The legal system of Iraq and the continuity of Islamic law

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In view of the vast changes and developments in the fields of law and government in the Arab-Muslim countries, the future of Islamic law (the *sharīʿa)* is of prime interest to scholars of Law and of Oriental studies. Some are of the opinion that in recent decades Islamic law has become a rigid institution or relic of the past. Others think that it is now less important in its application. Today about one billion Muslims are subject to Islamic law in one way or another. However, due to these changes and developments the question of the extent to which their socio-legal life is acually governed by it at the present time is more than academic. A detailed, comprehensive study is needed not only of the Arab countries which are linked together by common history, tradition, language and religion but of all Muslim countries. Notwithstanding that the Arab-Muslim countries have been subjected to foreign invasions, domination and colonization as well as Western influences and a modernization process, Islamic law seems to continue throughout the centuries as an essential part of the legal system. The case of Iraq may illustrate the development and the current place of Islamic law in the legal system of the country.

The legal tradition of Iraq goes back more than five thousand years. Twice in its history Iraq enjoyed a high reputation in the field of law and government. The first occasion was in Babylonian times when the country held pride of place among the nations by possessing a formal written law, namely the Code of Hammurabi, known from archaelogical evidence. The second was during the Abbasid Empire when Baghdad became the main center of Islamic jurisprudence and the capital of the largest centralized government of that time.

The famous Code of Hammurabi was not the first written law in the history of Iraq. The Sumerians around the 5th-4th millenium B.C. preceded Hammurabi in this respect. However, his Code was unique in both substance and form. The Assyrians and other dynasties which ruled Iraq during pre-Islamic times also had their own laws, customs and modes of government. Furthermore, in pre-Islamic times a considerable part of Iraq and the whole Arabian Peninsula were dominated socially,

legally and politically by a tribal system, in which the individual depended upon the protection of his tribe. The Arab customary law was a code of honor which gave him security and protection and regulated such family matters as marriage, divorce and inheritance. At a later stage the gathering of several tribes around a more powerful one created a rudimentary form of state.

The legal system of the various communities which lived in Iraq before the coming of Islam was thus a mixture of laws, customs, usages and traditional practices derived from the different existing local cultures. One of these was Arab culture.

Following the Islamic conquest of Iraq after the decisive battle with the Persians in 637 A.D. the conquerors settled down and established their own social and political system based on Islam's religious, social, ethical and legal standards. The different local cultures of the various communities gradually incorporated their laws, customs, usages and socio-legal practices in the new Arab-Muslim socio-legal and religious framework. The coming of Islam gave birth to a new law and a new system of government. Among other things it sought to overcome the differences between customs and tribes and unite the disparate communities under the new faith, invoking the well-known Qur'anic verse:

> "O mankind, we created you male and female and made you into nations and tribes, that you may know each other. Verily, the most honored of you in the sight of God is he who is the most righteous of you."[1]

Loyalty to one God and a single authority came into being. The religious tie was to replace tribal ties whereby the tribal blood bond was assimilated to a unified community or nation, the *umma*. One who adopted Islam had to abandon tribal customs and usages which were contrary to the principles of the new law and order. He must also surrender his tribal autonomy and alliances. This "theocratic" state based on the principles of unity, law and order, maintained its political authority by the idea of the sovereignty of God, head of the *umma* and the Supreme lawgiver. God's rule is absolute and His divine command was bestowed on Muhammad the Prophet who thus represented the Rule of God upon earth. This authority was then passed on to Muhammad's successors, the Caliphs, who were to be both the guardians of the Divine law and

[1] Abdullah Yusuf Ali, *The Holy Qur'an, translation and commentary*, Cambridge, Mass. 1946, vol. 1, p. 84, Sura 49:13.

directors of temporal affairs. The Caliph was therefore vested with temporal power in order to enforce the law, and his subjects were enjoined to obey him. This was expressed in the Qur'anic saying:

> "O you who believe. Obey God and obey the Messenger and those set in command amongst you!"[2]

