Recent trends in Islamic Law

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I am asked to talk to you today on recent trends in Islamic Law. For this purpose I am taking a very liberal definition of the word "recent" for I do not think that genuinely contemporary events can be understood without some historical framework to work on. Therefore I will divide my talk into three parts. The first part will be a brief recap of the historical developments of Islamic Law and particularly its attitude to change and reform. The second part will be a consideration of the role of Islamic Law in the era from approximately 1800 to 1945: an era which I shall, for want of a better phrase, call the era of Colonialism in which the notion of independant Islamic states was subordinated to the political influences of dominant European powers. The third part will consider the development of Islamic Law since the end of the Second World War. This period I will categorise as the era of independant Islamic states. I will concentrate particularly on very recent trends in the role and use of Islamic Law.

First, then, to consider the historical development of Islamic Law. Islamic Law is said to be an immutable and divine law – God given through the agency of the Prophet Muhammed who lived from approximately 570–32 AD in an area of the world we now know as Saudi Arabia. The Quran, the word of God revealed to the Prophet, is the first source of Islamic Law. But it is important to realise that it is only the first and not the only source of Islamic Law. There are other sources – of necessity. The Quran is a religious text more than it is a legal text – the legal material in it is small and not by any means comprehensively or consistently dealt with. Therefore the Quran needs to be buttressed with other sources. The second source is the Sunna. These are collections of the stories *(ḥadīth)* that relate to the Prophet's life and acts. They record the minutiae and detail of how the Prophet sought to live his life in accordance with the newly promulgated religious order propounded by the Quran. Particularly important among these stories are those which relate to the Prophet being asked to arbitrate disputes or decide questions of Law. The Sunna is textually a much larger formal source of material than is the Quran, but it is also more various and disputed. The text of the Quran was finalized very soon after the Prophet's death in the reign of the third Caliph Uthman. The Sunna was not collected together for at least a century after this and many different collections of *ḥadīth*

abound. Once it had been accepted by jurists as an important source, then jurists were not averse to fabricating stories to support their particular legal point of view. How much was fabricated is very controversial. Islamic jurists claim certain collections contain only genuine *ḥadīth,* while some western scholars (especially Schacht) maintain that very few even of these can be shown convincingly to be genuine. In the end it matters little because they are treated as genuine by the vast majority of past and present Islamic jurists.

Islamic Law as it was practised in the Islamic courts of the Islamic world up until the nineteenth century, however, was not that to be found in the Quran and the Sunna. It was the law of the early medieval islamic jurists. With the Quran and the Sunna as their foundations, successive generations of Islamic jurists developed the particular principles of law. Very rarely were their juristic writings works of general principle. Like Roman and Jewish Law before it, Islamic Law writing was a mass of individual answers to specific questions collected together subject by subject which acted as the starting point in any action and which allowed the operation of juristic development by analogy *(qiyās).* This then was Islamic Law. A Jurists Law developed in the two or three centuries after the Prophet's time and was promulgated in multi-volumed juristic writings. The fissiparous nature of such a law was only prevented by the jurist Al-Shāfiʿī promulgating a theory of the sources of law *(uṣūl-al fiqh)* which most Jurists accepted and which resulted in Sunni Jurists accepting and forming themselves around four main schools of law: the Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī.

In theory Islamic law was the only law. In practice many of its rules and exhortations were for an ideal society that did not exist, therefore from an early stage other laws and other courts were accepted as existing in parallel (though in theory subordinate) to the Islamic Law system. This was particularly true of the law of commercial and trading transactions and public law and criminal law. The lack of a formal mechanism change made Islamic Law more and more out of touch with social realities and enhanced this duality of process. The dynamism of the early jurists (through the exercise of independent reasoning known as *ijtihād)* was considered exhausted. Some jurists, however, called for a renewed interpretation. Ibn Taymiyya was one great late medieval jurists who did so, but his influence was negligible on the official path of the law and the Islamic law ossified into certain well defined subjects and procedures. By the beginning of the nineteenth century when the Islamic world was

forcibly opened up to the influence of European powers Islamic Law had already probably in practice lost its central and commanding role. That tendency was to be accelerated over the next century and a half.

It is generally considered that the era of colonial influence in the Islamic world commenced with the invasion of Egypt by Napoleon Bonaparte in 1798. Although it is too simplistic to assume that a single event began the era of colonialism in the Islamic world and it also ignores the connections and relationships between the European powers and the Islamic world before 1798, it is convenient to begin at that date. For it is from that date that the Islamic world began to adopt, sometimes voluntarily but generally forcibly, western political and legal institutions in place of their own. Napoleon drew up plans for reforming the administrative and legal stucture of Egypt some of which were put into effect by Muhammad ʿAlī, the first modern ruler of Egypt. The Ottoman Empire, which held political sway over a large part of the present Middle East, was desperate to join the Club of Europe and be accepted as an equal at International Conferences and in World Affairs (just as Japan was at about the same time). The price of admission for both the Ottoman Empire and Japan was the "Europeanization" of their political and legal structures. The Ottomans turned to French precedents in the reforms known as the Tanzimat. The Japanese turned to German precedents in the reforms know as the Meiji reforms. It is interesting and instructive to consider and compare how these two experiments in Social engineering turned out but that is a topic for a further lecture!

