Nicholas H.D. Foster

Key Ideas in Islamic Law

Es ist das große Verdienst des Sammelbandes, dem Leser nicht nur die vielfältigen Auswertungsmöglichkeiten der Quellengattung »Supplikation« exemplarisch und auf hohem Niveau vor Augen zu führen, sondern zudem den Blick auf die italienische Forschungslandschaft zu erweitern.

Martin Schennach

Key Ideas in Islamic Law*

Introduction

History is essential for understanding, and in today’s difficult climate there are few areas which are in greater need of understanding, particularly for non-Muslims, than Islamic law. Yet, in Chibli Mallat’s words: »A history of Islamic law, let alone of Middle Eastern law, is yet to be written.« ¹

Indeed, as Wael Hallaq points out in his introduction,² our level of knowledge of the most important part of the history of Islamic law, its origins and early evolution, is surprisingly low, despite considerable improvements in recent years. The difficulty is increased by the lack of a general monograph, as the recent scholarship which has cast new light on some areas and disproved earlier ideas in others, making »classic« works such as those by Coulson and Schacht largely out of date and misleading in many respects, is mostly scattered in journal articles and book chapters. Those monographs

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² 1–2.

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Kritik

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which do deal with some aspects of the subject focus on more specialist topics.

This book constitutes an attempt to fill that gap, the author’s aim being to sketch the outlines of the formative period, presenting a general survey of the main issues in the light of modern scholarship, much of it the author’s own.

The Content

The written content is preceded by two/three maps. The introduction is followed by eight chapters and a conclusion, plus several additional sections: a glossary, short biographies, bibliographies, suggested further reading and an index (all the additional sections are very useful apart from the index, which could have been fuller). Most chapters terminate with a helpful summary and conclusion.

Chapter 1 (»The pre-Islamic Near East, Muhammad and Quranic law«) is concerned with the historical and cultural background and the time of the Prophet himself. A convincing claim is put forward that, contrary to the former »Orientalist« view which regarded Arabia as a primitive backwater, the »cradle of Islam ... [was] part and parcel of the general culture that pervaded the entire Near East since the time of Hammurabi«, a conclusion of enormous importance for the nature of Islamic law and its development.

Chapter 2 (»The emergence of an Islamic legal ethic«) deals with the period immediately after the death of the Prophet. It looks at the »qadis-cum-administrators« or »proto-qadis«; consensus, based in Arabian tribal practice; established practice with its concomitant idea of 'ilm, the knowledge which enabled one to apply such practice; »ra'y«, discretionary opinion; and the beginnings of the idea of ijtihad, the »effort«, based in practice, which enables the deduction of a solution through the use of ra'y.

Chapter 3 (»The early judges, legal specialists and the search for religious authority«) continues the story of the judges and the court systems as a greater degree of legal specialisation took place, and recounts the way in which a class of legal specialists emerged, separate from the ruler’s administrative apparatus, »distinguished by their knowledge, and their knowledge alone«. These changes occurred against a background of a rise in Prophetic authority and the increasing use of Traditions (hadiths) as an indication of what that authority required. The chapter ends with a preliminary mention of a major subsequent theme, the traditionist-rationalist conflict.

Chapter 4 (»The judiciary coming of age«) deals with the judicial appointment system devised in the mature Islamic Empire, judicial independence, the composition and procedure of the court and the extra-judicial mazalim tribunals.

In Chapter 5 (»Prophetic authority and the modification of legal reasoning«) the author looks at various legal phenomena. He picks up the theme of Traditions, examining the background against which hadiths came to predominate over »practice-based sunna«, then considers the further development of consensus, ijtihad and ra'y, and Shafi’i’s role in the formulation of legal theory, a role which is too often misrepresented and exaggerated.

Chapter 6 (»Legal theory expounded«) describes and analyses »the emergence and fundamental articulation of legal theory«. The author starts by discussing »the Great Synthesis« (his own expression) of rationalist thinking, relying on human reason, and the traditionalist method, relying on hadith. As the Empire expanded,
guidance was needed in new areas and for new converts, who, unlike the Medinans, for exam-
ple, could not rely on knowledge of what the Prophet’s *sunna* actually had been; and the class
of peripatetic scholars which grew up needed a documentary source on which to base their
teaching. In the next section we have a development of legal theory, including key ideas such as
*ijtihad*, *ikhtilaf* (plurality of opinion), *qiyas* (reasoning by analogy), *ijma’* (consensus) and vari-
ous techniques employed to deal with problems of language and the transmission of texts. As
elsewhere in the work, the author’s explanation of the development of concepts is always linguis-
tically precise, showing the ways in which words were used at different periods, in different places
and by different people, and the way in which those concepts evolved to what they are today.

