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On the Origins of Islamic Law

by T. W. Lapin

American lawyers and law students who think about Islamic law — and, presumably, there are very few of us — probably think first of the lopping-off of hands for theft or of the recent execution of Prince Faisal of Saudi Arabia. Assuredly, there is considerably more to Islamic legal thought than the dismemberment of criminals. Due to the increased importance of the Islamic World in international affairs, I believe that some acquaintance with the legal system affecting the lives of more than 500,000,000 Muslims throughout the world would benefit those of us who would practice law in a society which, for better or worse, is daily increasing its economic, political and military contacts with the Middle East. This is the first of a series of articles written to that end: an attempt to give the aspiring lawyers of America some insights into the legal system of a no longer ignorable vast area of the world.

Muslim philosophy regards religion and law as being two humps on the same camel; both religion and law are divinely revealed, they are fundamentally immutable and inseparable. The opposite legal philosophy stands behind the Roman and Anglo-American law codes of the West which are the results of legal deliberation and, hence, are open to change under the same machinery which engendered them. More simply stated, Islamic law is religious while Western law is, for the most part, secular in nature.

Islamic law encompasses a far greater field than would ever be regulated by the Roman or Anglo-American legal systems; all of mankind's conduct is, in one way or another, subject to certain estab-

lished rules of law: public and private, national and international. Prayer, pilgrimage, fasting and ritual ablutions are covered by Islamic law just as surely as are theft, murder, marriage, bailments and taxes. The Muslim lawyer serves as a consultant for ethical and religious matters as well as for the criminal and civil cases handled by his colleagues in Europe, America and elsewhere. Naturally, much of this extensive body of law cannot be presented before an earthly court; this fact is accepted, and any violations of the more altruistic ethical rules are left to the "bar of Eternity." Islamic law has aptly been described as a collection of "oughts and ought-nots" and a "Doctrine of Duties" rather than the compendium of statutes we are accustomed to in the West. In the Islamic scheme of things it is society which must bend itself to the standards set by divinely-revealed laws; laws are not tools fashioned by society to suit society's ends.

Classical Muslim jurisprudence rested

upon four pillars, the "roots of the law": the Qur'an (Koran), the Sunna of the Prophet Muhammad, Ijma (consensus) and Qiyas (analogical reasoning). The Qur'an is the first source of Islamic law; it is a collection of revelations similar to, but not the same as, the Christian Bible or the Judaic Torah. The Qur'an was, according to Muslim tradition, revealed by God to Muhammad over a period of twenty-eight years, beginning in about A.D. 612. These revelations were written down on scraps of paper, bone, pottery, etc., before eventually being collected and preserved as a single entity. Although all of this occurred during the first half of the seventh century, the Qur'an itself had been written by God (in Arabic, of course) and has existed with God since before time began. Oddly enough, there are very few verses in the Qur'an of a purely legal nature. Islamic law was, therefore, not taken so much directly from the Qur'an as from well-established customary rules and government practices which the early Mus-



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lim jurists reviewed, amended, rejected or accepted depending on the degree to which these rules conformed to Islamic precepts.

No one but the ultra-orthodox ever maintained that the Qur'an was meant to provide a complete set of laws covering all the facets of human conduct. From almost the beginning of post-Muhammad Islam many laws were enacted based upon the Sunna of the Prophet. The word "sunna" originally meant a "trodden path". It came to mean the behavioral path intended by Muhammed for his followers. As it stands today, the Sunna is an immense collection of sayings of the Prophet, as well as recollections of what Muhammad permitted, forbade, approved of, and encouraged. Most of these elements are unquestionably fictionalized entries invented after Muhammad's death in 632 A.D. to suit whatever circumstances arose at any given moment. Almost everyone recognizes this, but the Sunna is still regarded as the second principal pillar of the law. The rationale behind this is the traditional belief that, although individuals can err, God will not permit the entire "umma" (Muslim community in toto) to be misled.

Even the voluminous pages of the Sunna could not provide answers for the numerous daily challenges presented to any legal system. In order to provide bases for the rulings in both secular and religious cases Islamic jurists began to legislate on their own, basing these legislative endeavors on what in their opinion (ra'y) would be most acceptable in the light of Islamic teaching. It was quickly ascertained that this method of legal derivation was far too subjective and fallible to become part of a system of law which claimed divine origin.

This rejection of opinion as an alternative for producing laws to deal with civil, criminal and ritual matters unspecified in either the Qur'an or the Sunna led to the practice of "qiyas", or "analogy," based on both the Qur'an and the Sunna. When confronted with an issue upon which no clear judgment had been made by either the Qur'an or the Sunna, a verse from either one of these authoritative sources most nearly paralleling the case at hand was taken and an analogy drawn from whatever could be most reasonably inferred from the given verse(s). The results of this practice vary from one extreme to the other, with some analogies being remarkably well

derived and others reaching out towards the far limits of often fertile imaginations. Eventually, the qiyas system became fairly well organized, being based on precedents deriving from the extensive work of a number of eminent Muslim jurists in the holy city of Madina (near Mecca), then the center of the Islamic empire. In the early eighth century the concept of "ijtihad", or "systemic original thinking", came into its own. The name of this practice is self-explanatory, and suffice it to say that ijtihad engulfed the qiyas system within a century.

