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Edinburgh University Press

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FOREWORD

In 1939 the prospect of a war which would involve many Asian nations made men in positions of responsibility in Britain suddenly aware of the meagre number of our experts in Asian languages and cultures. The Scarbrough Commission was set up, and its report led to a great expansion of Oriental and African studies in Britain after the war. In the third decade after 1939 events are making clear to ever-widening circles of readers the need for something more than a superficial knowledge of non-European cultures. In particular the blossoming into independence of numerous African states, many of which are largely Muslim or have a Muslim head of state, emphasises the growing political importance of the Islamic world, and, as a result, the desirability of extending and deepening the understanding and appreciation of this great segment of mankind. Since history counts for much among Muslims, and what happened in 632 or 656 may still be a live issue, a journalistic familiarity with present conditions is not enough; there must also be some awareness of how the past has moulded the present.

This series of "Islamic surveys" is designed to give the educated reader something more than can be found in the usual popular books. Each work undertakes to survey a special part of the field, and to show the present stage of scholarship here. Where there is a clear picture this will be given; but where there are gaps, obscurities and differences of opinion, these will also be indicated. Full and annotated bibliographies will afford guidance to those who want to pursue their studies further. There will also be some account of the nature and extent of the source material.

to those who want to pursue their studies further. There will also be some account of the nature and extent of the source material.

While the series is addressed in the first place to the educated reader, with little or no previous knowledge of the subject, its character is such that it should be of value also to university students and others whose interest is of a more professional kind.

The transliteration of Arabic words is essentially that of the second edition of *The Encyclopaedia of Islam* (London, 1960, continuing) with three modifications. Two of these are normal with most British Arabists, namely, *q* for *ḳ*, and *j* for *dj*. The third is something of a novelty. It is the replacement of the ligature used to show when two consonants are to be sounded together by an apostrophe to show when they are to be sounded separately. This means that *dh*, *gh*, *kh*, *sh*, *th* (and in non-Arabic words *ch* and *zh*) are to be sounded together; where there is an apostrophe, as in *ad'ham*, they are to be sounded separately. The apostrophe in this usage represents no sound, but, since it only occurs between two consonants (of which the second is *h*), it cannot be confused with the apostrophe representing the glottal stop (*hamza*), which never occurs between two consonants.

W. Montgomery Watt
GENERAL EDITOR

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INTRODUCTION

The Role of Legal History in Muslim Jurisprudence

LAWYERS, according to Edmund Burke, are bad historians. He was referring, of course, to a disinclination rather than an inaptitude on the part of early nineteenth-century English lawyers to concern themselves with the past: for contemporary jurisprudence was a pure and isolated science wherein law appeared as a body of rules, based upon objective criteria, whose nature and very existence were independent of considerations of time and place. Despite the influence of the historical school of Western jurisprudence, whose thesis was that law grew out of, and developed along with, the life of a community, Burke's observation is still today generally valid. Legal practitioners, of course, are interested only in the most recent authorities and decisions; and English law, it may be remarked, has declared the year 1189 to be the limit of legal memory for certain purposes. But more particularly, current Western jurisprudence as a whole relegates the historical method of enquiry to a subsidiary and subordinate role; for it is primarily directed towards the study of law as it is or as it ought to be, not as it has been.

Muslim jurisprudence, however, in its traditional form, provides a much more extreme example of a legal science divorced from historical considerations. Law, in classical Islamic theory, is the revealed will of God, a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by

Muslim society. There can thus be no notion of the law itself evolving as an historical phenomenon closely tied with the progress of society. Naturally the discovery and formulation of the divine law is a process of growth, systematically divided by traditional doctrine into several distinct stages. Master-architects were followed by builders who implemented the plans; successive generations of craftsmen made their own particular contribution to the fixtures, fittings, and interior decor until, the task completed, future jurists were simply passive caretakers of the eternal edifice. But this process is seen in complete isolation from the historical development of society as such. The role of the individual jurist is measured by the purely subjective standard of its intrinsic worth in the process of discovery of the divine command. It is not considered in the light of any external criteria or in its relationship to the circumstances of particular epochs or localities. In this sense the traditional picture of the growth of Islamic law completely lacks the dimension of historical depth.

