. They understand well that when the government signed the treaty, some of its intentions did not involve effecting the full equality of women in Bahraini society: "Most of what [you find] in the media is a display of the conventions on the rights of the family, women, and children that are signed by the Kingdom, but everyone is aware that it is just ink on paper unless the authorities support and enact realistic and systematic procedures and just laws that are strongly backed by those in power."<sup>290</sup> All of the actors involved are also well aware that in the end, the U.N. has no authority to enforce compliance with its treaties. They are entered into voluntarily, and countries in violation of them are not prosecuted except in exceptional cases such as genocide. This does not mean, though, that the treaties are useless. Even in the case of Arab governments, the fact of formally accepting international human rights law is both a sign that the government is already open to some degree of change and an action that

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<sup>289</sup> Ann Elizabeth Mayer, "Rhetorical Strategies and Official Policies on Women's Rights: the Merits and Drawbacks of the New World Hypocrisy," in *Faith and Freedom: Women's Human Rights in the Muslim World*, ed. Mahnaz Afkani, I.B. Taurus, 1995.

<sup>290</sup> Huda al-Maḥmūd, Secretary, PLC, "Bayān Lajnat al-Aḥwāl al-Shakhṣīyya," April, 2006.

“sets in motion a dynamic that over time should lead to mounting pressures for actual compliance with human rights standards.”<sup>291</sup>

The women activists’ role in this process cannot be underestimated. As we saw above, Ghāda Jamshīr has petitioned the U.N. directly, describing in detail the status of women in Bahrain. After studying the CEDAW Committee sessions, Mayer found that Committee members’ background on member countries is augmented by information submitted to them by women’s groups and human rights NGOs. Representatives from the member countries are then obliged to respond to the material presented by these groups, such as Bahrain did in the sessions of the Committee against Torture and the CEDAW Committee.

## CONCLUSION

Bahrain’s women activists have been struggling for family law reform for over three decades. In May of 2009, a codified law was passed. However, this law only applies to the country’s Sunni minority. The corresponding Shii law was immediately rejected by Shii members of Parliament. It is still too early to tell what the effect will be on Sunni families, and activists have expressed frustration that the majority of the kingdom’s women continue to be subject to what they consider to be a broken system. Even so, the activists have arguably effected significant change. They have played a role in not only the enactment of the Sunni law, but are also responsible for many other changes that have produced real differences in women’s lives: the establishment of an

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<sup>291</sup> Mayer, “Internationalizing,” p. 134.

alimony fund for women whose husbands have defaulted on support payments,<sup>292</sup> the dismissal of six judges reputed to be corrupt and/or unqualified from the *sharī'a* courts, and some procedural revisions that have made processing family cases more efficient. Women's NGOs involvement with international bodies such as the U.N. has acted to exert pressure on the state to bring its laws into compliance with the rights agreements it has already signed.

Women's engagement in these activities has been made possible in part by the opening of a "religious public sphere" in which lay people participate, along with religious scholars. The activists' participation in public discourse affects ideas about what the role of both religion and the state is or should be with respect to family law. The response of the '*ulamā*' and the government to the women's activity signals a shift in power relations in which women and lay people are playing a greater role in the determination of the meaning of *sharī'a* and hence of religion in society.

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<sup>292</sup> "Fund for divorced women on way," *Gulf Daily News*, September 30, 2006.



## **CHAPTER 5: THE STATE**

The family law debate in Bahrain has become the battleground upon which a struggle for religious, legal, and also political authority is being fought. Both those who support the government-sponsored codified law as well as those who oppose it claim the right to determine the future of the *sharī'a* courts and the laws that regulate them. Shii '*ulamā*' argue that Islam demands that no one but religious specialists are authorized to engage with family law, while lawyers and women activists contend that lay people can also participate in legal discourse. Many strategies are used: the women activists invoke the Bahraini constitution and international human rights treaties, and the '*ulamā*' pursue political activism through the elected Parliament. Both sides are striving to win the support of the public as well as the ear of the government, but what of the government?

The Bahraini government is an authoritarian regime. Power is concentrated in the hands of the ruler, King Ḥamad ibn 'Īsā Āl Khalīfa, and he does not require the consent of the population to pass laws or to issue binding decrees. The elected Parliament, while structured as a fully-authoritative legislative body serves, in practice, more as an advisory body, as the laws it passes need not be enacted if the king does not choose to do so. With regard to the family law the state does not have to justify its authority. Unlike other actors in the debate, it already has the power to pass the law at any time. If the '*ulamā*' incite their followers to revolt, as they have threatened to do if the family law is passed, the police could crush their resistance in a matter of hours.

Through various initiatives and public statements, the king has made clear his intention to pass a comprehensive codified family law. After seven years of efforts toward this end, in May of 2009 Bahrain did enact a family law, but it fell far short of what Ḥamad had originally intended. The 2009 law applies only to Sunnis, a minority of the population. To a large extent, the same problems remain: hundreds of divorce cases stalled in a huge backlog, hundreds of divorced women without homes, and the continued procedural and professional deficiencies in the *sharī'a* courts that handle the bulk of Bahrain's family cases, the Shii courts. What are the factors that have prevented an authoritarian state such as Bahrain from carrying out its wishes?

Despite the authoritarian nature of its rule, the Bahraini government is constrained by various factors. Three of those factors in particular have shaped the way in which King Ḥamad has managed the issue of the family law. First, the country's demographic composition serves as a persistent caution to the Sunni rulers. The government does not issue formal statistics of the distribution of the population by sect. However, at the turn of the millennium international NGOs and other observers estimated that Shiis comprise approximately 70% of the population. Estimates now put that percentage closer to 60% or less, and many Shiis will argue that this is due to recent policies issued with the express goal of altering the country's demographic balance. A report published by Dr. Šālāḥ al-Bandar, Political Advisor to the Ministry of Cabinet Affairs, in 2006 described certain government officials' involvement in the recruitment of Sunni immigrants from other Arab states, a Shii-to-Sunni conversion program, and the corruption of election officials. The Shiis have developed a historical narrative that

highlights the Shiis' indigenous status on the islands and depicts the Āl Khalīfa as invaders who took Bahrain by force and subsequently tyrannized the native population. Based for the most part in fact (see Chapter 2 for an account of the Āl Khalīfa's arrival on the islands), the Shiis' narrative, along with the country's more recent history in which the Āl Khalīfa pursued political, economic, and social oppression of the Shii population, continue to underlie relations between the two sects. Various actions taken by the rulers have triggered that hostility and led to the open revolt of Shii citizens, most notably in the 1990's.

The recent efforts of King Ḥamad to redress these injustices have engendered a political system that permits greater political participation among all citizens. This greater political involvement, while limited, is another factor that has placed constraints on the government. Michael Herb, writing on Kuwait and the United Arab Emirates (UAE), offers a helpful framework for looking at the relationship between political participation and state agency. In seeking to explain the divergence in economic development between the two countries, Herb found an inverse relationship between economic development and the level of political participation. While the UAE's citizens enjoy little to no political participation, the nation's economic success and ability to diversify away from dependence on oil revenues was legendary, at least until the recent economic crisis. At the same time, Kuwait has struggled to advance economically whereas its elected Parliament arguably holds more power relative to its rulers than any other country in the region. Herb demonstrates that Kuwait's high level of political participation acts to deadlock various economic development projects, thus limiting the

government's ability to pursue its policies in this regard. Bahrain's Parliament has much more limited powers, and has even been referred to as "mere theater."<sup>293</sup> Yet, Bahraini members of Parliament enjoy a high degree of visibility, and the public activism of the Shii bloc, al-Wifāq, in particular has greatly influenced the terms of the family law debate. While there are drawbacks to Herb's model, some of which are discussed below, the model is helpful in partially explaining the effect that having an elected Parliament has had on the ruler's pursuit of the family law.

The third, and I argue, the most significant factor that has constrained the ruler's actions is the existence of a vibrant public sphere in which Bahrainis participate in critical debate of public policy and issues. The work of Jürgen Habermas, Dale Eickelman and James Piscatori provides a framework for understanding the way in which Ḥamad's own policies of reform, such as those regarding freedom of the press, freedom of association, and the rejection of censorship, provided the conditions for the emergence of an arena in which individual Bahrainis and organizations representing various interest groups could publicly debate the family law. This included not only non-governmental actors, but also agencies of the state. Indeed, for Habermas, the creation of state bureaucracies in part produced a new sphere of public authority in which the various arms of the state, which are tangible objects separate from the ruler, participated with other actors in society in public debate. The state is not a unitary entity, but a set of institutions, agencies and individuals each of which has its own interests that change with time and depend upon the issue at hand. It is in the public

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<sup>293</sup> Toby Jones, *Gulf Analyst* 2003-2005, International Crisis Group, personal conversation, March 30, 2010.

sphere that these government agencies compete with non-governmental groups as well as with each other not just over power, but over the meaning of symbols that express the nation's identity, and the "rules and discourse that morally bind the community together."<sup>294</sup> The *sharī'a* court system serves as *the* symbol of Bahrain's Islamic identity. Because Bahrain has adopted Western commercial and criminal laws, legalized the sale of alcohol, and taken various other actions that are seen by conservative Muslims as the abandonment of religion, the family courts have been crucial for demonstrating the government's commitment to Islam. For the Shii community specifically, the ability to administer Shii family law without Sunni interference allows Shiis to preserve their sectarian identity as well as their religion. The agencies of the state who are involved in the process of *sharī'a* court reform such as the Parliament, the Minister of Justice and the judges themselves have varying interests and factors that they had to consider when responding to the king's family law initiative, such as religious and legal ideology, political and social implications, gender roles, and the maintenance of their own reputations. These interests which at times extend beyond Bahrain's national borders conflict in significant ways. To act quickly or indiscriminately on this issue would be disastrous for the ruler and for the country. Eickelman and Piscatori argue that "politics may have as much, if not more, to do with bargaining among several forces or contending groups as with...compelling obedience."<sup>295</sup> The following chapter details the actions taken by the state toward the promulgation of a codified family law. By looking at each of the relevant state agencies

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<sup>294</sup> Eickelman and Piscatori, *Muslim Politics*, p. 7.