The nature of Islamic law may best be described in the following formulation of the Arab philosopher and historian Ibn Khaldun:

> "Divine law seeks to prescribe the conduct of men in their affairs, their worship and their dealings, even those related to the state, which is natural to human society. The state, therefore, is patterned on religion, in order that the whole should come under the supervision of the Lawgiver."[3]

The development of Islamic law

On the foundation of the two sources, the Qur'an and the Hadith, the Islamic law developed into a detailed system. During the rule of the four rightly guided Caliphs, *ar-rashīdūn,* and during the Umayyad dynasty, Iraq became the base of the Muslim expansion to the east and a center of Arab-Islamic culture. It played a leading part in Islam's cultural, administrative and judicial development as well as in its political activities. In the sphere of the administration of justice the system of *arbitration* was reduced by the creation of the regular court of justice presided over by an appointed *qāḍī* (judge) – this since the reign of the Caliph Omar. Prior to that the Caliph and his representatives throughout the empire were in charge of both executive and judicial functions. The rapid development and expansion of the Islamic society and the complexity of its administration led to the separation of such functions and the creation of the different Schools of Jurisprudence. They enlarged the scope and application of man-made law based on the divine law.

During the Abbasid Empire from 750 A.D. Baghdad became the capital of the new Empire and the center of Arab-Islamic civilization. The classical schools of tradition and jurisprudence originating in Medina, Basra and Kufa moved to Baghdad, where they developed a flexible system by the method of *ijtihād,* which means personal elaboration or

[2] *The Holy Qur'an,* Sura 49:59.

[3] Ibn Khaldun, *An Arab philosophy of history,* transl. Ch. Issawi, London 1950, p. 135.

judgement. It attempts to find the suitable rule, or the true application of the Qur'an and the Traditions of the Prophet in a new situation. By *ijtihād* Islamic law could grow and develop in all of its fields: public and private, civil and criminal. Progress was made in the spheres of the administration of justice including the functions of the *qāḍī,* the administration of the central government, the activities of the provincial governors, the system of taxation, and army regulations.[4] Besides the systematization of the sources of law – how to use the Qur'an, the Sunna, the *qiyās* (analogy) and the *ijmāᶜ* (consensus) – two secondary sources gained acceptance: the first is *istiḥsān,* preference (similar to the concept of equity), and the second is *istiṣlāḥ,* interest, involving the amendments to rules relating to public policy derived from good will.

Some time during the twelfth century this development of the Arabic-Islamic society ceased. A main cause was the Mongolian invasion in 1258 A.D. Shortly thereafter disintegration and fragmentation of this once unified society began and Iraq entered upon the darkest period of its history. Various dynasties of Turkish and Persian origin ruled the country until the early part of the sixteenth century when the Ottomans occupied the country (in 1534 A.D.). It remained an Ottoman province until World War I.

Under these foreign rulers the decline of the Arabic-Islamic civilization accelerated. As far as the legal system is concerned, the door of *ijtihād* was closed and rigidity of the law prevailed. The *ijtihād* was replaced by imitation, *taqlīd.* Any change in the law was regarded as an evil innovation, *bidᶜa.* This state of affairs continued until the nineteenth century when, as a result of Westem influence, the Ottomans began to adopt a series of reforms.

The legal system under Ottoman rule

For more than four centuries Iraq was a province of the Ottoman Empire. The Empire itself was an Islamic state and its legal system was based on Islamic law. All its ruling power was vested in the absolute monarch, the Sultan, who was represented in the provinces by governors. The administration of justice was directed from Istanbul. Iraq's territory was divided into three major political divisions, *wilāyats:* the

[4] J. Schacht, Pre-Islamic background and early development of jurisprudence, ch. 2 of *Law in the Middle East,* ed. M. Khadduri and H. J. Liebesny, Washington 1955.

Mosul *wilāyat,* the Baghdad *wilāyat* and the Basra *wilāyat,* each administered by a governor whose chief task was to collect taxes and maintain law and order.