Since direct access to revelation of the divine will had ceased upon the death of the Prophet Muḥammad, the Sharīʿa, having once achieved perfection of expression, was in principle static and immutable. Floating above Muslim society as a disembodied soul, freed from the currents and vicissitudes of time, it represented the eternally valid ideal towards which society must aspire. To call Muslim jurisprudence idealistic is not to suggest that the terms of the law itself lack practical considerations realistically related to the needs of society; nor is it to imply that the practice of Muslim courts never coincided with this ideal. Both such propositions are demonstrably false. It is simply that Muslim legal philosophy has been essentially the elaboration and the analysis of Sharīʿa law *in abstracto* rather than a science of the positive law emanating from judicial tribunals. In

short, the function of Muslim jurisprudence has always been, with one notable but limited exception, to tell the courts what they ought to do, rather than attempt to prophesy what they will in fact do.

Inherent, then, in Islamic law—to use the term in the sense of the laws which govern the lives of Muslims—is a distinction between the ideal doctrine and the actual practice, between the Sharīʿa law as expounded by the classical jurists and the positive law administered by the courts; and this provides a convenient basis for historical enquiry, which would proceed, simply, along the lines of the extent to which the practice of the courts has coincided with or deviated from the norms of the Sharīʿa. Muslim legal literature, however, has shown little interest in such an approach. Biographical chronicles of the judiciary in particular areas, descriptions of non-Sharīʿa jurisdictions and similar works, are not lacking; but they cannot be regarded as systematic or comprehensive accounts of the legal practice, much less as attempts to compare the latter with the doctrine of the scholars. Occasional protests against the legal practice by individual jurists provide the exceptions to the general attitude of resignation which the majority assumed. The standards of the religious law and the demands of political expediency often did not coincide; and perhaps the arbitrary power of the political authority induced the jurists to adopt a discretionary policy of ignoring rather than denying. But however that may be, the nature of Muslim legal literature, coupled with the absence of any system of law-reporting, naturally makes any enquiry along the lines indicated a task of considerable difficulty. Light has been shed on certain aspects of the problem by Western scholarship, but the extent to which the ideal law has been translated into actuality in a given area at a given period remains a grave lacuna in our knowledge of Islamic legal history.

From these brief remarks on the nature of the Sharīʿa, it will be evident that the notion of historical process in law was wholly alien to classical Islamic jurisprudence. Legal history, in the Western sense, was not only a subject of study devoid of purpose; it simply did not exist. Two developments in the present century, however—developments of a wholly different origin and nature but possessing, as will be seen, a link of profound significance—require a radical revision of this traditional attitude. In the first place Joseph Schacht (who would generously ascribe the initiative in the approach he has adopted to that great Islamist of a previous generation, Ignaz Goldziher) has formulated a thesis of the origins of Sharīʿa law which is irrefutable in its broad essentials and which proves that the classical theory of Sharīʿa law was the outcome of a complex historical process spanning a period of some three centuries; further development of this thesis by Western scholarship has shown how closely the growth of Islamic law was linked to current social, political and economic conditions. In the second place the notion of the Sharīʿa as a rigid and immutable system has been completely dispelled by legal developments in the Muslim world over the past few decades. In the Middle East particularly the substance of Sharīʿa family law as applied by the courts has been profoundly modified and to a large degree successfully adapted to the needs and the temper of society.

Islamic legal history, then, does exist. The Sharīʿa may now be seen as an evolving legal system, and the classical concept of law falls into its true historical perspective. This classical exposition represents the zenith of a process whereby the specific terms of the law came to be expressed as the irrevocable will of God. In contrast with legal systems based upon human reason such a divine law possesses two major distinctive character-

istics. Firstly, it is a rigid and immutable system, embodying norms of an absolute and eternal validity, which are not susceptible to modification by any legislative authority. Secondly, for the many different peoples who constitute the world of Islam, the divinely ordained Sharīʿa represents the standard of uniformity as against the variety of legal systems which would be the inevitable result if law were the product of human reason based upon the local circumstances and the particular needs of a given community. In so far, then, as the historical evolution of Sharīʿa law falls into the three main stages of the growth, the predominance and the decline of the classical concept of law, the process may be measured in terms of these two criteria of rigidity and uniformity.