<sup>295</sup> Ibid.

in turn, the chapter examines each agency's specific interests with respect to the family law and considers the ways in which those interests complicate the ruler's management of the issue. Furthermore, the chapter demonstrates that while the family law initiative began as a key component in the king's genuine plan for reform, it quickly became the means by which Ḥamad delicately balanced various political forces and maintained the stability of his rule.

### **The King**

The "*path for a better future*"<sup>296</sup> –National Action Charter

A new, codified family law was supposed to have been the crowning achievement of King Ḥamad's new, progressive administration. When Ḥamad ibn 'Īsā Āl Khalīfā acceded to the throne on March 6, 1999, Bahrainis were hopeful for an end to the political repression and economic stagnation of his father's reign. That hope was not totally misplaced. Within two years, Ḥamad abolished his father 'Īsā's most oppressive tool, the State Security Law, and released more than 900 political prisoners. He drafted the National Action Charter, a document that provides a blueprint for a series of political, economic and legal reforms. In a move that engaged the Bahraini

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<sup>296</sup> Bahrain National Action Charter, 2001, p. 6.

population and secured their enthusiasm for his rule, Ḥamad held a national referendum on the charter. On February 14 and 15, 2002, 90% of eligible voters turned out to approve the charter by 98%. In addition to endorsing individual freedoms and the rule of law through the separation of powers, the document promises, albeit vaguely, the enactment of laws addressing the concerns of women and the family: “The state endeavors to support women's rights and the enactment of laws on the protection of family and family members.”<sup>297</sup> While it does not specifically refer to the *sharī‘a* courts, an article on judicial powers provides for the establishment of a constitutional court, or at least an official with the authority to assess the constitutionality of specific laws: “The state shall complete the judicial system as prescribed in the constitution. It shall specify the judicial authority vested with the jurisdiction over disputes as to whether a given law or executive regulations are consistent with the constitution.”<sup>298</sup>

The general principles regarding the government’s intention to address women’s concerns in the National Action Charter were not just words, but in part represented actions that were already underway. In August of 2001, the king had established a new government agency dedicated to the advancement of women, the Supreme Council for Women (*al-Majlis al-A‘lā li-l-Mar’a*).<sup>299</sup> Through the Supreme Council for Women (hereafter, SCW), the king implemented several policies aimed at addressing women’s concerns. Some of these policies which are dealt with in more detail below include the establishment of family counseling centers, the provision of free legal assistance for

<sup>297</sup> Ibid., Chapter 1, Basic principles of the society, Article 6, “Family as the basis of society,” p. 8.

<sup>298</sup> Ibid, Chapter 2, Government System, Article 6, “The Rule of Law and the Independence of the Judiciary,” p. 10.

<sup>299</sup> SCW, “*Al-Majlis al-A‘lā li-l-Mar’a*,” Informational pamphlet, 2005, p. 1.

women of lower economic classes, the opening of women's grievance offices, and the initiation of a formal study of divorce cases within the *sharī'a* courts. Then, in a move long-awaited by women activists, the king authorized the formation of a legal committee by the Ministry of Justice to draft a family law proposal in 2002. Also addressed in detail below, the 2002 committee produced a workable draft within a few months.

Part of King Ḥamad's reform efforts was to commit Bahrain to many of the international women's and human rights treaties promulgated by the United Nations and other international bodies. Bahrain had become a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Convention Against Torture, the International Covenant on Civil and Political Rights, and the Convention on the Elimination Against All Forms of Discrimination against Women (CEDAW). Decree Law No. 5 of 2002 issued on March 2, 2002 declared, "We hereby approve the accession of the Kingdom of Bahrain into the Convention on the Elimination of All Forms of Discrimination against Women, approved by the United Nations General Assembly on December 18, 1979, and attached hereto...Ministers shall, each within his jurisdiction, implement this law."<sup>300</sup> In its by-laws, the SCW was specifically designated as the agency authorized to assess Bahrain's

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<sup>300</sup> SCW, "*Ittifāqīyyat al-Qaḍā' 'alā Jamī' Ashkāl al-Tamyīz dīd al-Mar'a (al-Sīdāw)* (Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)," Idārat al-Maktabāt al-Āmma, 2005.



adherence to CEDAW principles. Bahrain formally acceded to the convention on June 18, 2002.<sup>301</sup>

A condition for joining such conventions was the participation in meetings and sessions in which representatives of Bahrain had to respond to the questions of international committees regarding specific practices occurring in their country that contravene elements of the treaties. In responding to these questions before an international audience, Bahrain's representatives constructed an image of the nation, and an image of the Bahraini government as it pertained to the specific issues being addressed. The fact that the family law had not been passed was an issue of concern to the CEDAW Committee. The Committee which met on July 21, 2008, expressed the opinion endorsed by Bahraini-NGO analysts that the promulgation of the family law could address many urgent concerns, and asked Bahraini representatives whether Bahrain had immediate plans to address the issue. In responding, the Bahraini delegates reported that "Civil consensus is required before a family status law can be promulgated."<sup>302</sup> Thus, with respect to the family law issue, the king maintained an image at home and abroad of a democratic government that responded to the needs of the people. We will also see this theme repeated below in statements made by other agents of the state such as the Minister of Justice and Islamic Affairs.

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<sup>301</sup> After a treaty has been negotiated and signed by other countries and has already entered into force, additional signatories are said to "accede" to the treaty, rather than to "ratify." However, accession has the same legal effect as ratification. See United Nations website [http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1\\_en.xml#accession](http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#accession), viewed on February 26, 2010.

<sup>302</sup> United Nations, CEDAW/C/BHR/Q/2/Add.1, July 21, 2008, p. 6.

Unfortunately, the king's carefully crafted image was severely tarnished almost as quickly as it was created. Without warning, and on the heels of the popular referendum on his National Action Charter, Ḥamad promulgated a new constitution in 2002 that rolled back many of the political rights he had just promised to deliver. Shiis especially were embittered by this surprise move. Therefore, when the Shii *'ulamā'* began to oppose the king's family law initiative, underlying their resistance was a more general discontent with Ḥamad's performance. The sections below will demonstrate the way in which Ḥamad sought to neutralize Shii opposition using the family law initiative. While each of the agencies discussed below have their own interests *vis a vis* the family law and acted of their own accord, they were also directed by the king to take certain actions either to enact further or to pull back on the family law initiative. An analysis of these actions demonstrates the delicate balance Ḥamad sought to maintain between the political demands of the Shiis, the stability of his rule, the maintenance of the state's image, and the needs of the population; as well as the ways in which other state agencies' own interests complicated the pursuit of this contentious issue.

### **The Judiciary**

*"The court is not for debating religion, it is for fixing problems"*<sup>303</sup> – Sunni Judge Yāsir al-Maḥmīd

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<sup>303</sup> Interview with Sunni High Court Judge Yāsir al-Maḥmīd, Muharraḡ, Bahrain, March 20, 2006.

Any changes that would be made to the *sharī'a* courts would of course require the cooperation of the judiciary, and especially, of the *sharī'a* court judges. While leading members of the Shii '*ulamā*' as well as a minority of Sunni Salafī '*ulamā*' have generally been opposed to the government's efforts, it would be a mistake to assume that because judges are also men of religion, they have been opposed to it as well. The *sharī'a* court system is a government institution. Judges are appointed by the king, and their salaries are paid by the state. However, Shii *sharī'a* judges do, and Sunni *sharī'a* judges prior to the enactment of the Sunni family law in 2009 did, maintain a large degree of independence. Indeed, that was one of the chief complaints of supporters of the codified law, that judges had too much freedom in deriving rulings from Islamic texts. Without a standardized set of codes, a judge could produce decisions that contradicted those of another judge, or even himself, for the same type of case. Ethical issues aside, this relative autonomy could have provided sufficient incentive for *sharī'a* court judges to oppose codification, as it would infringe upon their authority and autonomy.

Judges in both courts, however, have demonstrated support for the king's initiative, and have themselves participated in the process of drafting proposals for a family law. Although he himself has been the target of some of the women activists' accusations, Shii High Court Judge Shaykh Muḥsin Āl 'Aṣfūr has been working toward codification for over a decade.<sup>304</sup> In 1998, Shaykh Muḥsin submitted a sample marriage

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<sup>304</sup> See Chapters 2 and 4 for more on Judge Muḥsin Āl 'Aṣfūr and on the Āl 'Aṣfūr family of Shii legal scholars.

contract for use in the Shii court.<sup>305</sup> The following year, he submitted the first part of a draft of Shii rules regarding marriage for inclusion in a future personal status law. The draft contained 1507 articles, and was published in January, 2000 in Arabic and English.<sup>306</sup> When asked about the sources he used in developing the rules found within, Shaykh Muḥsin said that much of the text was drawn from the works of his ancestors, *Hadā'iq al-nāḍira fī aḥkām al-'itra al-tāhira*, by Shaykh Yūsuf al-Baḥrānī (d. 1186/1772) and *Sadād al-'ibād wa rashād al-'ubbād*, by Shaykh Ḥusayn Āl 'Aṣḥūr (d. 1802).<sup>307</sup> After examining Shaykh Muḥsin's proposal, the Shii *sharī'a* court rejected it. According to the SCW, this was because "it was an individual effort that contained differences from what is currently in practice."<sup>308</sup> Although no reference is made by the SCW to the specific Shii legal school followed by Shaykh Muḥsin, the fact that he is an Akhbari, while the majority of the Shii court is Usuli (see Chapter Three) most likely affected the reception his proposal received by the Shii court.<sup>309</sup> Shaykh Muḥsin said that he felt somewhat betrayed by this. He argued that there is a great need for codification, citing many of the same criticisms that the women activists have put forward, that there is no order in the courts, that it is chaos. The judges all go by their own opinions, and 80% of the problems in the courts are caused by the fact that neither the judges nor the litigants know *sharī'a*, Shaykh Muḥsin claimed. In the Shii court specifically, he said there is no consistency because the judges refer to several different

<sup>305</sup> Interview with Shii High Court Judge Muḥsin Āl 'Aṣḥūr, al-'Adliyya, Bahrain, March 9, 2006.