Early in the nineteenth century, as a result of Western influence and the modernization process, a number or laws, largely of Western origin, were introduced. They were in the areas of criminal, commercial, and maritime law, and of civil and criminal procedure. The majority were derived from French, German and Swiss laws. These new laws were established and developed under the Reform of 1839, called the Tanzimat, by an Imperial decree. Additional reforms along the same lines were enacted in the *khaṭṭ-i humayun* (Imperial decree) of 1856.[5] Subsequently there was a continuous increment of Western laws which led to the enactment of a mass of *ad hoc* legislation. As a result of these changes we find that in the spheres of criminal and commercial law the application of Islamic law was limited to some extent. A substantive proportion of civil law remained unchanged, as was prescribed in the Ottoman *majalla,* which was the Islamic civil law, except, however, as regards the adoption of some provisions and procedures from the above-mentioned European sources.

These changes brought both multiplicity and variation into the judicial system of Iraq. Many types of court came to be recognized, most of which still exist. There were naturally the Sharī^{c}a courts presided over by the *qāḍīs.* Their jurisdiction was now limited to family matters such as marriage, divorce, inheritance and guardianship.

The Nizamiya courts were of more recent origin and had jurisdiction in both criminal and civil cases. Their organization and procedure were largely based on French models. They were separated into two divisions: the Civil and the Criminal Divisions.[6] The Civil Division of the Nizamiya courts were known as the Courts of First Instance, the Commercial Courts and the Peace Courts. These courts had jurisdiction in civil and commercial matters. The Criminal Division of the Nizamiya courts were known as the Criminal Courts. They dealt with crimes, misdemeanours and contraventions, categories drawn along the lines of the French penal code. Then there were the Courts of Appeal: they had jurisdiction in cases already decided by lower courts. The highest level was the Court of

[5] Longrigg, S. H., *Four centuries of modern Iraq,* London 1925, pp. 280-289.

[6] Khadduri and Liebesny, *op. cit.,* pp. 284-291.

Cassation. It had jurisdiction over the decisions of the Civil and Criminal Courts and was located in Istanbul.

These were the general features of the Iraqi legal system until the onset of British rule in 1914, during the First World War. It may be recalled that during the later period of the Ottoman Empire many laws of Westem origin were introduced. Most of the changes concerned the law of procedure and criminal law, not civil law and family law.

The legal system under British rule

The general principles adopted by the British for the administration of the country evolved after much trial and error during the occupation period (1914-1920). They first tried to abrogate the Ottoman system of administration of justic and laws and to introduce their own legal system. This was embodied in a new code, called the Iraqi Occupied Territories Code, derived from Anglo-Indian civil and criminal laws. It was promulgated by the British Army Commander in August 1915.[7] This new code, however, was in force only in the Basra Wilāyat from the beginning of the occupation in 1914 and would eventually be expanded when the rest of the country was occupied.

The British encountered many difficulties in carrying out their new system of justice. In the first place, the inhabitants of the Basra Wilāyat were unfamiliar with the alien institutions and laws. They were further confused by the fact that the government administration, including trials, was conducted in English rather than in Arabic. Moreover, the people feared that this code would abrogate the already existing laws, including Islamic law, and regarded this as an indication of political change in the status of Iraq.[8] It was felt that the British intended to put Iraq under the direct control of India which was in turn under their control. As modern historians have pointed out, the Code, in its provision and the manner of its application, seems to have made little distinction between India and Iraq. It was intended to pave the way for the absorption of lower Mesopotamia into India.[9]

This created more confusion and dissatisfaction among the people.

[7] *Iraq, Iraq Occupied Territories Code, 1915,* Bombay 1915.

[8] *Iraq, Review of the Civil Administration of the Occupied Territories of al-Iraq, 1914-1918,* Baghdad 1918, pp. 52 f.

[9] Ireland, Ph., *Iraq: a study in political development,* London 1937, pp. 83 f.

