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Transliteration

We have used the standard transliteration of non-European words as adopted in the *Bulletin of the School of Oriental and African Studies,* including the diacritics. These words are italicised throughout. For convenience, I have generally preferred Arabic words over Persian, Malay, or Indian equivalents. Thus the word *sharī'a* (Islamic law) will be, unless otherwise dictated by the context, preferred to *Shariah* or *Shariat*. Where relevant, the transliteration chosen by each contributor was retained.

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PART II- CONTEMPORARY STUDIES

1. Introduction
On Islam and Democracy*

Chibli Mallat

History and Law

This book opens some avenues of modern scholarship to the study of public law in the Islamic classical and contemporary tradition.

Could addressing 'public law' avoid being drawn immediately on the terrain of politics? Since the early preparations for the conference leading to this work, there was a persistent concern to produce studies which would not be immediately overtaken by events. That was a tall order, and the recent sectarian turmoil in India serves as a reminder of the difficult burden which an adverse atmosphere creates in the face of detached scholarship. It is indeed a tribute to this high standard that, some four years after it was initially written, Chapter 8 reads as an unsullied rock of careful and eloquent assessment of one of the most delicate questions in the public law of India -- conversion to and from Islam. Nor are issues of Islam and public law in India unique, and the rules on conversion in the converse mirror of a country with a Muslim majority --Malaysia--, are surveyed in Chapter 9. The questions which this book addresses are of persistent importance on worldwide level.

So in order to secure the staying power of a scientific exercise against quickpaced and disruptive events, it was necessary to allow for a serious examination of the tradition. Some methodological principles helped guide the project away from the buffeting of portentous developments. Whether for the classical age or for the contemporary Muslim world, scholarly research on public law must respect a set of axiomatic requirements. First, the perusal of the tradition cannot be construed as a mere retrospective reading. By simply projecting present-day concepts backwards, it is all too easy to force the present into the past either in an apologetically contrived or haughtily dismissive manner. The approach is apologetic and contrived when

*This contribution was presented in a preliminary form at a seminar organised by the Foreign and Commonwealth Office on September 24, 1992.

Bills of Rights are read into, say, the Caliphate of 'Umar, with the presupposition that the 'just' qualities of 'Umar included the complex and articulate precepts of constitutional balance one finds in modern texts.[1] It is haughtily dismissive when the notion of 'human rights' is rejected a priori as a 'Western' concept. In that view, 'Western' models subsumed under imperialism, colonialism and other orientalisms are allegedly foisting concepts over Muslim societies which, one is told by intolerant or simple-minded sloganeering, do not need them. A recurrent form of this approach can be heard in an increasingly unashamed mode as 'the antagonism between Islam and democracy' and their allegedly quintessential and eternal incompatibility. These clichés are too pervasive to need an illustration, and can be found across the planet, in 'Islamic' as well as 'Western' circles. They generally reflect excuses for various forms of authoritarianism.

A corollary to the methodological flaw in the historical exercise can be found in Lucien Febvre's warning. The French historian, who founded the celebrated *Annales* school, cautioned against the worst mistake that the professional historian could commit: 'anachronism'.[2] Febvre's 'métier d'historien' can simply not tolerate the defacing of history by reading into the past categories of thought and practice which belong to more recent times.

But is history not inevitably retrospective, or in the words of the Italian philosopher Benedetto Croce, is history not always a contemporary exercise ?[3]

The present work must be assessed in the confluence, through law, between the contemporaneous vision of Croce and the scientific caution of Lucien Febvre. Through law, an effort to integrate the two visions is undertaken. In classical studies, texts are being asked for what they say, on *bay'a* and *shūrā*, on *iftā'* and 'appellate jurisdiction' in the theory and practice of Islamic law. In the contemporary section, decisions of the highest courts in the Egyptian and Malaysian systems speak on practical problems and their legal solutions, while custom and the reinterpretations of Islamic law are questioned from within the tradition. Legal research, throughout, respects Febvre's warnings. Yet the Crocean inevitability of contempo-

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[1] A good critique of Islamic 'Human Rights Instruments' can be found in Ann E. Mayer, *Islam and Human Rights,* Boulder and London, 1991.

[2] "Pour l'historien,... le problème est d'arrêter avec exactitude la série des précautions à prendre, des prescriptions à observer pour éviter le péché des péchés- le péché entre tous, irrémissible: l'anachronisme.' L. Febvre, *Le Problème de l'Incroyance au Seizième Siècle,* Paris, new ed. 1947, p.6.

[3] 'Ogni vera storia è storia contemporanea.' B. Croce, *Filosofia, Poesia, Storia,* Milan, 1952, p.444.

raneity is patent. When the theory of the Egyptian Supreme Court is developed, the profound tradition of Egyptian law, including the *sharī'a*'s, is made use of to enlighten and direct the decisions of the Court. To the extent that law, by definition, relies on precedent, the legal field is the area par excellence in which the Crocean and Febvrian visions of history may fuse. Unlike the professional historian, who seeks constantly to avoid retrospective reading, the lawyer thrives, for his immediate pressing practice, on the enlightenment of the tradition. The law lives on precedent.

