BOOK REVIEW


Islamic law in its long chequered history has passed through a number of stages. It evolved as a dynamic process to meet the newly arising conditions of the Muslim society. After its systematic development in classical times it became morbid and has now become progressive again as is evident from the present trends, in the legal sphere, of Muslim countries. Its early history is vitally important because it throws light on its origins and evolution in its formative period. A most comprehensive and detailed study of the subject to date, although primarily concerned with jurisprudence, is the Origins of Muhammadan Jurisprudence by Professor Joseph Schacht. But the classical period of Islamic law still remains a subject of enquiry. The book under review is a welcome contribution to this subject. Although it is basically a critical survey of the legal reforms afoot in Muslim countries, the learned author, in order to give the background of these reforms, has discussed in greater detail the principles of Islamic jurisprudence, their early development, nature of Shari'ah law and its historical process in Medieval Islam. It contains a Foreword by Professor W. Montgomery Watt, the general editor, explaining the aims and objects of the excellent series of monographs published by the Edinburgh University for the benefit of the general reader as well as the specialist in Islamic studies, of which the work under review is number two.

The book falls into three major parts preceded by an illuminating Introduction which deals with 'the role of legal history in Muslim jurisprudence'. Part one comprising five chapters, surveys the genesis of Shari'ah law. In these chapters the learned author discusses the Qur'anic legislation, legal practice in the first century of Islam, growth of the early schools of law, role of al-Shafi'i as the 'Master Architect' and the concluding stages of growth. Part two studies the legal doctrine and practice in Medieval Islam. It, also, has been split up into five important chapters. The author, in these chapters, surveys the classical legal theory, unity and diversity in Shari'ah law, sectarian legal systems, Islamic Government and Shari'ah law, and Islamic society and Shari'ah law. Part three covers Islamic law in modern times. It consists of four chapters dealing with the foreign influences, administration of Shari'ah law in contemporary Islam, taqlid, and legal reform, and neo-Ijtihād. The Conclusion contains some suggestions from the author concerning the reconstruction of Islamic jurisprudence.

In the Introduction the author attempts to show that there was no idea of law as such according to the classical legal system because law in the modern sense of the term grows out of, and develops with, the life of a community. But, according to the learned author, this was not the case with the Islamic legal set-up in the medieval ages. "Law, in classical Islamic theory," the author observes, "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" (pp. 1-2). By depicting the nature of the Shari'ah law as a 'rigid and immutable system' (p. 4) the author concludes that 'the notion of historical process in law was wholly alien to classical Islamic jurisprudence' (p. 4). But in view of the legal reforms in the Muslim countries the author traces the historical
starting point by saying that 'the Shari'a may now be seen as an evolving legal system, and the classical concept of law falls in its true historical perspective' (p. 4). He draws a distinction between the modern Muslim legal philosophy and the classical jurisprudence (p. 6). Here it may be pointed out that this view may be only partly true because the Islamic law, as it grew up, was dynamic and it developed with the growth of the society. The Islamic legal theory is not 'rigid and immutable' by nature as the author presumes. In another place he himself has accepted that 'legal history shows that current social conditions had exercised a predominant influence in the formative period of Islamic jurisprudence and that whatever the classical theory of law might maintain, the early jurists had in fact interpreted the Qur'an in the light of those conditions' (p. 216). But, unfortunately, this dynamism was not kept alive in the post-formative period and the Shari'ah law became undoubtedly rigid in the wake of sheer formalism and strict conformity. However, Shari'ah law is essentially a religious law, and the needs and aspirations of society, as the learned author very truly remarks, "cannot be the exclusive determinant of the law" (p. 6).

The author meticulously discusses the Qur'anic legislation. According to him, 'the so-called legal matter of the Qur'an 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' (p. 11). He illustrates his thesis by quoting a number of cases from the Qur'an which he regards as ethical rather than legal. Conclusively, he remarks: "In short, the primary purpose of the Qur'an is to regulate not the relationship of man with his fellows but his relationship with his Creator" (p. 12). It is difficult for the reviewer to agree with the author on this point. The Qur'an is neither a legal code, in modern sense of the term, nor is it a compendium of ethics. The primary purpose of the Qur'an is to delineate a way of life which regulates the relationship of man with man as well as his relationship with God. The Qur'an legislates equally for man's social life as it does so for his communion with his Creator. The laws of inheritance, rulings for marriage and divorce, provisions for war and peace, punishment for theft, adultery and homicide, are all meant obviously for regulating the ties of man with his fellow beings. It, also, repeatedly appeals to human conscience to follow the teachings of the Revelation for one's own welfare. The Qur'an by making the observance of the rules of Shari'ah a matter of human conscience has dignified the concept of law.