To overcome the resistance, or to appease it, numerous orders, proclamations and notices were issued - all to little avail. About three years after the inception of the Code the British acknowledged their failure. They evidently realized that the people had been accustomed to the laws and courts for a considerable time, and Government officials had been trained in the existing laws and legal procedures. Therefore, the abandonment of the existing legal system would not only cause serious inconvenience to the inhabitants of the country but also deprive the courts of any effective assistance from local judges and officials, not to mention the fact that the imposition of a radically different system of government and laws in an occupied country was contrary to the principles of international law as prescribed in the Hague Conventions of 1899 and 1907. It is important to point out, in this connection, that no law, i.e. a living law, can be suppressed completely, especially when the law replacing it is foreign to the traditions and way of life of those upon whom it is imposed.

By the time the Baghdad Wilāyat was occupied in 1917, the British felt the need to change their policy. Upon entering Baghdad General Maude's proclamation made it clear to the people that the Iraqi Occupied Territories Code would not be introduced in this Wilāyat.[10] He assured them that the existing institutions and laws would remain in force unless it was necessary to have them replaced or amended. In 1918, the two wilāyats, Basra and Baghdad, were merged and the judicial system and laws of both were consolidated along the lines of the Ottoman legal system.[11] This policy was welcomed by the population since it replaced a foreign system of law and procedure by one with which they were already familiar. In the following year the Mosul Wilāyat was brought under the same system.

Between 1914 and 1920 the separation of the judicial from the executive power was hardly considered by the British authorities. All powers, judicial, executive, administrative and financial, were vested in the military or political officers who were in charge of the headquarters of the cities and towns representing the authority or the Civil Commissioner. Generally, from the establishment of the Iraqi government in 1921

[10] *Iraq, Compilations of proclamations, notices ... issued in Iraq from October 1914 up to August 1919,* Proclamation No. 9.

[11] *Iraq, Basra Court's Amalgamation Proclamation by the General Officer Commanding, Dec. 24, 1918,* Baghdad 1918.

under the British mandate, up to its termination in 1932, many of the old laws were replaced, especially those pertaining to civil, commercial and criminal matters. In their place modern legislation was enacted. The Criminal Law and the Law of Criminal Procedure were modified and the change was incorporated in the new Baghdad Penal Code and the Baghdad Criminal Procdure which became effective in 1919.[12] Many features of the Ottoman Penal Code and of the Ottoman Criminal Procedure were retained. In its final form the Constitution of 1925 recognized three classes of court: the Civil Courts dealt with civil, commercial and criminal matters; the Religious Courts dealt with personal status and matters related to the religious trusts *(awqāf)*. This system also included the councils of the Christian and Jewish communities, which dealt with all matters connected with personal status and family law. There were also Special Courts such as the High Court, intended to try ministers, members of parliament and judges of the Court of Cassation; Military Courts and Tribal Courts. The latter were to try tribesmen in accordance with the Tribal Dispute Regulations. Those courts were administered by administrative rather than judicial officials, in accordance with the Regulations, without reference to the ordinary courts of the country.

The legal system since independence

Since independence, and despite the setbacks and interruptions, Iraq has made important strides forward. Its evolution has been significant in many fields of life. In the judicial sphere its laws, legal institutions and system of courts have advanced considerably: the number of Sharī^{c}a Courts, Courts of First Instance, Magistrates' Courts, Courts of Appeal and Peace Courts has increased.[13] New laws based on modern concepts of legislation have been enacted. A new civil law was adopted in 1953, based largely on the Egyptian civil law.[14] This law superseded the Ottoman *majalla*. A large proportion of this new civil law is based on the principles of Islamic law, but without being limited to the teaching of any

[12] *Iraq, Report on the administration of justice, 1919,* Baghdad 1919, p. 4.

[13] Government of Iraq, *The Organic Law of Iraq and amendment (The Iraqi Constitution),* Baghdad 1925. For further information concerning the Court's system see articles 71-88 of the Constitution.

