THEMES IN ISLAMIC LAW

The Origins and Evolution of Islamic Law

WAEL B. HALLAQ

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WAEL B. HALLAQ
McGill University

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THE ORIGINS AND EVOLUTION OF ISLAMIC LAW

Long before the rise of Islam in the early seventh century, Arabia had come to form an integral part of the Near East. This book, covering more than three centuries of legal history, presents an important account of how Islam developed its own law while drawing on ancient Near Eastern legal cultures, Arabian customary law and Quranic reform. The development of the judiciary, legal reasoning and legal authority during the first century is discussed in detail as is the dramatic rise of Prophetic authority, the crystallization of legal theory and the formation of the all-important legal schools. Finally, the book explores the interplay between law and politics, explaining how the jurists and the ruling elite led a symbiotic existence and mutual dependency that – seemingly paradoxically – allowed Islamic law and its application to be uniquely independent of the "state."

Wael B. Hallaq is a James McGill Professor of Islamic Law, teaching at the Institute of Islamic Studies, McGill University. He is the author of *Ibn Taymiyya Against the Greek Logicians* (1993), *A History of Islamic Legal Theories* (1997) and *Authority, Continuity and Change in Islamic Law* (2001).

THEMES IN ISLAMIC LAW I

Series editor: Wael B. Hallaq

Themes in Islamic Law offers a series of state-of-the-art titles on the history of Islamic law, its application and its place in the modern world. The intention is to provide an analytic overview of the field with an emphasis on how law relates to the society in which it operates. Contributing authors, who all have distinguished reputations in their particular areas of scholarship, have been asked to interpret the complexities of the subject for those entering the field for the first time.

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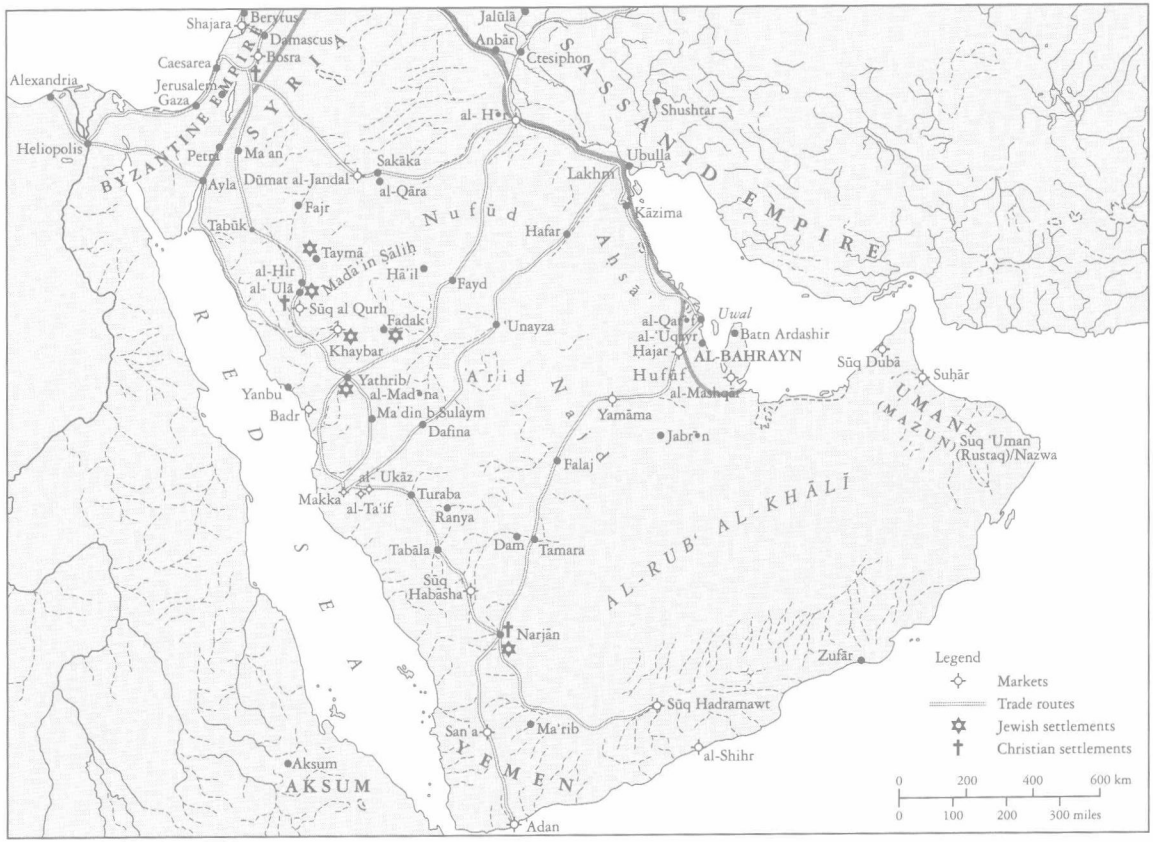
Maps