The Ottomans adopted verbatim a number of Western codes between 1850 and 1863 mainly in commercial and criminal law matters together with a separate court system to operate them. This was met with surprisingly little reaction from the more traditionalist elements of Ottoman society: for two reasons. First, these were areas in which the Ottomans had already accepted some interference by the state already in the form of laws *(qānūn)* and separate courts and second, there was a view that it was better to preserve Islamic Law in aspic as an ideal which could be used at a time in the future when the ideal society existed rather than to alter and amend it and thereby unalterably change it.

The trend to "Europeanize" however stopped short at replacing civil law and personal status law which continued to be in the jurisdiction of Islamic courts though they applied differing juristic texts, with little or no degree of uniformity, from one end of the Empire to the other. These were areas of traditional application of Islamic law rules. To promote

uniformity a solution was sought in the codification of the Islamic Law rules. There was much more oppostion to this than to outright replacement of Islamic Law by European Law. Why? Because it meant making choices of Islamic law texts; it meant accepting one juristic point of view as official and authoritative and rejecting the others. This is why the Ottoman Civil Code of 1869-1876 was so radical. It codified Ḥanafī civil law and applied it in all the Islamic courts of the Ottoman Empire. Personal status was even harder to tackle but this was done eventually in the codification of Ḥanafī Law in the Law of Family Rights of 1917. These two pieces of legislation marked a watershed in the development of Islamic Law because for the first time it was accepted that a State could make choices for the Islamic courts to abide by and they adopted Islamic law rules to a western format. This has been the main way by which Islamic Law has been adapted by modern state systems as we shall see. The remainder of this period saw a continuation of these two developments. After the collapse of the Ottoman Empire after World War One, then the British and French demarcated their areas of influence and were instrumental in continuing to export their own laws to the countries they controlled. In the heartlands of Islamic Law, however, laws codifying the Islamic rules began to be adopted. This was particularly true, in this period, of Egypt.

With the end of World War Two then independent Islamic states began to be established in the Middle East. They were eager to establish their Islamic credentials. Therefore almost all of them provided in their Constitutions for Islam to be the state religion and Islamic Law to be *a* primary or *the* primary source of law or legislation. This has in the main been mere windowdressing. States since independence have continued the trend they inherited of maintaining the duality of a secular European style legal system with its own laws and courts together with an increasingly truncated Islamic Law system. Some in fact have begun to eliminate the Islamic Law courts altogether and subsume their work into the secular system. This was done in Egypt in 1955, and more recently in Iraq and in certain emirates of the UAE. Only Saudi Arabia stands outside this framework. But even here although the Islamic courts are theoretically the only courts there exists a large network of tribunals (for labour matters, commercial matters and administrative law matters) which exist side by side with the Islamic courts and which increasingly are given *sole* jurisdiction to determine certain types of dispute.

The 1950's, 1960's and 1970's also saw an increasing number of

Islamic states adopting codes of personal status laws, beginning with the Jordanian Law of 1951. Unlike their predecessors, however, these laws sought not just to codify the law but to amend it as well. The techniques of amendment ranged from the simple (merely borrowing minor opinions within a school or opinions from another school) to the sophisticated (where states, buttressed by modern juristic opinion, chose to reinterpret provisions in the Quran and Sunna to better fit modern circumstances). This tendency had its apogee in the Tunisian law of Personal status of 1956 where Quranic provisions were reinterpreted to support a ban on polygamy and prohibition of a husbands right of unilateral repudiation of his wife *(ṭalāq)*. Later codifications have not been so bold.

These two tendencies (of secularisation and codification of Islamic Law) had become so ingrained that Professor Sir Norman Anderson in his book 'Law Reform in the Muslim World' published in 1976 felt minded to predict that:

"...the future will witness the disappearance of both Sharia and community courts and the application by unified national courts of a body of codified law which represents throughout a certain synthesis between western and Islamic concepts the former paramount in civil commercial and penal law and the latter in the field of personal and family law."

That this has not happened since Professor Anderson wrote can, I think, be linked inextricably to one event. That is the Iranian Revolution of 1979. Not that the Iranian Revolution had a direct influence on the Sunnī Islamic world as it was, and is, a very Shīʿī revolution. But it rekindled a debate which had been muffled and gave impetus (direct and indirect) to traditionalists to call for a more Islamic approach by governments. The Iranian Revolution stopped the increased secularism of states in its tracks but it has not yet so far had much influence (other than an increased debate) in producing more Islamic states. In Iran itself, although the political system was radically altered to give considerable power to Shīʿī jurists, in practice (except in areas of personal status) much of the pre-revolutionary law has been kept and is still used. The Iranian Civil Code, for example, a product of western concepts promulgated in the 1920's, was supposedly included in the blanket rejection of all legislation that was un-Islamic. In practice a handful of its provisions which are clearly and overtly contrary to Islamic Law have been removed and the Code is still used and referred to as the main Civil Law of Iran.