<sup>306</sup> Shaykh Muḥsin Āl 'Aṣḥūr, *The Personal Status Law According to Ja'fari Fiqh, Part One*, trans. 'Abbās Jawād Sāfi, Qum: Dār al-Tafsīr, January 2000.

<sup>307</sup> Interview with Shaykh Muḥsin Āl 'Aṣḥūr, Manama, Bahrain, March 9, 2006.

<sup>308</sup> SCW, "Istiqlāl li-l-ra'y hawl taqnīn aḥkām al-usra fī Mamlakat al-Baḥrayn," *Markaz al-Baḥrayn li-l-dirāsāt wa-l-buḥūth* for The Supreme Council for Women, 2005, p. 20.

<sup>309</sup> For more on the differences between the Ahkbaris and Usulis, see Chapter 4.

*marja* 's, whichever one suits his needs at the time. He noted that there have been over 11,000 complaints made by women against the courts, and said that it is only getting worse. He blamed the Shii '*ulamā*' of the '*Ulamā*' Islamic Council for hindering Bahrain's progress in establishing a personal status law. Disagreeing with their position, he asserted that their resistance to the family law is based on ignorance.<sup>310</sup> Regarding the government's rejection of his proposals, he defended himself and his scholarly and legal abilities, saying that Bahrain's own scholars are of a higher quality than Shii authorities that some of the judges refer to. For instance, regarding the scholars of Najaf, Shaykh Muḥsin said that since Saddam Hussein came to power in Iraq, the standards of scholarship in Najaf have declined.<sup>311</sup>

While the government declined to use Shaykh Muḥsin's proposals, another Shii judge was more successful in his efforts. Also a judge in the High Shii Sharī'a court, Shaykh Ḥamīd al-Mubārak submitted a draft in 2002 titled "*Mashrū' qānūn aḥkām al-usra ṭibqan li-l-madḥhab al-Ja'farī fī tanzīm al-zawāj wa-l-ṭalāq wa-l-naḥaqa wa-l-ḥaḍāna*" (Family law according to the *Ja'farī madḥhab* regulating marriage, divorce, maintenance, and custody).<sup>312</sup> The draft was divided into two sections, one on marriage, and the other on its dissolution. The first section included seven chapters covering *al-khiṭba* (betrothal), *al-aḥkām al-'āmma* (general rules), *arkān al-zawāj* (basic principles of marriage), *shurūṭ al-'aqd* (requirements of the contract), *ḥuqūq al-zawjayn* (rights of the spouses), *anwā' al-zawāj* (types of marriage), and *āthār al-zawāj (al-naḥaqa wa-l-*

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<sup>310</sup> Interview with Shaykh Muḥsin.

<sup>311</sup> Ibid.

<sup>312</sup> SCW, "*Istitla' li-l-ra'y*," p. 21.

*nasab*) (effects of marriage [maintenance and lineage]). The second section had three chapters that covered the issues of *al-ṭalāq* (divorce), *anwāʿ al-ṭalāq* (types of divorce), and *al-furqa bayna al-zawjayn (al-ʿidda, al-ḥaḍāna)* (separation between the spouses [the waiting period, custody]).<sup>313</sup>

At the same time that Shaykh Ḥamīd submitted his draft proposal, three judges from the Sunni court submitted another proposal for use in the Sunni court. Judge of the High Appeals *sharīʿa* court Shaykh ʿĪsā Abū Bushayt, judge of the High Sunni court Shaykh ʿAdnān Qaṭṭān, and judge of the High Sunni court Shaykh Ibrāhīm al-Marīkhī submitted a draft titled “*Mashrūʿ al-aḥkām al-sharīʿa fī aḥwāl al-shakhsīyya bi-tanzīm al-zawāj wa-l-ṭalāq wa-l-naḥaqa wa-l-ḥaḍāna* (Draft of sharīʿa rules of personal status regulating marriage, divorce, maintenance and custody). The Sunni draft comprised 142 articles and followed virtually the same arrangement as the Shii draft, except that the types of divorce were divided up and given their own individual chapters (*al-mukhālaʿa, al-taṭlīq, and al-faskh*). This draft draws from what is referred to as “The Muscat Document,” a uniform statute drafted by the Council of Arab Justice Ministers. The law, formally named “Muscat Document of the GCC Common Law of Personal Status,” was approved during the seventh meeting of the council in Muscat in 1996 and has served as a legal reference for several Muslim-majority countries.

At this time, in 2002, the Bahraini Minister of Justice presided over the formation of a committee to draft a codified law. He included in this committee the three Sunni judges who prepared the draft mentioned above, as well as Shaykh Ḥamīd

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<sup>313</sup> Ibid.

al-Mubārak from the Shii court and two other Shii judges. When the SCW learned of the creation of the committee, they requested that a number of women lawyers who specialize in family law be allowed to participate. The Minister agreed, and the final composition of the committee included three Sunni judges, three Shii judges, and three women lawyers.<sup>314</sup> Upon examining the two drafts, the women lawyers noticed that approximately 70% of the Sunni draft and 81% of the Shii draft included rules that were common to both *madhhabs*.<sup>315</sup> They then suggested that the drafts be combined to form a single draft, while preserving those elements that were distinctive to each *madhhab* by including them in separate articles to be applied according to sect. The committee agreed, and produced a final, unified draft titled “*Mashrū‘ qānūn aḥkām al-usra fī tanzīm al-zawāj wa-l-ṭalāq wa-athārhumā* (Family law regulating marriage, divorce, and their effects).”<sup>316</sup> The draft was organized according to the arrangement of the Sunni draft and included 87 articles that applied equally to both sects, 13 articles that applied only to Sunnis, 19 articles that applied only to Shiis, and 15 additional articles, presumably addressing organizational issues, for a total of 134.<sup>317</sup>

In September of that year, the independent newspaper *al-Wasaṭ* reported that the draft was complete and would be made law within months.<sup>318</sup> While women activists applauded the committee, Shii ‘*ulamā*’ raised objections. Member of the committee Zīnat al-Manṣūrī said that the Shii ‘*ulamā*’s objections surprised one of the committee’s Shii judges. He is from Iran, she explained, and said that Iran has a well-

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<sup>314</sup> Ibid., p. 22.

<sup>315</sup> Ibid.

<sup>316</sup> Ibid.

<sup>317</sup> Ibid., p. 23.

<sup>318</sup> Ibid.

developed codified law, and this has not resulted in a violation of religion.<sup>319</sup>

Immediately after this, the Minister of Justice was replaced. The new minister froze the draft and disassembled the committee until further notice. Al-Manşūrī said that “still no one knows why, and no one knows what happened to the draft.”<sup>320</sup>

The freezing of the 2002 draft represented a clean break with the trajectory King Ḥamad’s administration was pursuing with regard to the reform of the *sharī’a* courts. Many Bahrainis felt as though they were at long last on the brink of obtaining a codified law, and then it was retracted, without explanation. Women’s groups redoubled their efforts. The recently formed Women’s Petition Committee (WPC) took their concerns directly to the new Minister of Justice and Islamic Affairs Shaykh ‘Abdullāh ibn Khālīd Āl Khalīfa. Shaykh ‘Abdullah granted them a meeting on September 25, 2002.<sup>321</sup> WPC founder Ghāda Jamshīr presented her arguments, along with a delegation of more than 20 men and women. Among the delegation were lawyers who worked in the *sharī’a* courts such as Attorney Muḥammad al-Muṭawwa‘ and Attorney Fāṭima al-Hawāj, and the heads of other women’s NGOs such as president of the Bahrain Businesswomen Society, Afnān al-Zayānī, and the Director of the Bahrain Women’s Society. During the meeting, the WPC issued two chief demands: the enactment of the unified personal status law draft, and the immediate dismissal of some of the *sharī’a* court judges. Jamshīr also asked that a new law be passed to revoke judge’s current immunity so that they can be held responsible for mistakes they may have committed that have resulted

<sup>319</sup> Interview with Attorney Zīnat al-Manşūrī, 2002 Draft Committee Member, Manama, Bahrain, February 20, 2006.

<sup>320</sup> Ibid.

<sup>321</sup> Ghāda Jamshīr, *al-Jallād wa al-Ḍaḥīya fī-l-Maḥākīm al-Sharī’a* (The Executioner and the Victim in the Sharī’a Courts), Beirut: *Dār al-Kanūz al-Adabiyya*, 2005, p. 37.



in harm to the litigants. She argued that the current practice of sheltering the children of divorced couples in police stations may cause the children psychological harm, and suggested that social centers and NGOs would be a better alternative. The delegates then presented Shaykh ‘Abdullah with a range of anecdotes detailing the experiences of recent litigants, highlighting injustices regarding *nafqa* awards or lack thereof, seemingly unjust custody decisions, and judges’ failure to force husbands to provide *sakan*. Many of the delegates argued that these rights were assured to women by Islam, and that the judges, who were supposed to uphold the *sharī‘a*, were in violation of religion. As for procedural oversights, Attorney al-Muṭawwa‘ said that the regulations contained in Law No. 26 for *sharī‘a* court procedures are not followed because judges are generally not familiar with them.<sup>322</sup> Offering an example, al-Muṭawwa‘ explained that he has “appeals in the *sharī‘a* court for a long period that originated eleven years ago, despite the fact that the period of appeal is limited to only 45 days.”<sup>323</sup> He then described a particularly troubling case that had not yet been resolved. A woman was granted a divorce after which, following her prescribed waiting period, she remarried and became pregnant from her new husband. Her first husband then appealed the case to the Appellate court which declared the divorce invalid and ordered the wife to return to him. The first husband appealed to the Supreme Court requesting the annulment of the wife’s second marriage which this court denied, and confirmed the validity of the wife’s second marriage. Al-Muṭawwa‘ explained that the verdicts were equally

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<sup>322</sup> Al-Muṭawwa‘ was referring to “*Marsūm bi-qānūn raqm (26) l-sana 1986 bi-sha’n al-ijrā’āt amām al-mahākīm al-sharī‘a*,” *Dawla al-Baḥrayn, Wizārat al-‘Adl wa al-Shu’ūn al-Islāmiyya, Idārat al-Mahākīm, Qaṣr al-Riffā*, December 22, 1986.