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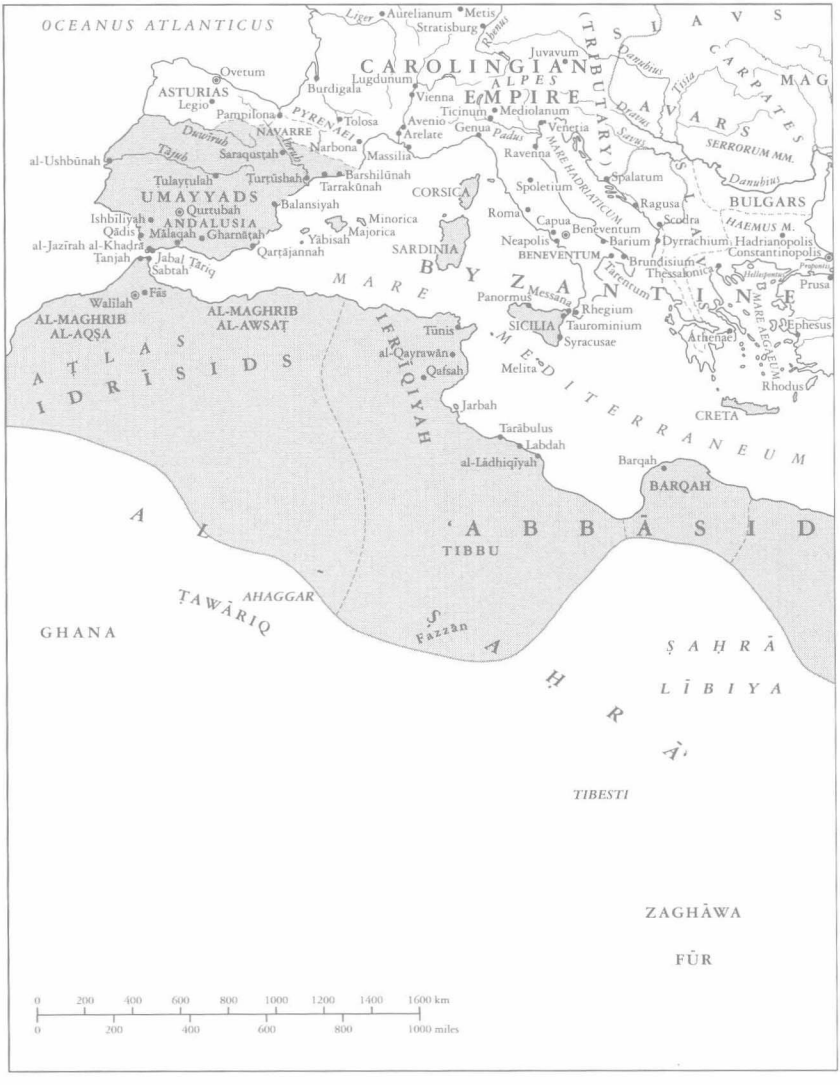
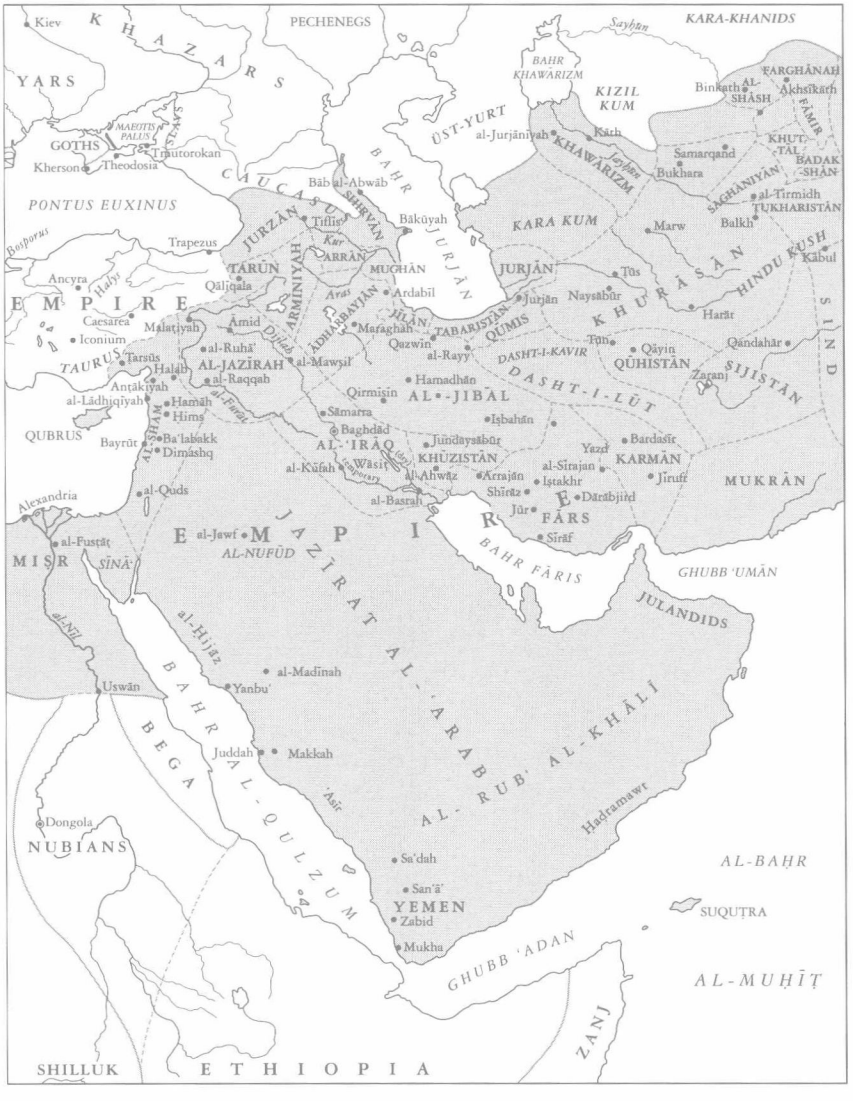


