Introduction

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The present volume contains most of the papers presented at the Conference on "Law and the Islamic World", which was held at the Universities of Copenhagen and Lund in March 1993.[1] The thirteen essays included in this volume deal wich various aspects of the history and present-day application of Islamic law. Apart from the two articles offering broad surveys, six deal with the early and classical periods, and five with contemporary topics.

Ian Edge's conrtibution "Recent Trends in Islamic Law" sketches a general framework for the conference, offering a global overview of the development of Islamic law focused on its history during the last two centuries. In his conclusions, the author predicts that in practice Islamic law will be less and less important. He foresees that family law will be codified also in those countries where pure Islamic law is nowadays applied, that in civil law the trend towards harmonization between Western and Islamic law will continue and that the countries enforcing Islamic punishments will be marginalized. A similar bird's eye view is presented by Ibrahim al-Wahab in this paper "The Legal System of Iraq and the Continuity of Islamic Law", which deals which the legal history of Iraq from the time of Hammurabi to the present.

About the origins of Islamic law there remains much to be clarified. The publication in 1950 of Joseph Schacht's seminal study *The Origins of Muhammadan Jurisprudence* was a landmark in the history of critical scholarship on Islamic law. His results still represent a point of reference for further research in the field. Three articles in this volume examine aspects of the early developments of Islamic law. What they have in common is that they all agree that, in the words of the much regretted R.B. Serjeant, "the notion of a break, a line separating the Jahiliyyah from Islam is to be abandoned". The theme of continuity between

[1] The following papers are not included in this volume: Jan Hjärpe, "The Human Rights Concept in Relation to the Modern Constitutional Debate in the Muslim World", Chibli Mallat, "Family Law in Islamic Countries", and Rudolph Peters, "Islamic Criminal Law in the Modern World". This last article has been published under the title "The Islamization of Criminal Law: A Comparative Analysis", in *Die Welt des Islams* 34 (1994), pp.246-274.

pre-Islamic and Islamic times figures prominently in the contributions of Serjeant, Hjerrild and Bæk Simonsen.

By a careful analysis of the so-called Constitution of Medina and the Qur'ân, Serjeant corroborates Schacht's findings that the Prophet Muḥammad did not abolish the existing customary law, but rather considered it as a sound basis for arbitral decisions. Drawing on a great variety of sources, from the Qur'ân and *ḥadîth* to recent observations of travellers and his own expertise on contemporary South Arabia, Serjeant further shows that pre-Islamic tribal law still continues to play an important role until the present day and that in many parts of the Arabia Peninsula the *sharîʿa* was until recently only marginally enforced.

Much has already been written about the question of the influence of Hellenistic Roman law on the development of Islamic jurisprudence. Larely, Patricia Crone in her book *Roman, Provincial and Islamic Law*,[2] has again dealt with this question and argued that Islamic Jurisprudence *(fiqh)* was indebted to Byzantine Roman and Jewish law. Other scholars, however, reject the notion of such a direct influencing and hold that such similarities as may exist between provincial Roman, Jewish and Islamic law may be better explained by their common substratum of ancient Near Eastern law (and culture).[3] Many Muslim authors, on the other hand, tend to emphasize the originality of the *fiqh* and do not accept any outside influence upon its development.

The contribution by Bodil Hjerrild, "Islamc Law and Sasanian Law" looks at the problem from at new angle and poses the question whether there could have been a Sasanian influence on Islamic law. She points at certain resemblances between Sasanian and Shîʿa family law (especially the *mutʿa* marriage) and law of succession and suggests that these may be more than just coincidental and that further research in this domain might prove fruitful.

Drawing on papyri from the early Islamic period, Jørgen Bæk Simonsen argues in his essay "The Development of Doctrine and Law Schools", at least for Egypt, that Islamic law in the conquered areas was relevant only to a very small group of Arab soldiers and that it came into being as a synsthesis between Qur'ânic rules, the customs and values of the Arabs in

[2] P. Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* (Cambridge: C.U.P., 1987).

[3] See e.g. Norman Calder, *Studies in Early Muslim Jurisprudence*. Oxford: Oxford University Press, 1993, pp. 198 ff.

the armies, and the actual problems caused by the army's stay in the conquered territories. Gradually, especially as the local population was converted to Islam, the law that was enforced developed in response to day-to-day practice, rather than as a result of imposing Islamic values and concepts.

There are many ways and methods to read Islamic legal texts. The three essays dealing with Islamic law in the classical period do so from very different angles. Norman Calder uses a textual and literary approach, focusing on the formal characteristics and the function of legal texts. Osswald and Johansen read *fiqh* texts against the background of social history and show how abstract and theoretical concepts relate to social reality.

