

The development of doctrine and law schools

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Since the publication in the early 1950's of Joseph Schacht's *The Origins of Muhammadan Jurisprudence* the study of Islamic law has followed the same path. Other scholars contributed to a further elaboration of the ideas presented therein, but only a few have until now questioned his thesis.

Among those who criticised Schacht's thesis are David S. Powers in his work *Studies in Qur'ân and Hadith: The Formation of the Islamic Law of Inheritance* edited in 1986, and Patricia Crone in her work *Roman, Provincial and Islamic Law* published in 1987. Powers rightly comments that acceptance of Schacht's thesis does not promote a deeper understanding of how Islamic law as a coherent system of practical regulations and rulings developed during the first century after the creation of the Caliphate. Crone for her part tries to give a number of examples of how the Romano-Byzantine system of clients was incorporated in the later Islamic rules on clients, i.e. *mawâlî*.

Already N.J. Coulson reiterated that Muslims, who had helped Muhammad to create the *umma* could not have been unaware of the impact of some of the rules contained in the Qur'ân, and therefore must have discussed both practically and theoretically how these regulations could best be applied to the real world. In his work *History of Islamic Law* from 1964 he said:

"The Qur'an itself posed problems which must have been of immediate concern to the Muslim community, and with which the Prophet himself, in his role of supreme political and legal authority in Medina, must have been forced to deal. When, therefore, the thesis of Schacht is systematically developed to the extent of holding that 'the evidence of legal traditions carries us back to about the year A.H. 100 only', and when the authenticity of practically every alleged ruling of the Prophet is denied, a void is assumed, or rather created, in the picture of the development of law in early Muslim society".

In Schacht's view it was the various geographical lawschools which emerged in the *amṣâr* created after the Conquest in the newly conquered provinces and of course in Mekka and Medina. Schacht for his part is however unable to trace the specific content of the various geographical

lawschools, but constantly refers to them in order to create a link backwards.

The practical implications of Islamic law have always been the object of intense discussion also among Muslims themselves. This was the case in the seventh and eighth centuries and is so even today throughout the Islamic world. There have been theoretical discussions and practical discussions of what to do and how to behave. We are however still in need of further clarification on two points:

- a) what rules and regulations did the different geographical law-schools actually formulate and
- b) how were these rules and regulations later incorporated in the teachings of the classical *madhhabs*.

With this in mind I think we must begin with a kind of deconstruction, if we wish to comment on the way Islamic law developed during the first century after the Conquest.

First of all: Islam was not yet a system, when the so-called rightly guided Caliphs after the death of Muhammad decided to launch the conquests, thereby creating the Caliphate as a new political structure in the Middle East.

It is therefore meaningless to label the conquests Islamic as is still often done, cf. Fred McGraw Donner in *The Early Islamic Conquests* published in 1981 and Walter Kaegi in his new book *Byzantium and the Early Islamic Conquests* edited in 1992. It was not until the conversion of the conquered peoples who inhabited the conquered provinces forced the Muslim-Arab upper class to participate in the formulation of an Islamic ideology where new Muslims were placed on a par with the old Arab-Muslims that the need for a more coherent Islamic system was formulated.

Needless to say this happened only after immense pressure from various groups which gradually converted to Islam and thus forced the Arab-Muslim upper class and the political structure they had created, i.e. the Caliphate, to formulate a practical system of laws and regulations which were identical for all Muslims at least in principle. There was no overall effort by the Caliphate to convert the conquered peoples to Islam – and therefore we have but a few examples of Christian martyrs resisting the Muslims. The Christians of Syria, Palestine and Egypt for their part did not regard the new masters as Muslims. In their sources dating from the seventh, eighth and ninth centuries they always refer to their new

political masters as Arabs, Hagareens or Saracens – never as Muslims¹!

In the real world there were only a very few Muslims – and these for their part never referred to themselves as Muslims, as can be documented from the papyri we have from Egypt dating back to the second half of the seventh and the first half of the eighth century. To cite only one of numerous possible examples, listen to what the Governor of Egypt, Qurra ibn Sharîq, wrote in a letter to the local pagarch in Aphrodito, when it was time for him to pay to the Caliph various taxes in money and kind:

“In the name of God, Qurra ibn Sharîq, governor, to Basil, administrator of the village of Aphrodito. We have apportioned to your administrative district 166 2/3 solidi for the price of the underwritten articles for the maintenance of us and the officials who are with us, both Arabs and Christians..”².

In my doctoral thesis from 1988 on the genesis and early development of the caliphal taxation system³, I argued for a methodological approach to the history of the early Caliphate which abandons the notion of either the conquests or the Caliphate having anything to do with Islam as such. As a reference Islam had meaning only to the relatively few Muslims resident in the conquered provinces, namely the Muslim Arabs who were sent to the *amṣâr* by the Caliph, or who migrated to the new military cities of their own free will, seeking new possibilities for themselves. They did not bring along any fully developed Islamic solution – but of course helped create one, or rather several, wherever they settled, giving thereby a lasting contribution to the gradual establishment of the geographical schools or, should we say, of geographical ways of applying the few rules contained in the Qur’ân to the complicated reality they found in the newly conquered provinces.