2 Muslim lands in the third/ninth century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ETHIOPIA

Contents

Introduction

One of the fundamental features of the so-called modern Islamic resurgence is the call to restore the Sharīʿa, the religious law of Islam. During the past two and a half decades, this call has grown ever more forceful, generating religious movements, a vast amount of literature, and affecting world politics. There is no doubt that Islamic law is today a significant cornerstone in the reaffirmation of Islamic identity, not only as a matter of positive law but also, and more importantly, as the foundation of a cultural uniqueness. Indeed, for many of today's Muslims, to live by Islamic law is not merely a legal issue, but one that is distinctly psychological.

The increasing importance of Islamic law in the Muslim world since the late 1970s and early 1980s has generated in western academia a renewed interest in this field, which had attracted only peripheral scholarly interest during the preceding decades. And even though the formative and modern periods were, and continue to be, two of the most studied epochs in the history of Islamic law, they remain comparatively unexplored. Worse still is the state of scholarship on the intervening periods, which continue to be a virtual *terra incognita*.[1]

An index of the state of scholarship on the formative period is the fact that, to date, there has not been a single volume published that offers a history of Islamic law during the first three or four centuries of its life. At least three works have thus far appeared bearing titles that contain the designation "Origins," in one way or another associated in these same titles with "Islamic law" or "Islamic jurisprudence."[2] None, however, can boast

[1] For analysis of the selective interests of modern scholarship and their political implications, see Wael Hallaq, "The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse," *UCLA Journal of Islamic and Near Eastern Law*, 2, 1 (2002–03): 1–31. See also the introduction in Wael Hallaq, ed., *The Formation of Islamic Law*, in Lawrence I. Conrad, ed., *The Formation of the Classical Islamic World*, vol. XXVII (Aldershot: Ashgate Publishing, 2003).

[2] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950); Harald Motzki, *Die Anfänge der islamischen Jurisprudenz: Ihr Entwicklung in Mekka bis zur Mitte*

content that truly reflects what is implied in these titles, all three volumes being specialized studies that – however meritorious some of them may be – endeavor to study the formative period through a rather narrow lens.

Although the main contours of legal development during the formative period can be culled from existing primary sources, there is much that remains unexplored. The quality of the sources from the first centuries of Islam is historiographically problematic, but even if this problem did not exist, we would still find that these sources remain quantitatively insufficient. For example, we possess no court records or any other source that can inform us of how the judiciary operated during the formative period, or what went on in courts of law. We have no clear idea of the types of problems that were litigated, how they were resolved, what legal doctrines were applied, how the parties represented themselves, how accessible courts were for women, how the judges used social and/or tribal ties to negotiate and solve disputes, and so forth. Thus, none of these issues can be addressed here in a comprehensive fashion, if at all. In line with the introductory nature of the present series, I attempt in this volume to sketch the outlines of the formative period, presenting a general survey of the main issues that contributed significantly to the formation of Islamic law. And it is in this general coverage that the present work differs from its above-mentioned predecessors, which offer topical or partial treatments rather than a synthesized picture of formative legal development.

Crucial to the present endeavor is the definition of a formative period. What is it that distinguishes a formative era from other historical periods? More specifically in our context, what are the criteria through which we can identify the formative period in Islamic law? Until recently, it has been thought that this period ended around the middle of the third century H (ca. 860 AD), when, following Joseph Schacht's findings, we thought that the all-important legal schools, as personal juristic entities, had come into existence and that, again after Schacht, Islamic law and legal theory had come of age. More recent research, however, has shown that Schacht's findings were largely incorrect and that the point at which Islamic law came to contain all its major components must be dated to around the middle of the fourth/tenth century, an entire century later than had originally been assumed. For our purposes, I define the "formative period" as that historical period in which the legal system arose from rudimentary beginnings

des 2./8. Jahrhunderts (Stuttgart: Franz Steiner, 1991), trans. Marion H. Katz, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools* (Leiden: Brill, 2002); and Y. Dutton, *The Origins of Islamic Law: The Qur'an, the Muwaṭṭa' and Medinan 'Amal* (Richmond: Curzon, 1999).

and then developed to the point at which its constitutive features had acquired an identifiable shape.

I say "identifiable" because all that is needed in the context of "formation" is the coming into existence of those attributes that distinguish and make unmistakably clear the constitutive features of that system. The notion of "formation," therefore, would have to be restricted to the evolution of the general features of the system, since the details – or what we might, philosophically speaking, call "accidental attributes" – endured constant movement and change. Thus, and to continue with our philosophical terminology, formation must be defined in terms of "essential attributes" which make a thing what it is; or, conversely, the absence of any essential attribute would alter the very nature of the thing, rendering it qualitatively different from another in which that attribute does exist. In the case of Islamic law, the essential attributes – those that gave it its shape – were four: (1) the evolution of a complete judiciary, with a full-fledged court system and law of evidence and procedure; (2) the full elaboration of a positive legal doctrine; (3) the full emergence of a science of legal methodology and interpretation which reflected, among other things, a large measure of hermeneutical, intellectual and juristic self-consciousness; and (4) the full emergence of the doctrinal legal schools, a cardinal development that in turn presupposed the emergence of various systemic, juristic, educational and practice-based elements. (Any other essential attribute, such as, e.g., the religious character of the law, must ultimately and derivatively fall under one or more of these four.)