<sup>323</sup> Jamshīr, *al-Jallād*, p. 40.

authoritative, but came from two different courts (one Sunni, one Shii, but he did not specify which was which). Now the woman is in the serious dilemma of being married to two men, and there is no procedure in place to resolve the issue.<sup>324</sup> Attorney Fāṭima al-Hawāj presented similar complaints, saying that judges often lacked professionalism and honesty, treated lawyers and litigants with disrespect, and that she had personally witnessed instances in which judges allowed themselves to be bribed by women litigants with money or favors when they felt that this was the only way in which they would be granted their legitimate rights.<sup>325</sup>

After listening to the arguments and complaints of the meeting attendees, Shaykh ‘Abdullah pledged to take action: “We will examine the cases our sisters have presented, especially those which have not yet been resolved and have not yet received a verdict. As for those which have received [judgments], a complaint will be lodged with the Supreme Council of Judges to look into it.”<sup>326</sup> He added: “If there was any harm caused by any judge belonging to the Ministry, it is possible to raise [the issue] also to the Supreme Council of Judges to study and investigate it, and issue a conclusive decision.”<sup>327</sup>

Several of the *sharī‘a* court judges responded to the WPC’s accusations, some with outrage, some with a measure of humility. Draft committee member and Shii judge Shakyh Ḥamīd al-Mubārak told *al-Wasaf* newspaper that the judges never claimed to be

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<sup>324</sup> Interview with Attorney Muḥammad al-Muṭawwa‘, Manama, Bahrain, March 19, 2006.

<sup>325</sup> Jamshīr, *al-Jallād*, p. 41.

<sup>326</sup> Ibid., p. 40.

<sup>327</sup> Ibid.

in a position that does not require improvement.<sup>328</sup> Shaykh Ḥamīd admitted that Bahrain's *sharī'a* courts experience problems regarding efficiency and organization. As for these procedural matters, "the timing of hearings, manner of conduct, and the way in which the hearings are managed, we need a comprehensive plan...Now after the creation of the Supreme Council of Judges there is great hope for improvement and solving many problems."<sup>329</sup> As for the accusation that many of the judges are not properly qualified and have been appointed not due to their competence, but due to their friendship with certain officials, Shaykh Ḥamīd responded that even in the highest judicial authorities in the world, capabilities vary. With regard to the implied accusation of nepotism, he responded that "I personally witnessed in the early 1990's that the system offered many educated religious scholars a chance to become judges, but they refused in fear of the social liabilities that accompany this job."<sup>330</sup> As for the serious claim that some of the judges intentionally delay divorce cases in order to bribe women into temporary (*mut'a*) marriages with them, Shaykh Ḥamīd said he never witnessed any such behavior. On the subject of the delay of cases, he explained that the new draft has addressed this problem in part by allowing the judge to force the husband to divorce his wife in cases in which the situation poses a threat to the wife, such as when she has demonstrated the occurrence of domestic violence. Judge Ḥamīd stressed that the judges did not arrive at this decision because they were sympathizing with women seeking divorces, but through exhaustive studies of the Qur'an, Sunna, and the *fatwās* of

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<sup>328</sup> *Al-Wasaf*, "Al-Mubarak," January 19, 2003.

<sup>329</sup> Ibid.

<sup>330</sup> Ibid. There is religious justification for refusing official positions such as that of judge. Several hadiths, both in the Sunni and the Shii collections, that warn against allying oneself with political authorities.

prominent Shii religious scholars such as Sayyid Muḥammad Kaẓim al-Yazdī, who stated that the judge can utilize *ijtihād* in any situation that poses a threat to the wife to force the husband to divorce her.<sup>331</sup> Shii judge Ḥamīd Āl ‘Aṣfūr said that it is unfair to make broad accusations against all the judges because it would unduly harm the reputations of those who are honest and respected, as well as demeaning the entire profession. He agreed that people’s opinions are important, and that they have the right to issue complaints, but that they should do so through official channels.<sup>332</sup>

Other judges were not so cordial in their responses to the WPC’s accusations. Shaykh Jalāl al-Sharqī, judge of the High Sunni *sharī‘a* court said that the claims are reprehensible, alarming, and based on faulty reasoning.<sup>333</sup> Quoting the Qur’an, Shaykh Jalāl said that those who spread such false rumors without providing evidence will end up in Hell: “They follow nothing but conjecture; and conjecture avails nothing against truth, 53 (*Sūrat al-Najm*): 28.” He laid blame for any problems occurring in the courts elsewhere, saying that judges can only rely on the evidence that is presented to them. If the plaintiff fails to provide sufficient evidence, Shaykh Jalāl said, the judge cannot be blamed for what results from it. He added that the Ministry of Justice has placed too great a burden on the judges who number only 23 in a population of 600,000 Bahrainis. The High court is forced to hear 20 cases each day, and the two lower courts 18 cases a day in addition to minor transactions such as the issuance of marriage certificates.

Shaykh Jalāl therefore called for an increase in the number of judges. He defended the

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<sup>331</sup> Ibid.

<sup>332</sup> Public statement made by Judge Ḥamīd Āl ‘Aṣfūr on January 19, 2003, transcribed by Hadiyya Fathallah, Political Assistant, U.S. Embassy, Manama, Bahrain, acquired April 20, 2005.

<sup>333</sup> Public statement made by Shaykh Jalāl al-Sharqī on January 20, 2003, transcribed by Hadiyya Fathallah, Political Assistant, U.S. Embassy, Manama, Bahrain, acquired April 20, 2005.

Sunni courts' handling of cases involving *nafaqa* and *sakan*, saying that these issues are decided based on the husband's financial status, and that judges are careful to ensure that the wife and children are kept at a standard of living equivalent to what they enjoyed prior to the divorce. He did, however, call for the implementation of a codified personal status law as long as it is in keeping with the Qur'an, the Sunna, and the four Sunni *madhhabs*. Shaykh Jalāl supports the Muscat document because it is based on all these things, and because it standardizes procedures and binds judges in all courts. He concluded his statement by exhorting members of the WPC to be pious and devout, and to conform to Islamic norms. He also warned them against attacking *sharī'a* and *fiqh* from the standpoint of secularism.<sup>334</sup>

As women activists, judges, and members of the '*ulamā*' presented their arguments both through official channels as well as to the press, public debate about the family law heated up. After months of no official word regarding the fate of the initiative, on February 20, 2003, Minister of Justice and Islamic Affairs Shaykh 'Abdullah announced the completion of a family law draft in the government-owned daily *Akhbār al-Khalīj*.<sup>335</sup> Strangely, he offered no details about whether the draft would be presented to Parliament, or what the government's timeline was for enactment. He did describe the draft, however, noting that despite being a unified document, the particularities of each sect are preserved in separate articles. The title of the draft was "*Mashrū' qānūn aḥkām al-usra fī tanzīm al-zawāj wa-l-ṭalāq wa-l-nafaqa wa-l-ḥaḍāna*

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<sup>334</sup> Ibid.

<sup>335</sup> Hanā' al-Maḥrūs, "*Qānūn muwaḥḥad li-l-aḥwāl al-shakḥsiyya yataḍamman al-masā'il al-muttafaq 'alayhā*," *Akhbār al-Khalīj*, February 20, 2003.

(Draft family law regulating marriage, divorce, maintenance, and custody),” and comprised a total of 139 articles. Shaykh ‘Abdullah disclosed the draft’s treatment of many of the most significant issues such as the rules for parents travelling with children after a divorce, the husband’s obligations for contracting a second marriage, and the division of property after a divorce.

Again, just as it seemed that the law would be submitted to Parliament, it was stalled. By May of that year, members of Parliament began to ask about the draft’s fate. In June, the Minister of Justice and Islamic Affairs Shaykh ‘Abdullah, who had announced the law months before, denied that he had knowledge of its current status. On June 20, 2003, he met with some representatives of a Shii religious institute.<sup>336</sup> Tensions were running high on all sides of the family law debate, especially the tension between some leading members of the Shii ‘*ulamā*’ and the supporters of the codified law. In what would seem like a transparent effort to address that tension, Shaykh ‘Abdullah made statements praising the institute’s work, and appeared in photos in the government-friendly daily, *al-Ayyām*, sitting next to a Shii religious scholar, smiling and enjoying conversation.<sup>337</sup> During the meeting, Shaykh ‘Abdullah was asked about his position on the family law. He responded that he is not in charge of the law, that it is not the Ministry of Islamic Affairs that handles it, but the Ministry of Justice. He did refer to the draft that had been frozen, however, and said that “the law must emerge from the will of the people. It must reflect their true wishes above all.”

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<sup>336</sup> Although the article does not offer any names of the Shii scholars, it does not seem likely that any of the Shii ‘*ulamā*’ who were leading the charge against the family law were in attendance.

<sup>337</sup> Wisām al-Sabu‘, “*al-Ma‘had al-dīnī al-Ja‘farī tajriba rā‘ida wa nataṭala‘ li-mazīd min al-taṭwīr*,” *al-Ayyām*, June 21, 2003.

An official explanation was delivered a couple of weeks later from the Ministry of Justice. Member of the 2002 drafting committee Judge Ḥamīd al-Mubārak announced that the effort to arrive at a workable draft had failed.<sup>338</sup> Stating that all sides had agreed upon the necessity to codify family law, the issue of unifying the laws of both sects had ultimately divided the committee and left them at an impasse. Al-Mubārak said that the women lawyers on the 2002 committee had almost succeeded in getting parts of the legislation passed, but even those efforts failed.

