BOOK REVIEWS

Noel J. Coulson: Conflicts and Tensions in Islamic Jurisprudence, the Centre for Middle Eastern Studies, University of Chicago, London, Chicago, 1969, pp. 118.

The modern age presents a great challenge to religion. Islam, 'a religion of law and tradition', is no exception. Today there is a palpable change in the traditional law of Islam. Modernism, an antithesis of medievalism, stands par excellence, despite grim opposition on the part of orthodoxy. Medievalism conserved the legal heritage of Islam; but it failed to meet the new situations that emerged in the wake of modern science and technology and the impact of western civilization. Shari'ah law, so inviolable in the eyes of the medieval man, is being radically changed in modern times to adapt itself to the changing social conditions. The legal reforms recently carried out in the Middle Eastern countries and Pakistan indicate the progressive attitude of Muslims towards the Shari'ah law. This is indeed a primary step in the direction of the reformulation of Muslim Jurisprudence as a result of constant conflict between the concept of revelation and reason. The study of these conflicting concepts in Muslim Jurisprudence unfolds new horizons of research on the subject. The book under review is an extensive survey of such conflicting concepts.

The book is a collection of six lectures delivered by Prof. N.J. Coulson, an eminent scholar of Islamic Law and Jurisprudence, under the auspices of the Centre for Middle Eastern Studies and the Law School of the University of Chicago. The author “probes the nature of Islamic Law”, in the words of William R. Polk, the Director of the Centre, “by examining six polarities: revelation and reason, unity and diversity, authority and liberty, idealism and realism, law and morality, and stability and change. Under these headings, Prof. Coulson elucidates the development of Islamic law at the hands of judges and jurist consults.” (preface).

In his introduction the author brings forth his thesis that tensions of the Western jurisprudence and those of the Islamic jurisprudence have their different sources. The former stem from the basic problem of the nature of law. Moreover, these tensions in Western law are based on ‘diverse philosophies’ and change in view of “the ultimate values and purposes of human life.”

Islamic law, on the contrary, is not the product of philosophies of life. It is, according to the author, “the directly ordained system of God’s commands.” (p. 1). Again, explaining the reasons, tensions and conflicts in Islamic Jurisprudence the author remarks: “Jurisprudence is the whole process of intellectual activity which ascertains and discovers the terms of the divine will and transforms them into a system of legally enforceable rights and duties. It is within, and only within, these strict terms of reference that the tensions and conflicts of Islamic legal thought arise.” (p.2)

Fiqh, the legal system of Islam, suffers form the weakness that theoretically being divine in character, it does not keep pace with the change in the Muslim society, because the divine cannot be altered. The tension is but natural in the Muslim mind for every system of law must expand with the progress of society, as law is meant for society.
and not vice versa. That the law must remain divine and must go on changing with the society is an enigma faced by the Muslim legal thinkers since long. This contradictory thinking in law, i.e. divine law and jurists' law, formulates the basic tension elaborated by the author under 'Revelation and Reason' in chapter I.

Fiqh has been defined by the author as "an understanding (Fiqh) of the Shari'ah" and the Muslim jurisprudence aims at reaching this goal. "Its primary task, therefore, was to formulate the principles (uṣūl) for which such an understanding might be achieved." (p.3)

The author thinks that "The Qur'an and the Sunna taken together in no sense constitute a comprehensive code of law." (p.4) This presumption is probably based on the prevalent view that Islam is a "complete code of life" which is primarily derived form the Qur'ān and the Sunnah. But it should be noted that to describe Islam as a 'code of life' or the Qur'ān and the Sunnah as a 'code of law', is to confine Islam, which is indeed a comprehensive way of life, to the straitened legal sphere alone. The legal aspect of Islam has been tremendously emphasized through the juristic activity in medieval times. Hence the idea of 'code of life' or 'code of law'. The Qur'ān and the Sunnah taken together are not code of law but provide raw material (i.e. values and standards) to formulate the code of law. In this sense Fiqh is a jurist's law and not a divine law. Again, the author correctly presumes that 'Islamic law, in its developed form, is a jurists' rather than a judges' law' and that it is theoretical in the sense that it lacks the color of particular factual situations and human circumstances, which to the Western student of law at any rate, often demonstrate that truth is infinitely stronger than fiction". (pp. 9-10). The author illustrates the complex of revelation and human reasoning in Islamic law by giving a number of examples. The law of succession, in his opinion, is based on dual basis. The share of the male agnates is determined by the tribal customary law, while Qur'ānic heirs were prescribed by divine revelation. (p.11) Thus revelation and human reason are "so closely interwoven as to be almost inseparable". In his last analysis the author arrives at the conclusion that "these two descriptions are complementary and not contradictory". (p.19)