During the formative period of the seventh to ninth centuries diversity of legal doctrine in the different localities of Islam was gradually reduced and the mobility of the law progressively restricted, as the movement towards the classical theory gained ground. In the tenth century the law was cast in a rigid mould from which it did not really emerge until the twentieth century. Perhaps the degree of rigidity which the doctrine attained has been unduly exaggerated, particularly in spheres other than that of the family law; and the notion of a uniform Sharīʿa is seriously qualified by wide variations of opinion between different schools and individual jurists. But a rift certainly developed between the terms of the classical law and the varied and changing demands of Muslim society; and, where the Sharīʿa was unable to make the necessary accommodations, local customary law continued to prevail in practice, and the jurisdiction of non-Sharīʿa tribunals was extended. From this state of coma, fast approaching *rigor mortis*, the Sharīʿa was roused and revived by legal modernism. Comparable to the effect of Equity on the moribund mediaeval

English common law, this movement has freed the congealed arteries of the Sharī'a. In the claim of the modernists the Sharī'a can be adapted to support the social upheavals and progress of modern times. Increasing mobility in the law, therefore, is the modern trend; and since the measure of adaptation of the traditional law is conditioned by the varying reaction of the different areas to the stimuli of modern life, the inevitable result is an increasing diversity of legal practice in the Muslim world.

Fundamental indeed is the distinction between modern Muslim legal philosophy and classical jurisprudence. According to the classical tradition law is imposed from above and postulates the eternally valid standards to which the structure of state and society must conform. In the modernist approach law is shaped by the needs of society; its function is to answer social problems. Thus expressed the distinction is, in broad terms, parallel with the conflict in modern Western jurisprudence between the exponents of *ius naturae* and the sociological school. But Islamic legal modernism in fact represents an interesting amalgam of the two positions. Social engineering, to use the phrase of Dean Pound, the American leader of the school of functional jurisprudence, is a fitting description of modernist activities. Yet the needs and aspirations of society cannot be, in Islam, the exclusive determinant of the law; they can legitimately operate only within the bounds of the norms and principles irrevocably established by the divine command. And it is precisely the determination of these limits which is the unfinished task of legal modernism.

The clash, therefore, between the allegedly rigid dictates of the traditional law and the demands of modern society poses for Islam a fundamental problem of principle. If the law is to retain its form as the expression of the divine command, if indeed it is to remain Islamic law, reforms cannot be justified on the ground of social

necessity *per se*; they must find their juristic basis and support in principles which are Islamic in the sense that they are endorsed, expressly or impliedly, by the divine will. As long as the theory of classical Muslim jurisprudence was predominant such support was difficult to find. Here it is, then, that the connection between modernist legal activities and the results of the researches of Western orientalists becomes readily apparent.

In its extreme form legal modernism rests upon the notion that the will of God was never expressed in terms so rigid or comprehensive as the classical doctrine maintained, but that it enunciates broad general principles which admit of varying interpretations and varying applications according to the circumstances of the time. Modernism, therefore, is a movement towards an historical exegesis of the divine revelation. Western scholarship has demonstrated that Sharīʿa law originated as the implementation of the precepts of divine revelation within the framework of current social conditions, and thus provides the basis of historical fact to support the ideology underlying legal modernism. Once the classical theory is seen in its historical perspective, as simply a stage in the evolution of the Sharīʿa, modernist activities no longer appear as a total departure from the one legitimate position, but preserve the continuity of Islamic legal tradition by taking up again the attitude of the earliest jurists and reviving a corpus whose growth had been artificially arrested and which had lain dormant for a period of ten centuries.

Modernist activities, therefore, can find their most solid foundation in a correct appreciation of the historical growth of Sharīʿa law. As this movement gathers momentum and a new era in Muslim jurisprudence is ushered in, legal history assumes a role of vital and previously unparalleled significance. The Muslim jurist of today cannot afford to be a bad historian.