A year later, the government started again from scratch. Partly in response to an opinion poll conducted by the SCW, detailed below, in which 97% of the respondents felt that the family law should be drawn from *sharīʿa*, a new committee was formed exclusively of judges and religious scholars. In addition, separate committees were formed for each sect. Member of the Sunni committee, Yāsir al-Maḥmūd, Sunni judge of the High *sharīʿa* court and self-described Salafī said that a meeting was convened with the Minister of Justice who said that he wanted a law quickly, within a year.<sup>339</sup> He told the judges that the Muscat Document was not appropriate because it was disorganized, not realistic, and did not provide enough flexibility. Instead, the committee looked at the laws of other Arab countries such as Kuwait, Egypt, Syria, and Jordan, as well as using the Muscat Document as a guideline. The committee also decided not to adhere to a single *madhhab*, but chose opinions from all four. Al-Maḥmūd commented that there is no prescription for Muslims to follow just one

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<sup>338</sup> Ḥusayn Khalaf, “*al-Mubarak: Kaddunā naṣṣal illā ḥall lākinna ‘al-tawḥīd’ afshala al-mashrūʿ*,” *al-Wasaʿ*, July 9, 2003.

<sup>339</sup> Interview with Yāsir al-Maḥmūd.

*madhhab*, and that it is best not to have a narrow vision because “the court is not for debating religion, it is for fixing problems.”<sup>340</sup> When asked about the divisive issue of unification of the Sunni and Shii laws, another member of the Sunni committee, Nizām Ya‘qūbī said that he thought it was far too early for such a move. A better approach, Ya‘qūbī suggested, is to implement new laws for each court, wait a few years, and then decide which articles the sects have in common and which articles should be kept distinct.<sup>341</sup>

### **Parliament**

***“This has become a purely political issue, and the losers are women and families” -***

**Member of Parliament ‘Abd al-Nabī Salmān<sup>342</sup>**

Because of the history of its domestic politics, the Bahraini political process has necessarily been defined by sectarian relations. Therefore, any issue that is raised for legislation is immediately measured against its implications for those relations. The family law issue is no exception. The fact that women activists had long-supported the unification of the laws of the two sects into one code gave Shiis reason to worry that any such resulting document could end up jettisoning Shii particularities in favor of Sunni preferences. As we saw in the previous section, it was this issue above all that divided members of the judiciary and prevented the draft committee from reaching a

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<sup>340</sup> Ibid.

<sup>341</sup> Interview with Nizām Ya‘qūbī, Manama, Bahrain, April 5, 2006.

<sup>342</sup> Interview with Member of Parliament ‘Abd al-Nabī Salmān, al-Ā‘alī, Bahrain, March 30, 2006.



solution. Shii members of Parliament have stood firm on this issue as well, opposing statutory unification, and those who did not lost their popular backing. Sunni members of Parliament were divided on a variety of issues.

The forty-seat elected Parliament was given the authority to propose legislation. However, their proposals can be accepted or rejected at the behest of the king. Still, members of Parliament have a degree of power by nature of their visibility, and for some, the strength of their constituent communities. Bahrain's Parliament is largely organized by religiously-affiliated blocs. The Sunni blocs include *al-Minbar al-Waṭanī al-Islāmī*, which is associated with the international Sunni organization the Muslim Brotherhood, and *Jam 'īyya al-Aṣāla al-Islāmīyya*, a Salafi organization, while the Shii bloc is *Jam 'īyya al-Wifāq al-Waṭanī al-Islāmīyya*, the largest Shii political organization. While there are currently fifteen religious political organizations in Bahrain, only three hold seats in the Parliament. It can be said that these blocs are often concerned more with religious ideology and advancing the interests of those whose religious views they share than the technical matters of governance. These interests at times extend beyond national borders, and encompass regional actors who advise Bahraini Parliamentarians how to vote on certain issues, or who are included in Bahrainis' consideration of their own domestic affairs. We will see below that this is the case with the issue of the family law.

During the April 1<sup>st</sup> session of the representative's council in 2003, five members of the *al-Minbar* bloc proposed a discussion of the issue of codification of the

family law.<sup>343</sup> The Muslim Brotherhood is generally considered to be a socially and religiously conservative organization due to its historical involvement with Islamist politics in Egypt and elsewhere. However, the Bahraini Muslim Brotherhood has at times been among the most vocal supporters of liberal policies, including the family law.<sup>344</sup> *Al-Minbar* members first listed several challenges faced by litigants in the *sharī'a* courts: cases drag on too long, especially those divorce cases which are initiated by women; judges too often deadlock between conflicting judgments; judges interpretations are not based on clear verses from the Qur'an or the Sunna; and that the courts have no mechanism with which to implement their rulings. They confirmed that they were in favor of the enactment of a codified law, and argued that it is possible to create a law that is not in violation of Islam as long as it is drafted with the assistance of religious scholars and based on Islamic texts. The *al-Minbar* members argued that the law should also be based on studies which assess current social and family conditions so that drafters can choose only those religious opinions which are best suited to Bahrain's specific needs. Lastly, they called for an increase in the number of judges, and the establishment of training programs to ensure judges' academic and professional competency.<sup>345</sup>

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<sup>343</sup> Description of April 1<sup>st</sup>, 2003 Parliament session, Hadiyya Fathallah, Political Assistant, U.S. Embassy, Manama, Bahrain, acquired April 20, 2005.

<sup>344</sup> *Al-Minbar* members have also opposed legislation aimed at restricting the freedom of assembly, and supported women's political rights. In reference to upcoming Parliamentary elections, *al-Minbar* representative Dr. 'Alī Aḥmad stated in 2006, "Granting women their political rights is not against Islamic precepts. Women should be motivated to achieve their aspirations and contribute to the Kingdom's development. We support women's political empowerment and want to field the best women who can win." See *Bahrain Tribune*, January 26, 2006.

<sup>345</sup> Ibid.

In the meantime, the Supreme Council for Women also issued a statement regarding the family law. On May 3<sup>rd</sup>, 2003, Secretary-General Lūlwa al-‘Awaḍī announced that the SCW welcomed the enactment of a new law regulating personal status issues. She asserted that a unified law would be consistent with King Ḥamad’s program for improving the nation: “The new law is in line with the principles of national unity stipulated in the National Action Charter, and contains the objectives of the amended constitution and His Majesty the King’s reform project.”<sup>346</sup> Despite the great amount of talk about the law, so far the government had not given any indication of when they would set the process in motion. Members of Parliament became frustrated. During the May 6<sup>th</sup> session, member of the *al-Minbar* bloc Dr. ‘Abd al-Laṭīf al-Shaykh threw out the first question to the Minister of Justice and Islamic Affairs, asking why there has been such a considerable delay in enacting the law. The Minister replied that the Ministry has a number of drafts to consider, and that it is still in the process of studying them. He did not comment on the committee that was formed in 2002, or on the draft they had produced.<sup>347</sup>

Public discussion continued between various agents of the state: judges, members of Parliament, and members of the SCW. On Tuesday, May 13, independent member of Parliament, self-described as Salafī in religious orientation, Jāsim al-Sa‘īdī stated to the press that he was surprised by a recent exchange between a group of ‘*ulamā*’ and the king.<sup>348</sup> The ‘*ulamā*’ expressed the opinion that scholars of religion

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<sup>346</sup> Bahrain Tribune, May 3, 2003.

<sup>347</sup> SCW, “*Istiḥlā*,” p. 24.

<sup>348</sup> *Akhbār al-Khalīj*, “*al-Nā’ib Jāsim al-Sa‘īdī: al-Aḥwāl al-Shakhṣiyya*,” May 13, 2003.

should be involved in the drafting of any law that would apply to personal status or family issues, and the king reportedly responded favorably to their request. Al-Sa'īdī said that he appreciates the '*ulamā*'s concern for the country's interests, he would like them to know that the approval or dismissal of the personal status law is none of their concern, but that of the members of Parliament: "I would like to remind them that the National Action Charter and Bahrain's constitution is clear about this matter, and that there is a legislative council that has been chosen by the people to represent them and to convey their needs."<sup>349</sup> He said that the law needs to follow the legislative process in the Parliament, and be presented to the Legal Affairs Committee which is comprised of legal specialists, religious scholars, and researchers who are deeply knowledgeable in these matters. After that, the law will be presented for a vote by the general assembly. Al-Sa'īdī also made an assurance that the law is drawn from the Qur'an, the Sunna, and will not be drafted from any source other than Islam. This is because, he argued, the constitution clearly states that Islam is the country's official religion, and on this basis, the law will not be incompatible with Islam.<sup>350</sup>

Al-Sa'īdī's position opposed that of the Salafī bloc. Upon the occasion of the launch of the SCW 2005 family campaign, Salafī bloc members reported that they were against the law because of the fear that it would violate the *sharī'a*.<sup>351</sup> In 2009 when the Sunni draft came up for a vote, the three Salafī MPs, 'Abd al-Ḥalīm Murād, Ibrāhīm Abu Ṣandāl and Ḥamad al-Muḥannadī were the only Sunnis to vote against it. The

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<sup>349</sup> Ibid.

<sup>350</sup> Ibid.

<sup>351</sup> Suad Hamada, "Deputy hosts open discussion on family law," *Bahrain Tribune*, October 21, 2005.

reason they gave is that they had consulted Salafi authorities outside Bahrain who had advised them to oppose the law.<sup>352</sup>

The issue of whether the family law should even appear in Parliament drew some of the most heated debate between MPs and judges. Shii Judge Shaykh Muḥsin Āl ‘Aṣḥūr and others who spoke during a conference of religious scholars disagreed with al-Sa‘īdī’s position. Shaykh Muḥsin agreed that the codified law was a necessity, but said that members of Parliament and members of the appointed cabinet (*Majlis al-Shūra*) should not be legislators in this case, and nor should the law be subject to voting. Because most legislators are uneducated about the specifics of *sharī‘a*, “subjecting God’s laws to such parliamentary procedures is an insult to their dignity and sanctity.”<sup>353</sup> Even if it were to pass both councils without being altered, he said the law would be subject to amendment in the future either by the Minister of Justice or by royal decree, relying on an argument similar to the one used by Shii ‘*ulamā*’. Another speaker, ‘Abd al-Laṭīf al-Maḥmūd, argued that just because the constitution stipulates that laws must be in line with the rules of *sharī‘a* does not mean that this will be the case. He said one cannot trust politics, “as it is the biggest liar.”<sup>354</sup>

On June 20, 2003, three members of Parliament presented their views on the enactment of a codified law at a seminar convened to discuss the issues surrounding the law.<sup>355</sup> ‘Abd al-Laṭīf al-Shaykh (Muslim Brotherhood), ‘Abdullah al-‘Aālī (Shii), and Farīd Ghāzī (non-religious Economists bloc) presented their perspectives and welcomed

<sup>352</sup> Habib Toumi, “Bahrain – Sunni family law passed by Parliament,” *Gulf News*, May 14, 2009.