In chapter 2 the author studies the tension between the unity and diversity in Islamic law. This tension, according to him, stems from two factors, namely revelation and human reason". Divine revelation represents the fixed and constant factor, and human reason the variable and fluctuating factor in Islamic jurisprudence." (p. 20) The author quotes an old Arab saying to show the confluence of unity and diversity in Islamic law. It goes من ام يعرف الاختلاف لم يشم رأيه- الفقه (The person who does not understand divergence in doctrine has not caught the true scent of jurisprudence. (p.21) The author opines that the unity in diversity is clearly crystallized in the Sunni school of law. The harmony among them was created by the doctrine of Ijmā' "which provides an umbrella authority for the variant doctrines of the different schools of law." (p.24) The author refutes the prevalent view that the variant schools are agreed on fundamentals, and differed on points of detail. He rightly observes that "the division between the schools in matters of substantive law goes deeper than this". (pp.24-25).

The author abundantly quotes examples from the personal law codified in the Muslim countries of the Middle East. Syria and Tunisia adopted Hanafi, Mālikī, and Hanbali laws in codifying the family laws as against the laws prevalent in each country
respectively. (pp.36-37). The author explores the social reasons behind these legal reforms in the Middle Eastern Countries. (pp. 37-38).

The legal reforms made in the Middle Eastern countries do not totally reject the traditional doctrines: the principle of permutation is applied to adapt the legal system to the changing social circumstances. Analysing this process, Prof. Coulson remarks: “In short, the eclectic principle has been used to adapt the law to the particular temper of Muslim society today. This is a healthy process of social purpose and one which has given a much deeper practical significance to the famous dictum of the prophet: Difference of opinion within my community is a sign of the bounty of Allah.” (p. 39)

In chapter 3 the author discusses the problem of authoritarianism and liberalism in Islamic law. In this study he seeks to explore, “what measures of freedom a Muslim judge or jurist in fact enjoys to determine the law, and to contrast in this respect the traditional attitude that dominated Islam from early medieval times to the present century with the new philosophy which is emerging today in contemporary Muslim states.” (p.41). In the beginning he analyses the causes of the closing of the door of Ijithad. He maintains that Islamic law, like Roman law and common law, remained static in the Middle Ages. “But now,” he observes, “when Islamic society has come to accept different values and standards of behaviour the traditional doctrine has been challenged and the principle of taqlid called more and more into question.” (p.44). He further examines the traditional mode of divorce and describes the changes made recently in the Muslim countries whereby he shows the independence of the law courts (p. 45).

The author quotes a number of cases decided by the law courts in Indo-Pakistan sub-continent which indicate their independent judgement and departure from the traditional law. He also compares the Muslim Family laws Ordinance, 1961, in respect of divorce, with the laws enforced in the Middle Eastern countries. The author appreciates the efforts of the judges to restrict the husbands' power of repudiation by their independent interpretation of divine revelation. In this connection he cites the leading case of Balquis Fatima V. Najm-ul-Ikram Qureshi, decided by the High Court of Lahore in 1959. In this case Balquis Fatima was released by the High Court on ground of Khul' without the consent of husband in contravention to the Hanafi law of Khul'. (pp.53-54).

This case was followed by a series of decisions by the law courts, “Which were based on the right of the courts to depart from the doctrines expounded in the classical legal manuals.” (pp. 55-56).

The author quotes another important case of Khurshid Bibi V. Mohamed Amin, decided by the Supreme Court of Pakistan in 1967. Khurshid Bibi demanded divorce on ground of ill-treatment and cruelty by her husband. But this could not be proved. Nevertheless, the Supreme Court decided that Khurshid Bibi could demand her divorce as her right, if she could return the dower paid by the husband. The Supreme Court made the following remarks in their decision: “Any proposed departure from the law of the classical authorities must be firmly grounded upon indications in the Qur'an or the sunna, or at least not be contrary to any specific regulations thereof.” (pp. 56-57). By adducing such examples of independent interpretation of law the author shows a subtle interfusion of authoritarianism and liberalism which seems prima facie contradictory.