The author has aptly shown that the Qur'an did not supplant the existing customary law but modified it in certain particulars (p. 15). Of course, the Qur'an was not revealed in a vacuum. It came down in a living society. Naturally, it was not possible to stamp out the customary set-up of the society in toto. But can this customary law of the seventh-century-Arabia adopted by the Qur'an with certain changes, be eternal?—is a serious question which is raised by certain modern scholars but is not touched upon by the author.

About the judicial system of Islam the author is of the view that it commences from the 'Abbasid time. Towards the end of the Umayyad rule the qādis were not exclusively concerned with the judicial business (p. 29). To support his presumption the author frequently quotes examples drawn from al-Kindi's (d. ca. 362 A.H.) Governors and Judges of Egypt. On this point the author seems to have been influenced by the thesis of Emile Tyan and Professor Schacht. They regard the reports about the early judges as mere legends, basing themselves mostly on al-Kindi. It is astonishing that these authors rely upon the reports of al-Kindi but suspect all the other reports tracing the origin of the judicial system in Islam from the earliest times, which are recorded in other equally,
if not more, reliable works of history. The correct way of approach to the problem would, in the opinion of this reviewer, be that one should reject these conflicting reports en masse and arrive at a conclusion by providing circumstantial evidence.

Analysing the diversity in private law during the first century of Islam the author gives two principal reasons for this diversity. In the first place, he thinks, the judges generally applied the local law which differed in various regions. For this local variety in law he gives a very telling example of Medina and Kufa. The society of Medina was following the tribal customary law. Hence, the Medinese lawyers stipulate the permission of guardian for the validity of the marriage of a woman. This is because a woman holds an inferior status in tribal societies. In Kufa, on the other hand, there was no influence of tribal customary law. Being a town in Iraq and originally an encampment, there prevailed in Kufa a society bearing the 'cosmopolitan atmosphere'. The Kufa lawyers, therefore, allow a woman to contact a marriage independently. The same social reasons he gives for the Medinese attachment to the 'establishment' in Medina and for the speculative character of the Kufans (p. 48). The second reason for this diversity, according to him, was that the judge possessed unrestricted powers to decide the case with his individual powers and that no effort was made by the Umayyads to unify the law in the form of case-law system (p. 30).

Tracing the starting point of the Islamic jurisprudence the author holds that it emerged 'not as the scientific analysis of the existing practice of courts whose authority was accepted, but as a formulation of the scheme of law, in opposition to that practice', i.e. of the Umayyads (p. 37). By such statements the author attempts to show that there was a grim conflict between the practice of the Umayyads and the early jurists. But this reviewer thinks that the Umayyad practice cannot be condemned in general terms. There is a good deal of evidence to show that the early legists based a number of their legal rulings on the Umayyad practice. Al-Awzl'i (d. 157 A.H.), as reported in al-Radd 'ala Siyar al-Awzd'i frequently refers to their practice. Mālik (d. 179 A.H.) bases many of his rulings on those enunciated by Marwān b. al-Ḥakam, 'Abd al-Malik and 'Umar b. 'Abd al-'Azīz (al-Muwafża', Cairo, 1937, vol. II, pp. 11, 14, 18). Had there been a continuous conflict between the jurists and the Umayyad practice, as surmised by the author, they would have never quoted the Umayyad rulings in their own support. The reviewer presumes that the Islamic jurisprudence, in its systematic form, must have started at the time when the Muslims were confronted with new situations soon after their military conquests and they began to think for themselves over their legal problems immediately after the demise of the Prophet. This gave birth to the concept of Ḥithād and the idea of the material sources of law. There might have been, of course, differences of opinion occasionally between the jurists and the Umayyad rulers, but from this it does not follow that the legal activity of the jurists was a movement in opposition to the Umayyad practice.