<sup>353</sup> *Al-Ayam*, “‘Abd al-Laṭīf al-Maḥmūd wa Muḥsin Āl ‘Aṣḥūr: Iṣlāḥ al-maḥākīm,” June 11, 2003.

<sup>354</sup> Ibid.

<sup>355</sup> Ḥusayn Khalaf, “\*,” *al-Waṣaṭ*, June 21, 2003.

questions and comments. Al-Shaykh began by saying that when he questioned the Minister of Justice about why there was such a lengthy delay in the enactment of the law, it stirred up a tumult in the streets, and that there was much confusion that needed to be cleared up. He then defined exactly what is meant by codification: the organization of rules found in the *sharī'a* and setting them down on paper, and establishing conditions that judges must follow. He said that these rules would only be drawn from the *sharī'a*, and argued that there is Qur'anic text that allows space for new interpretations. Al-Shaykh explained that the principle of codification should not be a sticking point: "The idea of codification is not an invention of *bid'a* outside the *sharī'a*, rather we say that a study of the law must be completed from the perspective of those who are specialists."<sup>356</sup> He said that regarding the issue of the unified law, there was much talk about the difficulties of applying one law in two separate courts. Al-Shaykh argued that it was entirely possible to work with one law without having to dissolve the separate courts. He said that the majority of the law would apply to both sects, while those issues on which there is sectarian particularity would be left to the *ijtihād* of the judge.

Member 'Abdullah al-A'ālī spoke next, and affirmed his absolute opposition to the law. Al-A'ālī explained that codification is exactly what he is opposed to. He said that the idea of codification originated in the West, and that even today, Western culture treats women in an unjust manner. Supporters of codification had responded to the Shii '*ulamā*'s opposition with the argument that Iran, a Shii-majority country with a Shii

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<sup>356</sup> Ibid.

government had had a codified personal status law for some time, and that it had served the population well. About the *fuqahā'* (scholars of jurisprudence) in Iran, Al-A'ālī stated: "They were helpless before the authority of the Shah. They passed that law, limiting *sharī'a*. Even now in Iran we find *fuqahā'* who are opposed to the personal status law there."<sup>357</sup>

Farīd Ghāzī defended codification, claiming that one will not find a personal status law in any Arab country that is incompatible with the Islamic *sharī'a* and makes its demise necessary. Nor do you find a situation in which the Islamic *sharī'a* treats women justly and then the personal status law deprives her of that. This is because, Ghāzī argues, "the law and religion are in agreement."<sup>358</sup> He lamented that, in his view, "Bahrain is the only country that abandons a [whole] part of its people." Ghāzī dismisses as irrelevant the frequent charge of the opposition that the idea of codification comes from the West, and that the term "personal status law" is a Western term: "The term 'personal status law' is a Roman term, and 'family law' is an English term. But we are talking about a law, not about terms."<sup>359</sup> He asserted that despite what Representative al-A'ālī said about the Islamic texts, the law will be drawn from *sharī'a*, and from these texts. Ghāzī concluded with a comment about the opposition: "I don't find justification for...dividing the country into two Bahraïns. They say that everything that has to do with religion, even questions regarding the muezzins should be kept from

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<sup>357</sup> Ibid.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

Parliament. Should we establish a special legislative body for the *'ulamā'* so they can rule on [these questions]?"<sup>360</sup>

The most dramatic stand taken by members of Parliament came after the SCW launched their family law campaign in 2005. Together with the council of Shii *'ulamā'*, al-Wifaq organized a mass demonstration against the family law on November 5<sup>th</sup>.<sup>361</sup> The rally was attended by over 100,000 people, a significant percentage of Bahrain's total population. Members of Parliament and the *'ulamā'* specified that it was not codification itself they opposed, but codification by individuals who were not also scholars of religion. They also opposed the unification of both sects into one law, and the fact that any law coming out of the Parliament could be subject to amendment in the future by the legislative body. Al-Wifaq's chairman Shaykh 'Alī Salmān stated that the Shii bloc would support a codified law only if the constitution was amended to include a provision that would ensure that, "no authority, even the two chambers of the Parliament, has the right to deal with it... The law must be drafted and, if need be, amended only by a religious panel."<sup>362</sup>

Not all Shii members of Parliament agreed. Although he is Shii, member 'Abd al-Nabī Salmān was a member of the Economic bloc, and supported the 2005 family law campaign. Citing economic stability and the needs of Bahraini women and children, Salmān said he believed the country desperately needed the codified law.<sup>363</sup> As a Shii, Salmān tried to broker a settlement between al-Wifaq members and those who

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<sup>360</sup> Ibid.

<sup>361</sup> This demonstration is covered in detail in Chapter 4.

<sup>362</sup> "Bahrain scholars squabble over new family law," *Gulf News*, October 23, 2005.

<sup>363</sup> Interview with 'Abd al-Nabī Salmān.



supported the law, but he was ultimately unsuccessful. Taking the position he did was a risky move, as the next Parliamentary elections were to be held in November of 2006. Salmān knew the risk. He described a meeting called by head of the ‘*Ulamā*’ Islamic Council Shaykh ‘Īsā Qāsim in the early spring of 2006. Qāsim had called all Shii members of Parliament to meet with members of the UIC to discuss the family law. By that time new drafts had been created by a new committee, one for each sect. It was rumored that the drafts would be presented to Parliament sometime before the 2006 elections. According to Salmān, Qāsim had called the MPs together to instruct them to walk out on the vote. If they refused, Qāsim threatened to withdraw his support, and therefore that of the majority of the Shii population.<sup>364</sup> Despite this threat, Salmān continued to support the family law, and in November was voted out of his seat.

### **Supreme Council for Women**

*“Separated families and small children are the ones most affected by the absence of the family law...The family law is a purely social issue and it is wrong to politicize it.” -*

‘Iṣmat al-Mūsawī, SCW Member<sup>365</sup>

At the same time that the Nation Action Charter was being drafted, Ḥamad created the SCW. Emiri decree #44, dated August 22, 2001 established the SCW as an

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<sup>364</sup> Ibid.

<sup>365</sup> SCW Newsletter, “*al-Mar’at al-Baḥraynīyya*,” Volume 3, No. 30, October 2005, p. 5.

advisory body with legal status to assess women's status in political, civil, and social life.<sup>366</sup> Article 1 of the decree states:

The Supreme Council for Women is to be established under the authority of His Majesty, have legal status, and be considered an advisory body on women's affairs for all official agencies...It will express views and decisions on issues directly or indirectly related to women's status. All official bodies will have to consult the Supreme Council for Women before making decisions in this regard.<sup>367</sup>

The king's first wife, Shaykha Sabīka bint Ibrāhīm Āl Khalīfa was made the chairwoman of the SCW, and the council included sixteen members who would be appointed by the king. Shaykha Sabīka would choose the deputy chairwoman. The council was empowered to perform duties including the proposal of public policy regarding the development of non-governmental organizations; the prevention of discrimination against women in public life; and the drafting of a national strategy to improve the status of women and address various problems they may face. The responsibilities of the SCW also included collaboration with ministries and other government agencies as well as non-governmental organizations in order to put into practice principles regarding women's status laid out in the National Action Charter and the Bahraini constitution; following up on the application of laws, resolutions and international conventions regarding women; and the submission of proposals for the amendment of existing legislation related to women; and the expression of views on

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<sup>366</sup> SCW, "*Majlis al-A'la li-l-Mar'a*," Informational pamphlet, 2005, p. 1.

<sup>367</sup> Ibid.

draft laws and decisions dealing with women before they are referred to the appropriate authority. The council was also authorized to recommend specific draft laws required to improve the condition of women.<sup>368</sup>

In a significant statement of the king's seriousness in regard to enacting reform, he chose Lūlwa al-ʿAwaḍī to be the Secretary-General of the council. One of the two first women lawyers to set foot in a Bahraini courtroom, prominent women's rights activist, and pioneering member of the Personal Law Committee, al-ʿAwaḍī would not serve merely as a mouthpiece for the king. Other well-known champions of women's rights were also appointed to the council: Dr. Shaykha Maryam bint Ḥasan Āl Khalīfa, Shaykha Hind bint Salmān Āl Khalīfa, and Dr. Munīra Aḥmad Fakhrū. From the start, one of the initial tasks of the SCW was to begin preparations for the reform of the *sharīʿa* courts, and the choice of al-ʿAwaḍī and the others with their histories of activism affirmed the king's earnestness to reach this goal.

On February 25, 2002, Ḥamad authorized the SCW to conduct a study on divorce cases in the *sharīʿa* courts.<sup>369</sup> In cooperation with the Ministry of Justice and Islamic Affairs, the study was carried out by four women lawyers who were members of the council and specialists in the area of family law. The study analyzed 306 divorce cases with the primary goal of generating concrete recommendations for alleviating some of the difficulties arising from both the processing of cases and the issuing of

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<sup>368</sup> Ibid, pp. 1-2.

<sup>369</sup> SCW, "*Mūjaz ʿan awḍāʿ al-marʿa al-muṭlaqa wa-abnāʾiha amāma al-qaḍāʾ al-sharīʿi* (Summary on the conditions of divorced women and their children in sharīʿa law)," *al-Amāna al-ʿĀmma*, Manama, Bahrain.

rulings.<sup>370</sup> Specifically, the goals of the study were to ascertain the duties of the courts according the code of procedure with regard to the time period within which appeals can take place, and the conditions of retrial; to measure the time required for the courts to hear initial petitions, the length of time it took these cases to be brought to a conclusion, whether they were concluded solely in the court of first instance or if they involved an appeal; to discover the standards used to determine the amounts and details of *nafaqa* (maintenance) and *sakan* (wife's housing after a divorce) rulings; and to examine "the reasons for [why judges] abstained from applying the legal principles found in the Qur'an in cases of marital discord."<sup>371</sup> Organizational meetings took place in early April after which the council commenced the study.