Chapter 4 is captioned 'Idealism and Realism. “In this chapter the author deals with the tensions between the legal doctrine and legal practice in Islam. He thinks that
doctrine and practice were interrelated' in the early days of Islam. By and large, the law consisted of the decisions of the Prophet, the early Caliphs, like Umar, and of early judges. Consequently, towards the end of the eighth century A.D. the notion of the theory of the sources of law and of the Shar'a emerged. The Shar'a was regarded as "the comprehensive and preordained system of God's commands, a system having an existence independent of society, not growing out of society but imposed upon society from above. And the discovery of this pure law, it was felt, was best undertaken in isolation from practice." (p.60).

The judgements given by a qadi in medieval times largely depended on evidence. He had two tasks before him, namely to determine the party carrying the burden of proof, and to see whether the witness produced was trustworthy in terms of integrity of character. If the plaintiff failed to produce witness, oath was administered to the defendant. With this process the judgment came out automatically (pp.63-64). Here it should be pointed out that the procedure of judgment mentioned by the author is of course laid down in the legal manuals of classical times. But whether this rigid and theoretical procedure was actually put in practice in the Middle Ages is a difficult question to answer. A qadi like a modern judge, must have taken into consideration other relevant facts and materials than sheer witness to reach the truth. To answer this question one must study in detail the procedure of Judgements given by the Muslim judges in the past. Citing a few examples from such a large chequered history of Islamic judiciary is not sufficient to prove anything conclusively on the point in question.

The author introduces the changes made in Shari'ah law in some Muslim Countries of Africa. Even usury (riba), he says, has been recognized valid in North West Africa on the basis of necessity, "so that it became an integral part of the Shari'ah law as applied by the courts." (p.71). Further, he points out that some punishments in Islam, like death by stoning and amputation of hands are deemed as "antiquated" in Muslim countries these days. This paved the way, he thinks, for formulating a new criminal code, as was done in Egypt, North West Africa, Sudan and Libya. Implementation of the new criminal codes in these countries, according to the author, reflects "the dominant European influence." (p.72). In the Middle Eastern countries "the rules of procedure and evidence by which the courts are bound have changed; and the rigid idealistic scheme of the traditional doctrine has been relaxed in many respects." (p.73).

The chapter is closed with his pithy remarks: "that the idealism of the doctrine both in matters of substance and procedure, has perforce had to give way to the needs of state and society in practice" (p.76).

In chapter 5 the author dwells on the question of the law and morality in Shari'ah law. He thinks that Islamic Shari'ah is "both a code of law and a code of morals." Law and morality are not so clearly divided in Islam as in Western society. According to him, even the Qur'an is not clear on distinction between the moral and legal rules. It is basically concerned with fundamentals. (pp. 79-80). Further, the observes that "the same predominantly ethical tone pervades the expression of Shari'a doctrine by the early jurists of Islam."

The Shari'a, in theory, in his opinion, is "a totalitarian and comprehensive code of conduct." (p.81). Besides, he maintains that there is a clear distinction between the standards "legally enforceable" through the courts and "morally desirable." This distinction is perceptible in the scale of five Shari'ah-values (al-a'hkâm al-khamsah) which
cover “the whole range of human behavior and activities.” (p.82). But this is not a real distinction, he thinks, because “the real values and standards by which a society lives are not always and merely those that the courts will enforce.” (p.84).

The author makes a brief survey of different schools of law in respect of their approach and concludes that the Hanafis have ‘legal formalist attitude’ towards law, while the Hanbalis are moralists. He illustrates ‘Hanafi formalism’ and ‘Hanbal’ moralism’ by citing the examples of marriage for a limited period, law of bequests and legal devices (p. 86). About the legal devices (hiyal) the author opines that these are not “legal fictions” familiar to western societies. “The Islamic hiyal are simply legal trickery, of no great ingenuity, with the blatant purpose of circumventing an established rule of the substantive law” (p.87). These comments of the author on hiyal are true of this doctrine as it stands. Yet let us say in the same breath that originally the doctrine of hiyal did not aim at “circumventing any established rule.” This doctrine must have been devised primarily to seek “a way out of an impasse” and not to seek deliberately “an escape from law,” as implied by the criticism. Prof. Coulson does not trace the origin and development of hiyal phenomenon in Islam. His comments on this doctrine would have been more meaningful if he had analysed them in the light of their historical evolution. The doctrine of hiyal has been criticized by the Muslim thinkers themselves.