Even in its classical endeavours, therefore, this book is highly contemporary. Through a network of key concepts, the tradition is questioned in a way which may and will be used to respond to immediate needs. But the depth and accuracy of the answer, through the rigour of analysis and research, is conditioned by the scientific mediation which Lucien Febvre would have appreciated.

* * *

For details, each chapter will respond for itself.

In the following pages, some preliminary reflections triggered by the present work will be offered on perspectives which scholarship casts on public law and Islam, and the haunting corollary of the 'question' of Islam and democracy.

I will use for this exercise two texts on the rule of law, which are separated by a thousand years, with a perspective on the debate about the compatibility of Islam and democracy through the prism of the rule of law.

Classical Texts and the Rule of Law

Shamseddīn al-Sarakhsī (d. 1090 A.D.) is one of the greatest jurists of the classical age, and his 30-volume *Mabsūṭ* ranks among the master legal books of mankind. Whilst some works of great value have examined Sarakhsī's compendium in some detail, a full investigation of the logic of Sarakhsī is yet to be undertaken, and only a comprehensive reading of his works will discover all the riches that his oeuvre carries: as Roy Mottahedeh has once noted, *fiqh* books yield surprising results in the most unexpected places.

This can be witnessed, for the purpose of our work, in the following remarks by Sarakhsī, which appear in the course of his discussing the legal

regime of waters and the role of state and ruler in the protection of the rule of law. The question put to Sarakhsī is 'about the validity of the granting by the Emir of Khurāsān to an individual of a right of irrigation from the waters of a great river, when that right was not [so established] before, or if the individual had irrigation for two *kuwwa*s [a measure of flow] and the Emir increased this measure and granted him that right over a land which may or may not be on the land of a third party'.

Sarakhsī's answer involves principles of larger impact than the strict watersharing issue at hand:

> If this decision of the Emir harms the public, it is prohibited, and it is permissible if it doesn't, that is if [the operation] did not take place on the land of a third party, for the ruler (*sulṭān*) has a right of supervision (*wilāyat naẓar*) without harming the public. So in case there is no such harm, the grant is valid for the grantee, but if harm occurs, the grant would be harmful to the public and the sultan is not allowed to carry it out.

Sarakhsī further explained that

> in the case of harm to the public, each individual can ask for the order's rescission, for the ruler (*imām*) would be impairing the individual's right (*mubṭilan ḥaqqah*). The ruler has only authority to collect his rights of the public (*wilāyat istīfā' ḥaqq al-'āmma*) and not the authority to impair them, and that only in a way which does not harm the public.

In the particular case at hand, 'the grant should not have taken place... and it is not permissible for the Emir of Khurāsān to empty (*aṣfā*) a man's right of irrigation over his land to the benefit of another, and the right must be given back to the original beneficiary and to his heirs'.

The most remarkable passage for our concern follows from the definition which the Ḥanafī jurist gave to *iṣfā'* (literally the 'drying' or 'emptying' of a right):

> What is meant by the word *iṣfā'* is usurpation (*ghaṣb*, wrongful seizure) but he [Sarakhsī] kept his tongue and did not use the word

> *ghaṣb* for the actions of rulers because of its rough connotations, and he chose instead the word *iṣfā'* as a sign of caution before the ruler. Abu Ḥanīfa, God have mercy on his memory, used to advise his friends in this manner, for man should be attentive to his own interest, keep his tongue and respect the ruler even if in such an action the ruler is equal to others before the law (*al-ṣulṭān ka-ghayrihi shar'an*). Didn't the Prophet say: the hand is responsible for what it took until it gives it back? The granting of ownership to other than the right owner is void, and the good which is wrongfully appropriated must be returned to his owner if alive and to his heirs after his death, and so for the sultan's appropriation of what belongs to the people.[4]

This passage epitomises for me the complex attitude to the rule of law which the Islamic tradition conveys. A few key elements can be established. There is a rule of law which is independent from the authority of the ruler, and 'the people' are entitled to protection against the ruler's impingement on their rights. In between the ruler and the people stands the interpreter, and perhaps the most touching element in the text is the acknowledgment that the interpreter is caught in a web which does not allow him to speak his mind in a straightforward and unadulterated manner. Caution and safety are urged, and a duty of reserve ensues.

Sarakhsī's answer is particularly useful for the development of the method of reading classical texts from a contemporary perspective, and in the repeated efforts on the way to 'modernism' in the Islamic world. Ever since Emir Shakīb Arslān wrote his pamphlet on 'why did the Muslims remain behind and the others make progress ?',[5] which itself offered poor practical answers beyond the call for a renewed attachment to the faith, reformism, tradition, fundamentalism, democracy, and other holistic and basic questions have been recurring in the debate. Starting from this passage of Sarakhsī and my modest practice of modern and classical texts, I would like to attempt a few answers.

The questioning of classical texts must remain cautious. If the contemporary reader of classical works is looking for the word democracy, or the expression human rights, he can only be disappointed by what he finds in law books. In Febvre's words, this investigation would be purely

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[4]All quotes from Sarakhsī, *Al-Mabsūṭ*, Cairo, 1906-1912, Vol. 23, p.183.