The SCW's findings echoed those which had been published by the PLC nearly two decades before. Women who initiated divorce cases were left in "desperate situations" as the majority of their cases were dismissed.<sup>372</sup> Women in the Sunni court often forfeited their rights and the rights of their children because of the difficulty of proving their claims. In the Shii court, cases brought by women usually ended in dismissal, or the judge forced the wife to pay compensation for a *khul'* divorce, despite evidence of harm. With regard to *nafaqa*, the council found that neither court referred to any objective standard when determining *nafaqa* awards, and did not take socio-economic status, class, life circumstances, or the educational level of the children into account. Several factors contributed to the reduction of awards, including administrative

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<sup>370</sup> Ibid., p. 3.

<sup>371</sup> Ibid., p. 2.

<sup>372</sup> Ibid., p. 4.

fees and the sector in which the husband was employed, for instance if he was not employed in the public sector (in which salaries are easier to confirm), *nafaqa* awards tended to be smaller.<sup>373</sup>

The most substantial problems occurred with regard to *sakan*, the provision of housing for the wife after the divorce for a specified period of time. In 99% of the cases examined in the study, following the divorce the wife and children were forced to live with relatives due to the lack of housing provided by the husband. In the few cases in which the husband was required to provide housing, the judge did not require the living space to be furnished. These rulings seemed especially injurious to some of the wives whose husbands were in the process of establishing a second family.<sup>374</sup>

In their final recommendations, the council advised amending the code of procedures to include measures to expedite the processing of family-related cases; the designation of a special court that would ensure the execution of rulings; and the establishment of a *nafaqa* fund.<sup>375</sup> They also suggested that the procedure of evidence be amended in the manner of those rules in force in the personal status laws of other Islamic countries. The council mentioned the rules of Kuwait specifically, which require the wife and the close relatives to give oaths in cases in which the wife is claiming harm.<sup>376</sup>

With the king's approval, the SCW had also begun to act definitively on many of the concerns that had been raised by women's groups and its own study on divorce.

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<sup>373</sup> Ibid., pp. 4-6.

<sup>374</sup> Ibid., p. 5.

<sup>375</sup> Ibid., p. 8.

<sup>376</sup> Ibid., p. 5.

In April of 2003, a special committee was established to provide legal assistance to women who cannot afford it for themselves.<sup>377</sup> The legal assistance committee worked with the Ministry of Justice to arrange for lawyers who would be assigned to help such women. To further assist Bahraini women in understanding their legal rights and obligations, the SCW published a legal guide titled *Women's Guide to Judicial Procedures in the Sharī'a Courts*.<sup>378</sup> The guide covers both procedural rules for initiating cases and women's rights regarding substantive issues. Also in April of 2003, the SCW secured authorization to establish a grievance unit to receive calls on all issues of concern to both Bahraini and ex-patriot women living in the kingdom.<sup>379</sup> Field offices were opened in all five governorates to receive complaints. The field offices report to the Secretary-General's office, which then studies the complaints and develops solutions to the larger, systemic problems. The SCW then works with lawyers to generate recommendations for legislation that could immediately address these problems. The head of the Grievance Unit explained that calls began coming in to the SCW in 2002, shortly after the council was formed.<sup>380</sup> Between 2002 and 2004 when the Grievance Unit officially opened, more than 11,000 calls had come in. 40% of these calls were from women asking for government housing, most of them having been thrown out by their husbands after divorce. 10% of the calls were from Bahraini women who were married to foreign men, asking for official citizenship for their husbands and/or children. Although the SCW does not have the authority to issue or amend laws,

<sup>377</sup> SCW, "*al-Taqrīr al-Khatāmī: al-dawra al-awwalī 2001-2004*," *al-Amāna al-Āmma*, p. 21.

<sup>378</sup> SCW, "*Dalīl al-mar'a fī ijrā'āt al-taqāḍī amām al-mahākīm al-shar'īyya*," *al-Amāna al-Āmma*, 2<sup>nd</sup> Edition, 2005.

<sup>379</sup> SCW, "*Taqrīr*," p. 21.

<sup>380</sup> Interview with Grievance Unit, Supreme Council for Women, Riffa', Bahrain, February 13, 2006.

they can take formal requests to the king. The Grievance Unit is actively working with the Ministry of Housing and Social Affairs to add housing options for divorced women. They are also planning a campaign to change nationality laws at some point in the future.<sup>381</sup>

In addition to these initiatives, on April 1, 2004, the king approved the creation of a family counseling center in each governate for those families suffering from marital disputes and domestic legal issues.<sup>382</sup> The centers also provide supervision and protection of children of such families in place of police stations which had been used for this purpose previously. The SCW works together with the Ministry of Labor and Social Affairs and the Supreme Council of Judges to instruct judges how to deal appropriately with this issue.<sup>383</sup>

### **SCW Family Law Campaign**

The government's attempts to arrive at a family law draft in 2002 and 2003 failed partly because none of the parties involved could agree upon a unified draft, and partly because the Shii population saw it as yet another attempt by the Sunni rulers to subjugate them. The Shii '*ulamā*' had gained public support for their position, speaking about the issue in Friday sermons, and giving statements to the press. In an effort to counter the '*ulamā*'s presence in the public arena, the government formulated an

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<sup>381</sup> Ibid. During the writing of this manuscript, the SCW announced the start of their nationality campaign in July of 2009. See Bahrain Centre for Human Rights at <http://www.bahrainrights.org/en/node/2927>, viewed on March 15, 2010.

<sup>382</sup> SCW, "*Taqrīr*," p. 21.

<sup>383</sup> Ibid.

extensive campaign to win public approval for the enactment of a codified law. The campaign was organized and directed by the SCW. It began with the administration of a public opinion poll. The SCW contracted the Bahrain Centre for Studies and Research to survey Bahraini's opinions on the question of the codified family law.

The study began in January of 2004, during which initial statistics and information were gathered during focus and discussion groups.<sup>384</sup> A sampling of an initial glance at the main issues was prepared and examined. During the months of February, March and April, the scope of the study was determined and questionnaires were distributed. Analysis was completed and a final report was prepared in May and June, after which the report was published. The study was completed using the responses of 1261 Bahrainis, and covered seven chief topics:

- 1) the extent of the necessity to enact a law that codifies *sharī'a* rules related to the family
- 2) the role of the *sharī'a* courts regarding the law
- 3) the competence of the *sharī'a* judges
- 4) the Personal Status laws of other Arab and Islamic countries
- 5) the Parliament and its role in the enactment of a family law
- 6) how to deal with disputes between spouses in the different *madhhabs*
- 7) the basic elements presumed to be included in such a law.<sup>385</sup>

A variety of statistics about the group of respondents is presented in the report. 53.8% of the respondents were female, while 46.2% were male. 70.3% were married, while 29.7% were single. Age groups of the respondents were broken down as follows: 18 – 24 years old, 25.5%; 25 – 31 years old, 21.1%; 32 – 40 years old, 28.9%; 41 – 50 years

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<sup>384</sup> SCW, "*Istiqlāl*," p. 37.

<sup>385</sup> Ibid., pp. 37-38.



old, 16.4%; 51 – 60 years old, 5.9%; and older than 60 years, 2.2%. Educational background was also taken into account. 6.2% of the sample completed less than primary school; 17% completed less than secondary school; 46.2% completed secondary school; 29% completed university studies; and 1.6% completed graduate or professional school.<sup>386</sup> The one statistic that is highly relevant to the family law issue that was not included in the study is the sect of the respondent.

After being asked about their personal information, the respondents were asked if they had knowledge of the rules and principles regarding the family currently applied in Bahrain. A majority (58.8%) admitted that they did not have knowledge of such rules. They were then asked if they thought it necessary to establish a codified law. 26.8% strongly agreed, 46.9% agreed, 14.8% were not sure, 9.8% did not agree, and 1.7% strongly disagreed that a law was necessary.<sup>387</sup> The study included a breakdown of the sex of the respondents to this question and found that of those who agreed or strongly agreed, the majority were women (56.08%), and of those who disagreed or strongly disagreed, a majority were men (64.38%). When asked if the law should be drawn from the *sharī'a*, an overwhelming majority answered that it should (66.9% strongly agreed, and 30.1% agreed), while only 6% answered that it should not. A large majority (28.2% strongly agreed, and 44.2% agreed) also believed that the enactment of a family law would limit the occurrence of the break-up of families, and 20.2% were not sure.<sup>388</sup> Regarding the issue of whether to unify the law to apply to both sects, or

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<sup>386</sup> Ibid., pp. 42-45.

<sup>387</sup> Ibid., p. 47.

<sup>388</sup> Ibid., p. 50.

keep two separate laws, the respondents were fairly evenly divided. They were given four options and asked to choose the one they preferred: 30.1% preferred a unified law for both sects; 34.6% preferred a unified law that would include separate sections for each sect to cover certain issues; 29.8% thought the laws should be kept separate; and 5.6% did not believe any law should be enacted.<sup>389</sup> Last, the respondents were asked who should draft the family law. They were given three options: 1) a group of scholars of jurisprudence (*al-fuqaha' al-shar'iyyīn*) and religious scholars (*'ulamā' al-dīn*), 2) legislators, or 3) a committee composed of all of the above in addition to members of some NGOs. A slight majority of respondents (53.6%) chose the last option, while 45.9% chose the first option, and only 12.1% chose the second.<sup>390</sup>

The public opinion survey was the SCW's first step in attempting to establish national consensus on the enactment of a codified family law. In the meantime, the king made a move that shocked the nation. In March of 2004, King Ḥamad suspended six *sharī'a* court judges indefinitely. The six judges were some of the same judges accused by Ghada Jamshir and the PLC of misconduct.<sup>391</sup> They were replaced by judges who were comparatively more qualified, younger, and more open-minded. Member of the 2002 family law drafting committee Zīnat al-Manṣūrī considers this a watershed moment when the climate in Bahrain changed, and issues involving the *sharī'a* courts came out in to the open: "There is more transparency now. People exposed the corruption and indiscretions. People are not afraid anymore to talk in the open about

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<sup>389</sup> Ibid., p. 52.