The author thinks that 'the concept of the Sunna of the school' appeared as a result of the established local consensus in different localities (p. 39). As regards the doctrine of the Prophetic Sunnah he has adopted the theory of the mechanism of 'back-projection', started by Ignaz Goldziher and confirmed by Prof. Schacht (pp. 40-42). He sums up his opinion by saying: "We take the view that the thesis of Joseph Schacht is irrefutable in its broad essentials and that the vast majority of the legal dicta attributed to the Prophet are apocryphal and the result of the process of 'back-projection' of legal doctrine"(p. 64). The learned author, in some cases, refutes Schacht's arguments for the fabrication of the
Prophetic traditions (pp. 65-69). Nevertheless, he believes that this criticism 'cannot affect the fundamental validity of Schacht's thesis' (p. 69). He, also, does not rely on the authenticity of isnād, which is, according to him, usually spurious (p. 70).

Here it may be pointed out that the Qur'ān over and again lays stress on obeying the Prophet. It seems, therefore, implausible that the Muslims, for such a long time in the classical period of Islam, followed their own individual opinions in legal matters without reference to the practice of the Prophet. Fabrication in Ḥadīth cannot be denied, yet to condemn the entire corpus of Ḥadīth as 'apocryphal' is a fact against history. Besides, isnād is an independent science, and it is not so easy to dispose it of merely by calling it "usually spurious". The criterion of historical criticism and circumstantial evidence can also be challenged like isnād, as the author has done himself. One, therefore, cannot claim that either of these criteria is the only 'final' standard of judging the authenticity of the Prophetic traditions. The judicious method would be to combine the two.

Through his penetrating analysis of al-Shāfi‘ī the learned author puts him in his rightful position in the history of Islamic law by describing him as the 'Master Architect' (p. 53), and the 'Father of Muslim jurisprudence' (p. 61). According to him, al-Shāfi‘ī at first played the role of a 'critical spectator rather than an active participant in the evolving drama of Islamic law' (p. 53). He portrays him as a 'Colossus of Islamic legal history.' (p. 55). He very truly observes that al-Shāfi‘ī insisted for the first time that 'the Prophet's legal decisions were divinely inspired' and that this is his 'supreme contribution' to Islamic jurisprudence (p. 56).

Commenting on the principle of qiyās the learned author remarks: "The role of juristic reasoning is thus completely subordinate to the dictates of divine revelation" (p. 60). One can justify this proposition by showing the development of ra'y and its culmination in qiyās. But the author ignores the emergence of the concept of nasy which implied the dictates of divine revelation in the process of qiyās. Al-Shāfi‘ī condemned individual opinion (ra'y) and laid stress on the principle of qiyās because it was quasi-nasy according to his system of reasoning.

While surveying the classical legal theory and showing its links with the early formative period the author dilates on the role of ijmā‘. He believes that it gained 'an exaggerated respect' and finally became 'a term of reference' (p. 81). He regards ijmā‘ as one of the major causes of taqlid and of rigidity in law (pp. 80-81). He presumes that ijmā‘ in the classical period contradicted al-Shāfi‘ī's thesis because it tolerated those 'variants' which al-Shāfi‘ī wanted to stamp out (p. 80). The reviewer thinks that ijmā‘ in the classical period partly conformed with the scheme of al-Shāfi‘ī, because it completed the task of integration and consistency in the Medieval Islam which was started by him.

Discussing the divergence among the various schools of law the author refutes the prevalent view that the Ḥanafis are the exponents of ra'y while the Mālikis are the exponents of Ḥadīth. He asserts that both the schools in their formative period adopted the same position (p. 98). He draws a distinction between these two schools on a different basis. Firstly, Mālikī law had, according to him, a conservative attachment to tradition while Ḥanafi legal system was dominated by the freedom of juristic speculation. Secondly, Mālikī legal system had a 'moralistic' approach, while the Ḥanafis adopted a 'formalistic' attitude. He illustrates this by several examples (pp. 98-100) and concludes by saying that their 'individual characteristics were furnished by their circumstances of origin' (p. 101).

In chapter 10, analysing the relation of Shari‘ah law and Islamic Society the author
describes the tension between the dictates of Shari'ah law and the needs of Society. Referring to some communities, e.g. the Berber people of North Africa, he observes that they accepted Islam as a religion and not as a way of life. They are governed to date by a customary law which is patriarchal. In other Muslim countries, on the contrary, custom gave way to Shari'ah law in some fields but continued to be applied in others (p. 196).

About the system of legal devices (hiyal) the author believes that it was 'designed to achieve purposes fundamentally contrary to the spirit of the Shari'ah' (p. 199). He compares Islamic hiyal with 'legal fictions' of English legal history. The distinction between the two is that the act in the former is a real one but fictitious in the latter. He considers this system 'a betrayal of their (jurists') trust where any claim that the letter of the law was being observed was little short of blatant hypocrisy' (p. 140). He tells us that the purpose of adopting the system of hiyal by the jurists was that the doctrine could retain some semblance of control over actual practice' (p. 140).