By the middle of the third/ninth century, the third and fourth attributes had not yet developed into anything like their complete form. By the middle of the fourth/tenth century, however, all of them had. And this is the cut-off point. All later developments, including change in legal doctrine or practice, were "accidental attributes" that – despite their importance for legal, social and other historians – did not affect the constitution of the phenomenon we call Islamic law. With or without these changes, Islamic law, for our present purposes, would have remained Islamic law, but without the legal schools or the science of legal theory, Islamic law cannot be deemed, in hindsight, complete.

Far more complex than plotting the end-point of the formative period is the determination of its beginning. It is no exaggeration to say that of all the major questions in Islamic legal history, the issues involved in studying these beginnings have proved the most challenging. The problems associated with "beginnings" have for long stemmed more from unproven assumptions than from any real historical evidence. Hence, the classic

Orientalist creed that the Arabia of the Prophet was a culturally impoverished region, and that when the Arabs built their sophisticated cities, empires and legal systems, they could not have drawn on their own vacuous cultural resources. Instead, it is maintained, they freely absorbed the cultural elements of the societies they eventually conquered, including (but especially) the Byzantino-Roman and Sasanid civilizations. In this account, Syria and Iraq become the loci of legal transmission.

These assumptions have consistently failed to stand the test of scrutiny, as recent research has shown. Except in a few cases, attempts to demonstrate genetic links with these cultures have proved futile, if only because Arabia has provided an equally, if not more, convincing source for much of the law that Islam came to adopt. Chapter 1, therefore, attempts to provide a more balanced account of pre-Islamic Arabia as a region that was an integral part of the general culture of the Near East. Through intensive contacts with the northern Arabs who dominated the Fertile Crescent during the centuries before the rise of Islam, the Peninsular Arabs maintained forms of culture that were closely linked to those prevailing in the north. The Bedouins themselves were to some extent part of this cultural map, but the sedentary and agricultural settlements of the Hejaz were even more dynamic participants in the commercial and religious activities of the Near East. Through trade, missionary activities, and northern tribal connections (and hence the constant shifting of demographic boundaries), their inhabitants knew Syria and Mesopotamia as well as the inhabitants of the latter did the Hejaz. When Muhammad embarked on his mission of establishing a new religion and building a state, he and his collaborators were well acquainted not only with the political and military problems of the Fertile Crescent, but also with its cultures and much of its law. While law as a doctrine and legal system does not appear to have been on the Prophet's mind during most of his career, the elaboration of a particularly Islamic conception of law did begin to emerge a few years before his death. The legal contents of the Quran, viewed in the larger context of already established Jewish law and the ancient Semitic–Mesopotamian legal traditions, provide plentiful evidence of this rising conception.

During the first decades after the Prophet's death, an Islamic polity took shape, guided by both the Quranic legal ethic and the customary laws of the Peninsular Arabs – laws that underwent a gradual transformation under the influence of emerging religious values. Chapter 2 provides a sketch of the evolving legal culture as reflected in the transformations that took place in the office of the proto-*qāḍī*s, the earliest quasi-judges of Islam. The increasing specialization of this office as a judicial function represents

an index of the evolution of an Islamic legal ethic, signified by the concomitant rise of Prophetic authority. Chapter 3 continues this theme by exploring the emergence of the so-called legal specialists, a group of men who in their private lives elaborated a legal doctrine that became the juristic foundation of legal practice. With the rise of the class of legal specialists at the end of the first century H and the beginning of the next (ca. 700–40), there again occurred a concomitant development in the construction of Prophetic authority, represented by the emergence of *ḥadīth*, the verbal expression of the Prophetic model. Chapters 2 and 3 thus explain, among other things, how Prophetic authority was to emerge out of the ideas of social consensus and the model behavior (*sunna*; pl. *sunan*) of the tribal and garrison societies that contributed to the first stage of empire-building.