[5]Shakīb Arslān, *Limādha Ta'akhkhara al-Muslimūn wa Limādha Taqaddama Ghayruhum?*, Cairo, 1930.

anachronistic. It would hardly be different when recent scholarship suggests that the concept of separation of powers, for which fatherhood is universally admitted to have been the honour of the Baron de Montesquieu, was constructed in *l'Esprit des Lois* in 'undemocratic' ways and means.[6] Similarly, a formal depiction of the separation of powers will not appear in the unitary classical status combining ruler and ruled, but this does not mean that the concept doesn't have an intellectual pedigree also in previous Islamic societies. Manifestations of an effective line drawn between several spheres inside and outside government are manifold in the history and law books, but Sarakhsī shows how constraints operate on a writer, who must 'keep his tongue' (*hafiẓa lisānah*) whilst acknowledging, *in petto,* the ruler's breach of law.

In the history of Muslim societies, the list is long of those who spoke their mind, and paid a heavy price for it. Like for Portia in *the Merchant of Venice*, it proved for Sarakhsī 'easier [to] teach what were good to be done, than be one of the twenty to follow [his] own teaching'.[7] He is reported to have written the *Mabsūṭ* whilst in prison for 'a word of advice' to the local ruler.[8] But there is no doubt that a consciousness of an infringement on the rule of law, here connected with administrative expropriation of an individual right, was clear to Sarakhsī the jurist.

It must be noted that in this, and other classical *fiqh* treaties, the operation of the rule of law is negative. That is, Sarakhsī and many other jurists perceive clearly the infringement of the (Islamic) law of the land by a given ruler.[9] What their horizon does not reach is the positive element which is recognised in the twentieth century as democracy, the *threshold* of which cannot be found in tenth- or sixteenth- century law treatises. An overstretching of Qur'ānic verses or legal commentaries only leads to Febvre's 'unforgivable anachronism'.

By threshold of democracy is meant the formal combination of two elements over a certain period of time in the institutional life of a country: uncensored public fora and free recurring elections. What Sarakhsī offers is only the inarticulate -even if extremely conscious- allusion to the first element, which covers freedom of speech and association.

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[6]See for details my article on 'Comparativism in the eighteenth century: Lord Mansfield and the French tradition', forthcoming.

[7]Shakespeare, *The Merchant of Venice,* the Arden ed., London, 1912, I, iii, ll.16-19.

[8]Khalīl al-Mīs ed., *Fahāris al-Mabṣūt,* Beirut, 1980, p.7.

[9]See Ann Lambton, *State and Government in Medieval Islam,* Oxford, 1981, pp.306-315.

From the second chapter in this volume, it will be clear that the transformation of the concept of *shūrā* to mean present electoral processes cannot be intellectually warranted in the legal and historical tradition.

The hallowed concept of *bay'a*, which can be termed to be the logical positive consequence of the consultative process, is even more anachronistic as a democratic concept. Ibn Khaldūn (d.1406) exemplifies the limits of the concept when he defines it as 'commitment to obedience' (*al-'ahd 'alal-ṭā'a*).[10] He further explains that duress in the process was usual, and that in his days, *bay'a* had become equated with 'the kissing of the [ruler's] soil, or the hand, or the foot, or the tailcoat'. Democracy is hard to derive from the Khaldūnian characterisation of *bay'a*.

The account of the celebrated historian al-Ṭabarī (d.923) depicting the *bay'a* process of the first 'righteous caliphs' is no less constraining on the search for democratic precedents. The commitment to the would-be caliphs reeks of duress in several places: in the *bay'a* of the fourth caliph, 'Alī ibn Abī Ṭāleb, Ṭabarī reports that Ṭalḥa and al-Zubayr said that 'they offered the *bay'a* to 'Alī out of fear for themselves.'[11] The *bay'a* of the first caliph, following the death of the Prophet, is in Ṭabarī's *History* equally indicative of a method in which competition between opposed candidacies was rejected in principle. Immediately after Muḥammad's death was known, the Anṣār group (from the city of Madīna) met to entrust leadership to Sa'd ibn 'Ibāda. Then resistance came from the Meccans, which the Anṣār anticipated in Ṭabarī's telling account as follows:

> [After Sa'd 's acceptance], the Anṣār discussed the matter and the possibility that the Quraysh *muhājirūn* [ie those from the Prophet's tribe in Mecca who left with him for the *hijra* to Madīna] would contend that they are the *muhājirūn* and the first companions of the Prophet, his tribe and friends, and that there would be no ground for the Anṣār to dispute their choice of leadership. If such were the contention, a group of the Anṣār put forward the proposal that they would answer: from us an Emir, and from you an Emir. We will not settle for less (*Minnā amīr wa minkum amīr wa lan narḍā bi-dun hādha*).[12]

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[10] Ibn Khaldūn, *al-Muqaddima*, Beirut at al-Qalam, 1978, p.209.
[11] Ṭabarī, *Tārīkh al-Umam wal-Mulūk*, Cairo, 1939, Vol.3, p. 452.
[12] *Ibid.*, p.456.