The author shows that the growing foreign influence on the legal system of Muslim countries is due to the rigidity of the Shari'ah law which could not fulfil the needs of the modern Islamic Society (pp. 149-153). He thinks that impetus for reform came as a result of western standards and institutions (p. 161). In this connection he quotes the example of Turkey which, in 1927, 'saw as the only solution the total abandonment of the Shari'a and the adoption of Swiss family law'. He considers it unfortunate that other Muslim countries could not follow this example (p. 162).

In Chapter 14 under the caption 'Neo-Ijtihad' the author has furnished a full-length critical survey of the reforms made in the Muslim personal law in different Muslim countries. He describes these reforms as 'Neo-Ijtihad', 'quasi-Ijtihad' (p. 203) and legal modernism (p. 206). Appreciating the reformation in the law of polygamy by direct Ijtihad in Syria, he observes: "For the first time independent assessment of the Qur'anic precepts had resulted in a departure from interpretations hallowed by thirteen centuries of legal tradition" (p. 210). He discusses critically the Muslim Family Law Ordinance, 1961, of Pakistan, and regards it as 'moderate' in comparison with other Middle Eastern countries (pp. 213-14). He considers this ordinance 'best suited to the present mood and aspirations of Pakistan' (p. 215). He draws a distinction between the reforms in the personal law of the Middle Eastern countries and those of Pakistan and concludes that Pakistan has simply amended 'existing law in a number of particulars' (p. 214). But he thinks that 'the introduction of the representation rule in succession in Pakistan, is completely disruptive of the finely balanced scheme of priorities established by the Shari'a (p. 221).

The author appreciates the modern trends towards neo-Ijtihad: "...its practical and undeniable effect has been to infuse life and movement into Shari'a' law. The era of taqlid now appears as a protracted moratorium in Islamic legal history. Stagnation has given way to a new vitality and potential for growth" (p. 217).

The conclusion of the book is very important. The author furnishes some valuable suggestions concerning the religious law and progress in contemporary Islam. He points out the following two principal features of modern legal activities:

(1) "In the first place the current expression of the law rests upon a striking diversity of juristic criteria, which represent varying degrees of fusion between the two basic influences of practical necessity and religious principles" (p. 218).
"The second feature of modern Islamic law which is relevant to the question of potential future development is the fact that many of the substantive reform must appear, on a long-term view, as temporary expedients and piecemeal accommodations" (p. 221).

He thinks that modern Islamic jurisprudence failed to evolve a system, 'of adapting the traditional law to the circumstances of Society'. It has tackled, he opines, 'the process of a reform as a whole in a spirit of juristic opportunism' (p. 221). The author observes that Muslim jurisprudence is facing the problem, inherent in its nature, 'namely, the need to define the relationship between the standards imposed by the religious faith and the mundane forces which activate society' (pp. 22-3). The solution has been sought by two extremes: (i) classical jurisprudence, (ii) secularism. Commenting on these solutions the author remarks that the former is wholly 'unrealistic', while the latter is 'positively un-Islamic.' The answer, according to him, lies between the two (pp. 223-24).

In view of the modern social needs, the author suggests the reconstruction of Islamic jurisprudence on the basis of the Qur'anic precepts. He wants to discard the notion of religious law, 'expressed in totalitarian and uncompromising terms', and to evolve new principles whose term of reference would be 'to determine what limitations religious principles set upon society' (p. 225). The author closes his work with an important and fundamental principle: "Law, to be a living force, must reflect the soul of a society; and the soul of present Muslim society is reflected neither in any form of outright secularism nor in the doctrine of the mediaeval textbooks" (p. 225).

On p. 195 there is a minor mistake. The word ghunjah has been spelt ghirra and on p. 236 it is defined as 'blood money or compensation payable for the destruction of a foetus.' According to the major Arabic dictionaries the word ghirra does not connote the meaning in which the author has used it.

The book contains, in the end, notes, a useful glossary, bibliography and a comprehensive index.

It is a serious scholarly work and a valuable contribution to the history of Islamic law and jurisprudence. It leads to a fresh line of thinking on the subject. For this the author and the publishers deserve gratitude of the students of Muslim Law as well as that of the general readers.

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