<sup>390</sup> Ibid., p. 57.

<sup>391</sup> U.S. Department of State, "Bahrain," February 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41719.htm>, viewed on March 8, 2010.

these things.”<sup>392</sup> Al-Manṣūrī also said that the character of the courts had changed as well, much for the better: “Some of the new generation of judges are more engaged with society. In the past they held themselves above society. The new judges don’t just sit and advise, they listen instead.”<sup>393</sup> Although the king did not offer any explanation to the public for his dismissal of the judges, observers attributed his decision to the work of Ghāda Jamshīr, and especially, her exposure of the divorce case of Badriyya Rabī’a, a woman who lost custody of her two children due to a particularly poorly handled case.<sup>394</sup>

At a press conference marking the occasion of Arab Women’s Day on February 1, 2005 Chairwoman of the SCW Shaykha Sabīka bint Ibrāhīm Āl Khalīfa announced the council’s intention to promote the promulgation of a codified family law.<sup>395</sup> She said that, according to the opinion poll conducted by the SCW, the enactment of the law is an urgent demand of Bahraini society. Shaykha Sabīka asserted that the law would solve many problems faced by Bahraini women, and would help support family stability. She said it would also be based on *sharī’a*, and would preserve the character of the Bahraini family.<sup>396</sup>

## A SECURE FAMILY = A SECURE NATION

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<sup>392</sup> Interview with Zīnat al-Manṣūrī.

<sup>393</sup> Ibid.

<sup>394</sup> Interview with Secretary-General of the Supreme Council for Women, Lūlwa al-‘Awadī, Riffa’, Bahrain, March 26, 2006; Interview with Attorney Jalīla al-Sayed, Manama, Bahrain, March 12, 2006; Interview with Hadīyya Fathallah, Political Assistant, U.S. Embassy, Manama, Bahrain, April 20, 2005. See Chapter 3 on the work of the women activists.

<sup>395</sup> SCW Newsletter, “*al-Mar’at al-Baḥraynīyya*,” Volume 3, No. 23, February 2005, p. 1.

<sup>396</sup> Ibid., p. 2.

Secretary-General of the SCW Lūlwa al-‘Awaḍī officially launched the SCW family law campaign, “A Secure Family = A Secure Nation” in a press conference on October 9, 2005.<sup>397</sup> Al-‘Awaḍī announced that the goal of the campaign was to raise awareness of the role a family law can play in increasing social stability, preventing the violation of litigants’ rights in the *sharī‘a* courts, and eliminating discrimination against women. She said that the campaign would especially target housewives who may not fully understand their rights or the way in which a codified law could secure them. The campaign was designed in three phases. The first phase consisted of a series of public seminars, press interviews, and the distribution of informational materials in public spaces such as malls and plazas. The second phase analyzed the results of the first, and the third would be based upon those results.

During the course of the announcements made by al-‘Awaḍī and by the Chairwoman Shaykha Sabīka, the SCW was careful to address those who stood on all sides of the debate. Al-‘Awaḍī noted the *‘ulamā*’s rejection of the Parliament’s role in future amendments to the law, and their fear that those amendments could entail the removal of *sharī‘a* rules from the law, but said that the SCW was in the process of negotiating with the government to secure regulations in the law that would prohibit members of Parliament from making any amendments to the law without the approval of leading Sunni and/or Shii judges and religious scholars. She stated that a focus of the campaign would be to discourage people from closing their minds to the idea of a codified law because of the objections that had already been raised against it by some of

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<sup>397</sup> *Bahrain Tribune*, “Campaign launched for family law in Bahrain,” October 10, 2005.

the *‘ulamā’*. She referenced the 2002 drafting committee and said that it was forced to cease its activities because it was rejected by women who were influenced by the *‘ulamā’*. Al-‘Awaḍī stated that the SCW does support one, unified law that would cover both sects because it would enhance national unity. However, she said that if there is too much opposition to the idea, then having a separate law for each court would be better than having no law at all.

In her press statement made on October 21, Shaykha Sabīka paid special tribute to the women activists who had worked for the family law.<sup>398</sup> She described their efforts and reiterated their demands and goals, affirming their importance. She also portrayed the SCW campaign as a national, inclusive project: “The Supreme Council for Women welcomes the participation of everyone in the national campaign for the family law.”<sup>399</sup> Both Shaykha Sabīka and al-‘Awaḍī addressed the interest of those who support the law in reform. Shaykha Sabīka spoke of the importance of regulations to “ensure a fair judiciary system,” and that “such positive developments will help consecrate the principles of the state of law based on the national reforms.”<sup>400</sup> Al-‘Awaḍī described the family law as a legal obligation of the state: “The 1973 constitution and its amendments highlight the government’s duties to protect family stability and the law is part of the kingdom’s keenness on fulfilling its obligations.”<sup>401</sup> That al-‘Awaḍī referenced the 1973 constitution rather than the more recent 2002 one speaks to the discontent with the 2002 document that was still present. This important issue had to be handled carefully, as the

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<sup>398</sup> *Gulf News*, “Lawmakers asked to work on family law in Bahrain,” October 21, 2005.

<sup>399</sup> *Ibid.*

<sup>400</sup> *Ibid.*

<sup>401</sup> *Bahrain Tribune*, “Campaign launched.”

women activist supporters of the family law as well as its Shii '*ulamā*' opponents tended to agree on the fact that the 2002 constitution was a disappointment that belied the king's reform project.

In many of the SCW's public statements, it was made clear that although the SCW was a government agency, it did not have the authority to pass the law or to dictate its contents. As mentioned above, al-ʿAwaḍī explained that the SCW was negotiating with "the government"<sup>402</sup> on the issue of the '*ulamā*'s concern with future amendments of the law made by Parliament. She also highlighted the SCW's role in illuminating some of the problems occurring in the *sharīʿa* courts, and that the council "had contributed to motivating the government to hold pay inspection visits and to courts and evaluate judges' performance."<sup>403</sup> In her statement, Shaykha Sabīka called directly on members of Parliament to "initiate steps to promulgate the family law," making it clear that the law would not be forced on the country.<sup>404</sup>

Throughout the month of October, the SCW held seminars during the weekly salons of members of Parliament, religious scholars, and women activists. In its monthly newsletter, the council published quotations that supported, or seemed to support the family law. Judges, '*ulamā*', members of Parliament, and prominent members of society of every political and religious perspective were featured as being in agreement with the campaign's goals.<sup>405</sup> Unfortunately for the council, the campaign did not succeed in winning the public's support. On November 5, al-Wifāq and the UIC

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<sup>402</sup> *Bahrain Tribune*, "Campaign launched."

<sup>403</sup> *Ibid.*

<sup>404</sup> *Gulf News*, "Lawmakers asked."

<sup>405</sup> SCW Newsletter, "*al-Marʿat al-Baḥraynīyya*," Volume 3, No. 30, October 2005.

brought over 100,000 demonstrators out in the streets to reject the law. This was not merely a symbolic action. Shaykh ‘Īsā Qāsim issued a statement in the press asserting that the Shiis would fight the law to the death if necessary: “our faith is more valuable to us than our blood.”<sup>406</sup>

In November, the SCW admitted defeat. Secretary-General al-‘Awaḍī cited two primary reasons for the failure of the campaign. For one, the approach did not reach the grassroots, such as housewives in the villages. As for the other, al-‘Awaḍī blamed the influence of the *‘ulamā’*: “The majority of women rejected the bill not because they were against it, but because scholars did not want it. I thought that reaching out to the entire population would be a simple mission because of Bahrain’s size, but I came to know that some segments in society are unreachable because of their dependence on their leaders...Most women who took part in rallies against the law don’t know much about it.”<sup>407</sup>

## CONCLUSION

As the SCW campaign was dying a quick death, two legal committees were busily working. One Sunni, one Shii, the committees were formed by the king after the results of the SCW’s opinion poll reflected that the country was divided on the issue of unification. Separate laws were drafted for each sect, and rumors suggested that they would be submitted to the Parliament for a vote before the 2006 elections. Responding

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<sup>406</sup> UIC Statement, “*Al-Bayan al-Khatami li-l-masirat al-Jamahiriyyat* (The Conclusive Statement on the Public Demonstration),” *al-Majlis al-Islami al-‘ulama’i*, [www.olamaa.com](http://www.olamaa.com), November 9, 2005.

<sup>407</sup> *Bahrain Tribune*, “Bahrain’s family law drive fails to reach grassroots,” November 13, 2005.

to these rumors, members of the Shii *'ulamā'* together with members of al-Wifāq convened an emergency meeting in which they discussed strategies for action. Speaking to the press, Deputy Secretary-General of al-Wifāq Shaykh Ḥuṣayn al-Ḍayhī said that submitting the laws to Parliament would be an undemocratic move on the part of the government since the Shiis had already expressed their views on the subject: "During the meeting, we declared our anger at the government's move to send this issue to Parliament without taking into consideration our views... We believe that this is a dangerous proposal which is disrespectful of our sect and its views."<sup>408</sup> The 2006 elections came and went, and the laws were not submitted until January 3, 2009. Again, Shiis resisted, and on May 14th the Sunni law was passed alone.<sup>409</sup>

As the shining symbol of a new, progressive era and the solution to many very real and serious social problems, the government's family law was supposed to be one of Hamad's crowing achievements. Unfortunately for the law's supporters, the project proved too contentious. Varying interests of the actors and institutions responsible for bringing the law to fruition could not be resolved. Although the National Action Charter promulgated in 2001 promised a truly representative government, the 2002 constitution enacted on its heels belied this promise. After such a move, all initiatives were met with suspicion. The family law plan generated even more mistrust, as it proposed to enter the only area in which Shiis still had autonomy – the *sharī'a* court. As the king responded to the realities of Bahrain's demography, the expectations created by an increase in

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<sup>408</sup> *Gulf Daily News*, "New Protests on family law," September 30, 2006.

<sup>409</sup> Toumi, "Sunni Family Law."



political participation, and the pressures of public debate over the issue, the family law became a political tool rather than a political goal.