[14] *Iraq, The Iraqi Civil Law,* Baghdad 1953, law no. 40, 1951, became effective in 1953.

of the classical Schools of Jurisprudence. The Law of Civil Procedures was amended several times until the passage in August 1956 of a new law, which became known as the Law of Civil and Commercial Procedure. A more comprehensive Law of Civil Procedure was enacted and came into force in 1969. The Criminal Law of 1918 was amended several times and in 1969 a new law was adopted which was followed by a number of amendments. Likewise, the Law of Criminal Procedure of 1919 was amended several times until the adoption in 1971 of the new law, which is based on modern legislation. The Labor Law was amended several times and superseded by a new one in 1971. In 1959 a new law of personal status was enacted. It was drawn from the previous Islamic law and the different classical schools.[15] Shortly thereafter a Court of Personal Status was established side by side with the Sharīᶜa Courts. These courts have jurisdiction in matters of family relations for the non-Muslim communities and for foreigners whether Muslims or non-Muslims.

Generally, during this period until the present time, new laws and regulations were passed, based on modern legislation. At the same time many of the old ones, which were no longer adequate to the current stage of the country's development, were replaced. Briefly, Iraq has been able since its independence, and particularly during the republican regime from 1958, to develop its legal system and administrative structure to a higher level than it has known for centuries.[16]

As it appears, and by virtue of the development of the Iraqi legal system, many sources of law were incorporated and merged with Islamic law. These sources are: French, German and Swiss, Anglo-Indian and Egyptian laws. They became the historical sources of Iraqi laws. Beside these there are formal and informal sources from which the judiciary derives its authority and coercive force. Article 1 of the Civil Law classified these sources into two categories: the formal and the informal sources. The formal sources are the legislation, customs, Islamic law (the Sharīᶜa) and equity. The informal sources are the judicial decisions or precedents and the juristic opinions. Thus, when an Iraqi judge decides upon a case, he first applies the statute, i.e. the enacted law. If there is no provision in the statute which governs the case he has to apply the custom, and if there is no custom, he follows the principle of Islamic law. If there is no rule applicable to the case he then makes his decision in

[15] Zidān, ᶜAbdalkarīm, *Introduction to Islamic Law*, Baghdad 1966 (in Arabic).

[16] Government of Iraq, the Iraqi Official Gazettes, 1958-1993.

accordance with principles of natural law or the rules of equity. He may also base his decision on previous juducial decisions (precedents) or on juristic opinions.

In conclusion, we can state that for many centuries Islamic law was the general law of Iraq as well as of other Muslim countries. In modem times it is still considered so in some Muslim states such as Saudi Arabia, Sudan, Pakistan, Iran and Libya whereas in Iraq and other Muslim countries such as Egypt, Syria, Tunisia, Morocco etc. Islamic law in some instances became a *source* of legislation but remained to a high degree the substantive civil law and the principal family law. However, it should be pointed out in this connection that, since the beginning of Islam, the general rule was that all new laws, customs, social and legal norms that were created, incorporated or adopted from other sources should conform to the Islamic legal, ethical and religious rules. This rule still prevails in the Arab-Muslim countries. Practically all their constitutions, including that of Iraq, prescribe that Islam is the religion of the state. Article 4 of the Constitution of Iraq of 1970 laid down that "Islam is the religion of the State" which clearly implies that no law shall be enacted contrary to the principles of Islam. Islamic law has a tendency to absorb and incorporate new laws, changes resulting from the modernization and development processes which have taken place. It may be recalled that the period of *ijtihād* which contributed to the growth and development of Islamic law produced a flexible legal system. This tendency still exists. The legislation has taken over the role of the classical Schools of Jurisprudence in the sense that the *ijtihād* became the function of modern legislation. New laws, Amendments and changes should not be contradictory to the principles of Islamic law. Islam is regarded as "a religion and state", thus religious rules and legal rules are not separated but complementary to each other. Accordingly, wherever there is a Muslim community there is also Islamic law governing it to a greater or lesser degree.