Other Sunnī states have had to contend with increasingly vociferous

(and violent) groups whose sole political purpose is to see Islamic Law applied as the main (or even sole) law in the state. Beyond slogans such as "Islam is the solution" and "the Quran is our Constitution", however, it is not clear how such an approach would be put into practice. In Algeria the prospect of a parliament and government dominated by Islamic fundamentalists was enough for the pro-western government with the assent of the army to declare emergency rule. In Jordan, however, where Islamic fundamentalists have been allowed to take a sizeable number of seats in Parliament no great changes to the legal system seem to have been brought about as yet, although a new Personal Status Law has been drafted and is under discussion.

Only two Sunnī states have seriously attempted to implement an Islamic State and the difficulties they have experienced exemplify the increasingly fragmented arguments as to "what is an Islamic state?" and "What must one do to apply Islamic law?" The two cases are the Sudan and Pakistan. Both are cases where leaders with quasi-dictatorial powers imposed their view of Islamic Law on the legal system almost certainly against the wishes of a majority of the population. In the Sudan, President Numeirī by the September laws of 1983 sought to gain popular support and short term political gain by enacting a number of stringent Islamic Laws and making a break with the old common law based legal system. The main laws introduced were a criminal code, a civil transactions law and a commercial law. They were applicable to all Sudanese irrespective of religion, a fact which led directly to civil strife between the Muslim North and the Christian-animist South. The laws have been applied harshly and indiscriminately. In a notorious incident a famous modern Sudanese Islamic jurist who attacked the laws as un-Islamic was executed for apostacy. No longer is Islamic Law what the jurists say; it is instead what the state says it is and to argue otherwise is the new heresy.

In Pakistan too a new Islamic Law is being forged. President Zia al-Ḥaq promulgated by decree a number of Islamic ordinances mainly pertaining to Islamic crimes (such as *zinā* and theft) but also *qiṣaṣ* (retaliation or payment of blood money for injuries) and the payment of Islamic taxes (such as *zakāt*). However, his most lasting testament has been the creation of the Federal Shariat Court with power to test and strike down legislation which contradicts the Injunctions of Islam as found in the Quran and Sunna. Although the court does indeed look at the works of the Islamic jurists it considers itself not in any way bound by them and it comes to its decisions on its own interpretation of the principles it finds

in the first two textual sources of Islamic Law. Thus, the main development of Islamic Law by the medieval jurists is replaced by the views of a small coterie of very conservative and unelected judges. The sphere of activity of the Federal Shariat Court is curiously limited however. It was prohibited from dealing with financial and economic matters until 1990 when it then heard a number of cases and in a notorious decision declared the interest provisions in a large number of Pakistani statues void for *ribā*. The decision, which caused much confusion in the money markets, has now been suspended pending an appeal to the Supreme Court. The Court is still nevertheless prohibited from hearing cases concerning Muslim personal status matters which means that the amendments of Islamic Law in Pakistan made by the Muslim Family Laws Ordinance of 1961 have so far survived its scrutiny. But one wonders for how long.

What then of the future?

All states in the Islamic world are involved in the debate of how relevant Islamic Law is, and should be, in the contemporary world. The debate involves as much as anything else a consideration of "what is Islamic Law?" For the majority of Islamic states it is my opinion that although the debate will carry on the reality will continue to be that Islamic Law will be less and less important in practice and that its expression even in areas such as family law will be codified along broadly similar lines. I think we will see in the next ten years or so family laws or codes promulgated in those remaining countries without such legislation: Qatar; the UAE; Oman; perhaps even Saudi Arabia. In Civil Law the trend towards a harmony of mainly Western with some Islamic Law input will continue. In Criminal Law those states that purport to apply Islamic punishments will be marginalized .

In summmary therefore I do not forsee a renaissance for Islamic Law except in its modern guise. The debate will certainly continue, but the reality will be at variance with it. This is not a popular opinion. But it is one based upon the expectations of ordinary people. After all to put it into an other context: the Prophet Muḥammad lived contemporaneously with St Augustine and converted the Arabs to Islam at the same time as Augustine converted the heathen English to Christianity. Islamic law was almost complete by the date of the Battle of Hastings. Islamic Law therefore accords with the flowering of Anglo-Saxon Law in England. To argue that Anglo-Saxon law has a direct relevance today and provides a complete and comprehensive code of laws would find few adherents in

England; yet this is the equivalent of what many Islamic traditionalists in an Islamic context would try to impose. I do not see the majority of forward-looking people in any modern Islamic state agreeing to this. But the debate as to the proper role of Islamic Law and its role in the modern Islamic state, will continue for a long time yet and will I am sure be a source of much future controversy.