Thus having de-constructed the traditional view of the Conquest as being in any way Islamic, we must formulate an alternative in order to analyse the sources at our disposal. The Conquest was a military conquest

¹ Cf. S.P. Brock: Syriac Views of Emergent Islam in G.H.A. Juynboll (ed.) *Studies on the First Century of Islamic Society*, Papers on Islamic History, Vol. 5, Southern Illinois University Press, 1982.

² H.I. Bell: *Greek Papyri in the British Museum*. Vol. IV, The Aphrodito Papyri, London 1910 no. 1375.

³ Jørgen Bæk Simonsen: *Studies in the Genesis and early Development of the Caliphal Taxation System*, Copenhagen 1988.

– and was followed by a military occupation by the Arab Muslims deployed in the various *amṣār* in the occupied provinces. This is clearly documented by the sources we have from Egypt. The Caliphate in the beginning never interfered in local administration as long as the various local communities and cities paid what was demanded as taxes in cash or kind.

At the same time the Arab-Muslim army had to be administered – and here we have the historical genesis for the later Islamic *qâdî* – the Muslim judge. Anyone familiar with the Arabic sources can quote at least a dozen *ḥadīth* telling how Muhammad named this or that person *qâdî* in parts of the Arab Peninsula. We know for sure that he placed persons in various parts of the peninsula to help him and his supporters to administer the areas which linked themselves with the *umma* in Medina, but I think we have to differentiate between developments in the Arab peninsula and in the newly conquered provinces.

If we turn to Egypt we have at our disposal various types of sources through which we may be able to re-construct the gradual, slow growth of the Caliphal administration, thereby allowing a more profound understanding of the gradual growth of practical Islamic law as it developed here.

Al-Kindî's book on governors and judges in Egypt contains a long list of persons, who acted as *qâdî* during the first century after the Conquest. The information given in al-Kindî's work is of course coloured by later Muslim efforts to adjust historical tradition to ideological assertions. This, however, does not alter the fact, that in al-Kindî we find several indications of the scope of the first *qâdîs*' actual work: it concerned only the Arab-Muslim army stationed in al-Fuṣṭât and Alexandria.

Thus their job in the decades after the Conquest had nothing to do with formulating rules for civil life as such. Several of the first *quḍât* were individuals known to be well informed about traditional Arab rules and customs – a fact of the utmost importance for the understanding of the ways in which Islamic rules and regulations were formulated in the various provinces. They can only be understood as a synthesis between three formal positions:

- a) the however insufficient Islamic rules known in the Qur'ân.
- b) the traditional values of the Arabs in the caliphal army in Egypt and
- c) the actual problems caused by the army's stay in the conquered province of Egypt.

Here we have to search for one of the sources of the practical Islamic law

as it developed in Egypt. No doubt the same situation prevailed in the other central parts of the Caliphate, i.e. the *amṣar* in Syria and Iraq.

However, the caliphal administration also had to administer the population of Egypt in general. For this the conquerors established a close co-operation with the local Egyptian upper class. During the first century after the Conquest all administration in principle was delegated to the local pagarks (in arabic *ṣāhib al-kūrâ*, in Greek *pagarkhos*). They alone, without any interference at all from the Arab-Muslim governor, ran the local administration throughout Egypt.

The rich source material from Egypt preserved in the many papyri clearly indicates a growing concern for the way the local administration worked. By analyzing the preserved papyri we have a good, albeit limited, knowledge of how the Arab-Muslim Governors acting on behalf of the Caliph in Damascus during the first half of the eighth century slowly but to an ever increasing degree interfered with the local administration.

This is important, because it proves how the Caliphate as a whole developed – not by implanting a certain Islamic concept of administration in the conquered provinces – quite the contrary: by deriving rules and regulations from the daily administration. Thus the caliphal administration had to secure for itself an ever growing understanding of daily life in the occupied provinces.

This development was reinforced by the fact, that part of the conquered population turned Muslim after the Conquest. Moreover the original Arab-Muslim army was integrated in the local society as time went by. They intermarried, they took over or bought land, they invested money and time in local production and so forth. This is documented too in the work of al-Kindī on the *quḍât* in Egypt. As a result they had to formulate points of view on new questions and thus the various geographical schools of practical Islamic law were created.

In this connection it is important to notice how little a role the various *qâdis* played in the formulation of theoretical jurisprudence. They are hardly known to have been active in the transmission of *ḥadīth*. This does not mean, that they played no part in the actual formulation of practical Islamic law. Indeed they devised many of the rules, which were later formulated in the various *madhhabs* – but due to the fact that they formulated rules and gave regulations that had to do with the caliphal administration as a military occupation they were disqualified in the eyes of later Muslims as being conquerors or conqueror's assistants.

If we seek a deeper understanding of the historical genesis of Islamic jurisprudence we must analyse the available Arabic sources and the preserved papyri from Egypt dating back to the seventh and eighth centuries. By so doing we may have a better chance of documenting the growth of practical Islamic jurisprudence during the first century after the Conquest, thereby contributing to a more comprehensive understanding of the genesis of Islamic law in its first creative period.