Chapter 4, which takes up the next stage of judicial development, describes the process through which the Muslim court, as part of the empire's structure, acquired its final shape, in which all its essential features came into existence in developed forms. Chapter 5 treats jurisprudential changes that occurred parallel to the developments in the judiciary described in the previous chapter. Here, we return to the changing dynamics of legal authority, which marked a further, but still gradual, shift from what we have called sunnaic practice to a staggering proliferation of Prophetic *ḥadīth*. In this chapter, we also describe the relationship between these competing sources of the law and the positive concepts of consensus, *ijtihād* and *raʾy*. A discussion of the changing relationship between the latter two also illustrates the evolving dynamic of legal reasoning toward stricter and more systematic procedures.

By the end of the second/eighth century, all essential features of the judiciary and positive legal doctrine had clearly acquired a highly developed form, only to undergo further refinements, *mutatis mutandis*, throughout the centuries thereafter. But legal theory, the so-called *uṣūl al-fiqh*, remained in embryo, still struggling to take shape. Indeed, the competing movements of the rationalists and the traditionalists (initially discussed in chapter 3, section 4) would have to settle on a compromise before such a theory – which ultimately came to define Sunnite Islam itself – could emerge. Chapter 6 examines what I have called the Great Rationalist–Traditionalist Synthesis, and how legal theory emerged out of it. The remainder of this chapter offers an outline of this theory as it stood during the second half of the fourth/tenth century.

Chapter 7 offers an account of the rise of doctrinal legal schools (*madhhab*s), the last feature of Islamic law to develop. These schools originally

emerged out of the scholarly circles of legal specialists, going through a middle stage dominated by what I have termed "personal schools" (a designation mistakenly used by some scholars to refer to what I in this monograph have characterized as doctrinal schools). In this chapter, I also attempt to explain why only four legal schools survived, and why the others failed to do so. It will become obvious that the success of the four schools, as well as their evolution to the final stage of doctrinal schools, was partly connected with a particular relationship that existed between law and the legal profession, on the one hand, and the political, ruling elite, on the other. Although this chapter completes the account of the formation of Islamic law in all its constitutive elements, this relationship between law and politics remains in want of further analysis, and this I take up in the eighth and final chapter. Here, I discuss the relative independence of positive law from government, and the symbiotic relationship that existed on the basis of mutual interests between the legal profession and those wielding political power. Despite all of the attempts of the latter to manipulate the law, classical Islam, in my view, offered a prime case of the rule of law. To say that the caliphs, rulers and their proxies ultimately fell under the imperatives of the religious law is merely to state the obvious. Yet, it is undeniable that political authority and power did affect the evolution of certain aspects of law, especially the direction in which the legal schools developed and were shaped. The reader, therefore, may find it beneficial to review chapter 7 after having read chapter 8. Finally, the conclusion offers a summary of the main issues raised in this volume, with a view to providing a synthetic account of how these issues contributed to the formation of Islamic law.

One further remark about calendars. This book uses a dual system of dating: one is the Muslim Hijri calendar, the other Gregorian (e.g., 166/782). To omit the former would deprive the reader of the sense of relativity of time in Muslim history; and to omit the latter would probably aggravate the problem even further (and in other ways to boot). I have therefore thought it judicious to use both calendars. But this method has its own problems, hence the following caveat: In this work, it is often stated that this or that event occurred, for example, "at the end of the second/eighth century." In fact, the end of that Hijri century, say 190–200, corresponds to 805 to 815 AD, i.e., the beginning of the ninth century AD. Stylistically, it would be awkward consistently to render the Gregorian equivalent of the approximate Hijri date numerically. So the reader is advised that in such contexts, the Gregorian dates in this book are provided merely as guidelines, whereas the Hijri calendar reflects the