The concluding chapter deals with the problem of ‘Stability and Change. “The author portrays in detail the conflict between traditional and the modern reforms particularly made in personal law in the Muslim countries. He presumes that from these legal reforms in the Shari’ah law “a system of legal education” is evolving. The text-books of the Shar’ah law are being studied as “a part of general law curriculum.” By application of the reformed Shari’ah law through the courts and through its study as an integral part of general law, the dichotomy, in his opinion, will be bridged.” But the author is afraid of the fact, that “Shar’ah law will become externally divorced from religion.... in the sense that it will lose its traditionally close and exclusive association with religious personages and institutions and become instead the province of the professional lawyer.” (p.100).

Analysing the role and nature of divine command in law the author concludes that the attitude of classical jurisprudence rests upon two propositions: (1) that the Revelation prescribed rules for all times and situations, and (2) that the Revelation covered, directly or indirectly, all possible legal problems. Now as a result of modern legal reforms change in law has been accepted as “legitimate and desirable” and “not deviation from an immutable ideal standard.”

The author thinks that as against the comprehensive nature of Shari’ah, i.e. to derive rules directly or indirectly from the Qur’an or the Sunnah, there is a change in modern legal thinking in the Muslim countries today——“human intellect is free to determine a legal rule unless the relevant matter has been expressly regulated by the divine revelation. Therefore, outside the standards specifically laid down in the Qur’an or the Sunnah, no further justification for a legal rule is required than broad ground for its social value and desirability.” (p.104). The author quotes a decision of the High Court of Lahore in a case Khurshid Jan V. Fazal Dad, 1964. It goes: “If there is no clear rule of decision in Qur’an and traditional text (that is, the Sunnah) ...... a court may resort to private reasoning, and, in that will undoubtedly be guided by the rules of justice, equity and good conscience...... The views of the earlier jurists and imams are entitled to the utmost
respect and cannot be lightly disturbed; but the right to differ from them must not be denied to the present-day courts." (pp. 106-7). By citing such decisions of the courts and views of the modern legal thinkers the author tends to show that this liberal attitude towards legal interpretation amounts to a renunciation of taqlid (conformity), and this is a step towards independent Ijtihad like the early jurists of Islam.

Passages from the book under review have been quoted frequently to show that Prof. Coulson has dealt with this subject from a fresh angle. Polarizing concepts in Islamic jurisprudence in modern times and their harmonization is a novel idea scholarly discussed in detail. The merit of the book lies in the novelty of the topic, rational approach to the problems, clarity of argument and analysis, healthy criticism, and valuable suggestions here and there. This book is a welcome contribution to the subject. It is equally of great interest to the scholars as well as to the general readers.

Islamabad
Pakistan

Prof. Shaikh Inayetullah — WHY WE LEARN THE ARABIC LANGUAGE, Third Enlarged Edition, Published by Sh. Muhammad Ashraf, Kashmiri Bazar, Lahore, Page 78 — Price not given

This booklet was first published by Dr. Shaikh Inayetullah, former Professor of Arabic in the Punjab University, Lahore, in 1942 with a Foreword by Prof. Sir Hamilton Gibb. The second and the third enlarged editions were brought out in 1943 and 1969 respectively.

Now that the Muslim Ummah has shown the signs of reawakening all over the world the necessity of learning the pristine teachings of Islam is severely felt by the non-Arab followers of Islam. This necessity can undoubtedly be fulfilled only by learning the language of the Qur'an and the sayings of the Holy Prophet (May Allah Have Peace and Mercy upon him!). The twentieth century Muslims having been impressed by the Western scientific achievements feel restlessly that they must abandon their long-worn-out traditional branches of study which kept them so long static and caused them sufferings and decadence in the present tremendously advancing world. The true and sincere urge which enabled the followers of Islam in the seventh and the centuries that followed to take lead in all spheres of life, as realized by the Muslim intelligentsia of world, can only be created in the Muslim masses by direct understanding of the Qur'an and Had th. The language of the Qur'an has therefore great significance for the newly developing as well as emerging young Muslim states all over the globe.

The Arabs even before Islam boasted of the clarity of their diction so much so that they called all the non-Arab "ajam", non-plussed or unable to speak. This language went on thriving while the people speaking Arabic fell and decayed. Perhaps, the verses of Amr al-Shu'arā' Aḥmad Shawqi inserted on the very first page of the booklet under the caption, "al-Lisān al-Mubn", the clear Tongue, are most true in their theme and may be quoted for the readers:

ما علمنا لغير هم من لسان
زلا اهلوه و هو في اقبال
إذ قامت النجمات و بابا نزار
بلت هائم و بادت نزار

"We do not know of any language other than Arabic the advocates of which