This brings us to "ijma'." The use of this practice of judging the legal status of a particular problem by consensus of the people who could reasonably be considered to have some authoritative knowledge of the issue of the case at hand began where the formative period of the components of the Sunna ended, i.e. after the death of Muhammad. The "consensus" was originally derived from the opinions of a group of men called the Companions of the Prophet. These were men who had been among the earliest followers of Muhammad during the Prophet's lifetime; their prestige in matters of religion has remained strong among Muslims to this day. The Com-

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panions were never regarded as perfect or infallible, but their views on religious issues always carried considerable weight. Indeed, much of the development of the Hadīth (sayings of the Prophet) and of the Sunna itself occurred under the auspices and with the assistance of these men.

“Ijāa’ ” eventually became simply the opinion of qualified lawyer-theologians, based on the Qur’ān and the Sunna. (Lawyers during most of Islamic history have been theologians as well; the reverse was not necessarily always the case.) “Ijma’ ” was regarded as authoritative, but not infallible. Again, it was taken for granted that an individual could be wrong, but it was always held that the “umma” (Muslim community in toto) could never err in important matters of religion because such an occurrence would never be allowed by God. In this context many modern writers have drawn parallels between the concept of ijma’ and the “ex cathedra” declarations of the Roman Catholic Church.

The great body of Islamic law may be referred to by the word “Shari’a”. The original meaning of “shari’a” was a “path leading to water”; as Islam originated in a country which is almost entirely arid, the emphasis which water received as a symbol of the creation and maintaining force of life cannot be overly stressed. The Shari’a is the way which God ordained for men to follow: it encompasses all mankind and all that mankind can do. Islamic laws are, necessarily, part and parcel of the Shari’a.

Although the Shari’a is all-inclusive in theory, the factual application of its essentials is another matter: criminal law, administrative law, constitutional law and commercial law were all quite beyond the power of the Shari’a to regulate completely and, hence, to control. Because of its rigid and exacting nature the Shari’a became moribund. To handle the daily needs of an expanding society, courts of complaints, inspectors of markets, police and informal courts of mercantile arbitration arose very early in Islamic history. There was no rival code: the Shari’a remained supreme in this respect, and the other forms of jurisdiction were never officially recognized as such.

As Islamic society matured, courts were established in which the administration of the law was entrusted to judges called “qadis”, who were appointed by the state. Drawn from the “ulama’ ”, that body of men learned in matters of religion and religion-sanctioned sciences, these judges, because they were state-appointed, soon became tools of whomever wielded power at any given time. Many of the more virtuous members of the ‘ulama’ would refuse to accept appointment as judges, feeling that their personal integrity could easily be compromised by unscrupulous commands from above. In addition to courts administered by qadis, the sultan held “mazalim” courts for the relief of personal wrongs. These mazalim courts often functioned much as do the appellate courts of our own system. In these courts the sultan himself dispensed judgement according to his own feelings on the case at hand. The third major type of court was the so-called department of “moral practice”, or “ihtisab,” which superintended public morality and made immediate judgments on readily apparent crimes such as those involving defective scales, counterfeit money, adulterated commodities and other commercial violations.

By the end of the nineteenth century, the Shari’a courts within the Ottoman Empire (which, at that time, included most of the Islamic World) were reduced in authority to the handling of family disputes and questions of personal status. In some parts of the Islamic World these courts continued to function well into the twentieth century, although by and large they have been replaced by Western-style civil courts.

The legal reforms instituted in the Ottoman Empire during the last century are beyond the scope of this article; they did, however, provide the background for the eventual practices of formulating modern legal codes which became popular in many parts of the Islamic World after the First World War.

Today there are essentially three legal systems in use in Muslim countries: 1.) Those countries in which the Shari’a is still the fundamental law of the land; 2.) Countries which have abandoned the

Shari’a altogether in favor of entirely secular law; and 3.) Countries using a system based on a compromise between the two.

In the first category are countries such as Saudi Arabia, Libya, and ‘Oman — traditionalist countries with highly conservative governments and populations. In Saudi Arabia, for example, there is very little Western-inspired legislation. Any legislation contrary to the tenets of Islam is forbidden, as is evidenced by Article 6. of the “Fundamental Law of al-Hejaz”: “Legislation in the Kingdom of al-Hejaz shall always conform to the Book of God (i.e. the Qur’ān), the Sunna of the Prophet and the conduct of the Prophet’s Companions and pious Followers”. (Al-Hejaz was once an independent kingdom comprising the nucleus of what is now the Kingdom of Saudi Arabia. This development of modern Saudi Arabia took place in the 1920’s and ‘30’s.)

In the second category is Turkey, a case unto itself in which the official, Europeanized law of the land is still rejected by a large element of the population in favor of traditional Islamic law regarding family matters, marriage, religious observances, etc.

It is to the third category that most Islamic nations belong. Egypt, Syria, Lebanon, the Sudan, ‘Iraq, Tunisia and Jordan, for example, have yielded to popular sentiment dictating that, instead of the borrowing of a foreign code, adequate modern, national legal systems be derived from the Shari’a. Tunisia has developed a truly enlightened legal code using this impetus, and many of the other Islamic states have followed suit, albeit via heavy borrowing of some provisions of French and British law.

While in many parts of the Islamic World the old, traditional legal systems have been replaced by those founded upon other models, the fundamental guide of them all has been the need to retain at least some of the flavor and philosophy of the law dictated by the religion they all share. The religion plays an indispensable role in the life of every citizen and resident of these states and, increasingly, is affecting everyone of us.