Part One

THE GENESIS OF SHARĪ'A LAW

CHAPTER I

QUR'ĀNIC LEGISLATION

'OBEY God and His Prophet.' In this Qur'ānic command lies the supreme innovation introduced by Islam into the social structure of Arabia: the establishment of a novel political authority possessing legislative power.

Prior to the advent of Islam the unit of society was the tribe, the group of blood relatives who claimed descent from a common ancestor. It was to the tribe as a whole, not merely to its nominal leader, that the individual owed allegiance, and it was from the tribe as a whole that he obtained the protection of his interests. The exile, or any person hapless enough to find himself outside the sphere of this collective responsibility and security, was an outlaw in the fullest sense of the term, his prospects of survival remote unless he succeeded in gaining admittance into a tribal group by a species of adoption or affiliation known as *walā'*.

To the tribe as a whole belonged the power to determine the standards by which its members should live. But here the tribe is conceived not merely as the group of its present representatives but as a historical entity embracing past, present, and future generations. And this notion, of course, is the basis of the recognition of a customary law. The tribe was bound by the body of unwritten rules which had evolved along with the historical growth of the tribe itself as the manifestation of its spirit and character. Neither the tribal *shaykh* nor

any representative assembly had legislative power to interfere with this system. Modifications of the law, which naturally occurred with the passage of time, may have been initiated by individuals, but their real source lay in the will of the whole community, for they could not form part of the tribal law unless and until they were generally accepted as such.

In the absence of any legislative authority it is not surprising that there did not exist any official organisation for the administration of the law. Enforcement of the law was generally the responsibility of the private individual who had suffered injury. Tribal pride usually demanded that inter-tribal disputes be settled by force of arms, while within the tribe recourse would usually be had to arbitration. But again this function was not exercised by appointed officials. A suitable *ad hoc* arbitrator (*ḥakam*) was chosen by the parties to the dispute, a popular choice being the *kāhin*, a priest of a pagan cult who claimed supernatural powers of divination.

This general picture of the primitive customary tribal law of Arabia in the sixth century requires some qualification as regards the settled communities of Mecca and Medina. Mecca, the birthplace of the Prophet Muḥammad and a flourishing centre of trade, possessed a commercial law of sorts, while Medina, an agricultural area, knew elementary forms of land tenure. In Mecca, moreover, there appear to have existed the rudiments of a system of legal administration. Public arbitrators were appointed and other officials were charged with the task of recovering compensation in cases of homicide or wounding. Yet in both these centres, just as among the Bedouin tribes, the sole basis of law lay in its recognition as established customary practice.

The year 622 saw the establishment of the Muslim community in Medina. The Arab tribes or sub-tribes (with some temporary exceptions) accepted Muḥammad

as the Prophet or spokesman of God, and regarded themselves and his Meccan followers as constituting a group of a new kind wherein the bond of a common religious faith transcended tribal ties. While Muḥammad's position gradually developed into one of political and legal sovereignty, the will of God as transmitted to the community by him in the Qur'ānic revelations came to supersede tribal custom in various respects. To assess the nature and scope of the legislation which the Qur'ān contains and its impact upon the form and substance of the existing customary law is the purpose of the remainder of this chapter.

In the evolution of a society the technical process of legislation is a secondary stage. Reducing into terms of rights and obligations an accepted standard of conduct and providing remedies in the event of its infringement, it presupposes the existence of this accepted standard. Naturally enough, therefore, the religious message of the founder-Prophet of Islam, the purpose of which included the establishing of certain basic standards of behaviour for the Muslim community, precedes, both in point of time and emphasis, his role as a political legislator. Accordingly, the so-called legal matter of the Qur'ān consists mainly of broad and general propositions as to what the aims and aspirations of Muslim society should be. It is essentially the bare formulation of the Islamic religious ethic.

Most of the basic notions underlying civilised society find such a mode of expression in the Qur'ān. Compassion for the weaker members of society, fairness and good faith in commercial dealings, incorruptibility in the administration of justice are all enjoined as desirable norms of behaviour without being translated into any legal structure of rights and duties. The same applies to many precepts which are more particular, and more peculiarly Islamic, in their terms. Drinking of wine and