In his contribution "Exploring God's Law: Muḥammad ibn Aḥmad ibn Abî Sahl al-Sarakhsî" Norman Calder analyses two passages on *zakât* by the eleventh century Ḥanafite jurist al-Sarakhsî and observes that behind the author's obvious intention of giving practical rule of conduct, there were other messages. The play of elaborating theoretical concepts and relating them to tradition and, sometimes, to the realities of the world, often transcended practical interest. One of messages of this scholastic activity, Calder asserts, was to show commitment to tradition, represented by the School doctrine, and therefore commitment to authority. But at the same time al- Sarakhsî and his likes, also intended to show that within the framework of the Ḥanafite tradition there is much room for pluralism, as exemplified by the omnipresent differences of opinion between the three founding fathers of the School, Abû Ḥanîfa, Abû Yûsuf and al-Shaybânî. It is clear, although Calder does not say so with so many words, that contrary to conventional wisdom, the so-called "Closing of the Gates of Ijtihâd" did not result in a fossilized legal tradition. The work of the jurists continued to be part of an ongoing creative process of interpretation.

Under the *sharīʿa* not all human beings are equal before the law. Differences in legal personality are related to three concepts: religion, gender and slavery. But beyond these the law does not recognize other forms of collective legal inequality. Descent, ethnicity, social status and the like do not affect a person's legal capacity. But social reality often prevails over doctrine. Rainer Osswald's very interesting essay "Inequality in Islamic law" shows how certain abstract and theoretical legal concepts can acquire a totally novel and unforeseen meaning and function in a specific social context. The essay focuses on the notion of *istighrâq*

al-dhimma, which means that the legal claims against a person resulting from his unlawful acquisition of goods exceed his assets and that therefore all of his possessions are considered to belong not to him but to their lawful owners. If these owners cannot be identified, the possessions are regarded as *zakât* to which the poor of the community are entitled. Drawing on manuscripts of legal texts dating from the sixteenth century onwards and composed by jurists from Mauretania, Osswald shows how this concept of *istighrâq al-dhimma* was used by Mauretanian jurists to deprive one group collectively of its legal rights. Mauretanian society did not have a state organization. It consisted of two groups, the nomad warriors and trading clerics. The latter, who monopolized the interpretation of the law, declared the warriors collectively as *mustaghraq al-dhimma,* thereby depriving them of any legal right of ownership, and claimed that they themselves were poor people, entitled to *zakât.* Further it was assumed that under the prevailing conditions it was impossible to identify stolen cattle. All this meant that in their dealings with the warriors the clerics were not anymore bound to the rule of the *sharī'a,* since all the warriors' possessions were rightfully theirs anyway. Thus a collective unequality based on social status was created that normally does not exist in Islamic law.

Most Western textbooks on Islamic law clearly state that in Islamic law there are no separate domains governed by special rules. There is no clear distinction between public and private law, between substantive and procedural law, between criminal law and the law of torts. This view is contested by Baber Johansen in his essay "Commercial Exchange and Social Order in Ḥanafite law". Johansen investigates whether there exists a clear demarcation line between the norms governing commercial exchange and those controlling social relations, such as family relations, relations between neighbours, between the state and its subjects etc. In view of the fact that the market (*sûq)* occupies a special geographical as well as political position (being subject to direct public control), one could expect that the rules connected with commercial relations would be distinct from those related to social relations. Analysing classical Ḥanafite texts, Johansen concludes that although these texts have no separate chapters on commercial law, there are certainly specific rules through which this domain it set off against the other branches of the law. These rules are related to the actors on the market, which is reflected in the concept of legal capacity: in commercial relations legal capacity is merely based on the capacity of sound reasoning, and status deriving

from religion, gender or slavery is hardly of importance. Secondly they are connected with the forms of exchange. Commercial relations are embodied in synallagmatic contracts where the objects are commodities (*mâl mutaqawwim*) which makes possible the precise calculation of the value relationship between them. On these two points commercial exchange is different from social exchange.

Of the five contributions dealing with the present Muslim world, two are clearly committed to a cause: al-ᶜAshmâwî's essay to democracy and to the separation of religion from politics and Rubya al-Mehdi's paper to feminism. The other three essays are more detached and deal with Islamic banking (Kazarian), with the notions of *umma* and Islamic citizenship (Schulze), and with the *fatwas* of the present State Mufti of Egypt (Skovgaard-Petersen). I shall first introduce the latter group.

In the development of Islamic law the legal consultants, *muftîs,* have always been of crucial importance. It was they who would first offer new interpretations, which would be included in the legal textbooks after they had been generally accepted. Some muftis were directly appointed by the State and incorporated in a hierarchical organization. The head of the organization, often called *Shaykh al-Islâm,* would be the highest functionary for *sharîᶜa* affairs. Such functionaries still exist in many Muslim countries and they are called upon by the state and private individuals alike, to expound the Islamic rules on often controversial issues. Recent rescarch on Islam has very much focused on the Islamist movements and tended to neglect the study of "official" Islam. Therefore, Jakob Skovgaard-Petersen's original essay "Judicial Opinions in Comtemporary Egypt: Sayyid Ṭanṭâwî, the State Mufti of Egypt" is a most welcome contribution to Islamicist scholarship. Skovgaard-Petersen examines the opinions of the present State Mufti of Egypt, al-Ṭanṭâwî, and deals with a number of issues on which the Mufti has offically expressed his opinions, such as the ways of establishing the beginning of Ramaḍân, new medical techniques like organ transplantation and sex-change and banking practices. The author places these decisions in their political and social contexts, showing why these issues were controversial and on whose side the Mufti was. If there are certain distinctive tendencies in al-Ṭanṭawî's *fatwas* to be discerned, these can be found in his adherence to broad principles of the *fiqh* instead of the rules of detail, in a strong interest to protect the poor, and, finally, in his aversion to private enterprise and his support for state control and regulation. Because of the emergence of the Islamist movements in the 1970s and 1980s the