Chapter 7 (»The formation of legal schools«) traces the development of the schools of law (*madhhab*, plural *madhhab* (1) from scholarly circles to personal schools (»when a leading jurist attracted a loyal following of ju-
rists who exclusively applied his doctrine in courts of law or taught it to students, or issued *fatwas* in accordance with it«); and (2) from personal schools to doctrinal schools, one of the characteris-
tics of which is the possession of »a cumulative doctrine of positive law«, a doctrine which relies »on an interpretive methodology or on an identifiable and self-sufficient hermeneu-
tical system«. In this chapter the author also looks at the reasons for the success of those
schools which survived and the failure of those which did not, as well as their diffusion. He
draws particular attention to the unique nature of the schools in world legal history, and to a
vital consequence of their formation, the fact that »legal authority became epistemic rather
than political, social or even religious. ... In

In other words, a masterly knowledge of the law was the determinant of where legal authority
resided«, and that therefore »legal authority never resided in the state«.

Chapter 8 (»Law and politics: caliphs, judges and jurists«) brings together many of
the themes mentioned so far to look at the symbiotic relationship between the ruler and the law, a
relationship in which »there always remained a point of friction between worldly, secular power
and religious law« and which was therefore »constantly negotiated«. The author’s vitally
important conclusion is, however, that: »On balance, if there was any pre-modern legal and
political culture that maintained the principle of the rule of law so well, it was the culture of
Islam.«

The Conclusion reprises the main themes of the book, stressing key points such as the unique
nature of Islamic law: a »religious law that was at once the law of the body politic«, the salient
points of the development of traditionist reasoning and its true significance, and legal meth-
odology. Notably, the author returns to the non-state nature of Islamic law, stressing the non-
governmental source of legal rules (»Never could the Islamic ruling elite, the body politic, deter-
mine what the law was.«) He expands on this theme by pointing out that there was a true rule
of law, reliant on the *madhhab*; and that, tragi-
cally: »The dismantling of Islamic law and the
religious legal institutions during the nineteenth
and early twentieth centuries automatically
meant the decimation of whatever rule of law
there was in that traditional society.« The
consequences are, of course, profound and are
still very much with us.

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6 126.
7 155–156.
8 156.
9 163.
10 165. See also 204: »the uniqueness
of the doctrinal schools in world
legal cultures«.
11 187.
12 193.
13 195.
14 204.
15 205.
Some Quibbles and a Suggestion

Like any other work, the book is not perfect, and will not wholly please everyone. Some may complain, for example, that the question of outside influences on Islamic law is not dealt with in any great depth, other than the discussion of the general context of legal development. For this reviewer, though, the main quibble is the way in which the author presents his knowledge. The book is very scholarly, an advantage of course, but at the same time it creates something of a difficulty, in that the author defends and justifies his positions at some length, resulting in a text which is quite dense and at times not as easy to follow as it might be, since one must absorb not only the historical development but the academic controversies surrounding it. If he had concentrated on the story as he sees it, and left the reader to delve into the controversy if she wished to do so by reading the more specialised works, there would have been a significant increase in clarity and ease of reading in many passages. This viewpoint may reveal a personal bias, as Professor Hallaq has already convinced this reviewer of the validity of his views. In addition, there is a significant amount of repetition, some of which is understandable, but which could have been reduced by a closer revision of the text.

The result is that, although the book is described as an introduction, and can certainly be considered as such in a sense, for it introduces the reader not only to the fundamentals of the story but also to the academic debates, it would be quite hard going for an absolute beginner in the field. Therefore, if a suggestion may be made, it would be useful for teaching purposes and, more generally, the spread of knowledge about Islamic law, to have a truly introductory work, one which delves less deeply into the controversies and academic arguments and allows a clearer view of the main lines of development. The problems associated with such a work are obvious, but clear caveats would satisfy all reasonable critics.

Overall Assessment

These points are, however, counsels of perfection (or maybe beyond perfection, it is a chronic fault of reviewers to criticise a book for not being something different). Overall, this is an outstanding book. It demonstrates an extraordinary depth and breadth of research and a seemingly effortless mastery of the material – hardly surprising, perhaps, as the author is one of the foremost authorities on Islamic law, perhaps the foremost historical scholar in the field alive today. The work fully achieves Professor Hallaq’s aim of plugging the hitherto gaping gap in the monograph literature. It should have a place of honour on all Islamic law reading lists, and will be of considerable interest for anyone wishing to expand her knowledge of world legal history to include this vital subject.

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