office of the State Mufti has increasingly become politicized. As the *fatwas* of his adversaries are also published and widely read, the controversies and debates among the leading Islamic scholars are for all to follow.

In his paper "Islamic Law and Financial Intermediaries: A Historical Inquiry and a Future Outlook" Elias G. Kazarian explores the origins and practice of Islamic financial institutions. After a long historical survey, he addresses the question of what makes a financial institution Islamic. He answers the question by referring to the official Handbook of Islamic banking (*al-Mawsûʿa al-ʿilmiyya wa-l-ʿamaliyya li-l-bunûk al-Islâmiyya),* published by the International Association of Islamic Banks. The basic principles are the following: absence of interest-based transactions (*ribâ*-transactions), avoidance of speculation, discouragement of the production of goods and services that contradict the value pattern of Islam, and, finally, the introduction of *zakât.* Some Muslims would argue that there is another aim in Islamic banking, viz. to promote the social and economic development of the Islamic countries. The author deals with the legal forms, such as *muḍâraba* (commenda) that are used nowadays to bring banking practice into confotmity with Islamic law. He concludes that Islamic banking, by the ideological restraints under which it has to operate, is probably less efficient than traditional banking and that, where Islamic banks have to compete with traditional ones, they are under a constant pressure to trade off Islamic purity to financial gains. One of the ways to prevent this is the establishment of Religious Supervisory Boards that nowadays exist in the majority of Islamic banks.

The notion of the islamic *umma* is the central issue of Reinhard Schulze's essay: "Citizens of Islam: The Institutionalization and Internationalization of Muslim Legal Debate". Schultze observes that already in the eighteenth century the concept of the *umma* had been secularized. It referred to a civilization rather than to a community of law, which it was in early Islam. This "delegalization" of this concept reached its peak in the nineteenth century, with the formation of nation states and the secularization of large domains of the law. However, at the same time a new call for political unity of Islam was raised by intellectuals and activists like Jamâl al-Dîn al-Afghânî. As one of the means to reach such unity, the re-evalution of the legal tradition was proposed, with the aim of accomodating the *sharîʿa* to the entire Islamic *umma.* This call, however, did not find much response and the issue remained very theoretical and even fictitious. Most Muslim jurists accepted the political division of the

Islamic world. Interestingly, however, the idea of the Islamic *umma* became ethnicized in certain regions. Islam then was regarded as a nationality, to which Islamic law served as a marker. Pakistan was the first state to experiment with this concept. But is was followed in Bosnia-Herzegowina and among the Black Muslims in the USA. During the 1960s a totally novel approach towards the repolitization of the *umma* was proposed by Muslim jurists who promoted the unification of the *sharīʿa* as a means to re-establish a transnational Muslim identity. Several supranational Islamic organizations debated the issue, but without any tangible result. Schulze consludes that this is to be expected as the intellectual debates on the legal character of the *umma* have only a restriced participation.

In his essay "Shariʿa in the Discussion on Secularism and Democracy" Muhammad Saʿîd al-ʿAshmâwî reaches the same conclusions as the Egyptian modernist ʿAlî ʿAbd al-Râziq had formulated some seventy years ago in this *al-Islâm wa-uṣûl al-ḥukm* (Islam and the foundations of power), viz., that Islam is originally not a political religion. His arguments, however, are somewhat different. Al-ʿAshmâwî founds his conclusion on the fact that the original meaning of *sharīʿa* is not law, but method, path towards God, consisting of worship, ethics and social intercourse. Only later did it come to mean law. The result of this was that the scholars became clergymen who had a hold on politics and created a theocracy. Al-ʿAshmawi therefore calls for a deep change in understanding the sources of Islam so as to remove the ideological obstacles to democracy.

The issue of womens's rights in Islam is the theme of Rubya Mehdi's contribution "The Legal Rights of Muslim Women: A Pluralistic Approach". Mehdi argues that there are many different interpretations of the sources of Islam, and that this undoubtedly affects women's rights. She shows how fundamentalists and modernists give entirely different explanations of the same Qur'ânic verses. However, given the fact that there are state laws regulating the position of women in society, laws that may be more or less favourable to women, there is the additional problem that the position of the majority of women is not governed by state law, but by custom. In her conclusion she calls for a period of empirical analysis for Muslim feminism so as to eleiminate the traditional stereotypes of Muslim women and to better address their problems.