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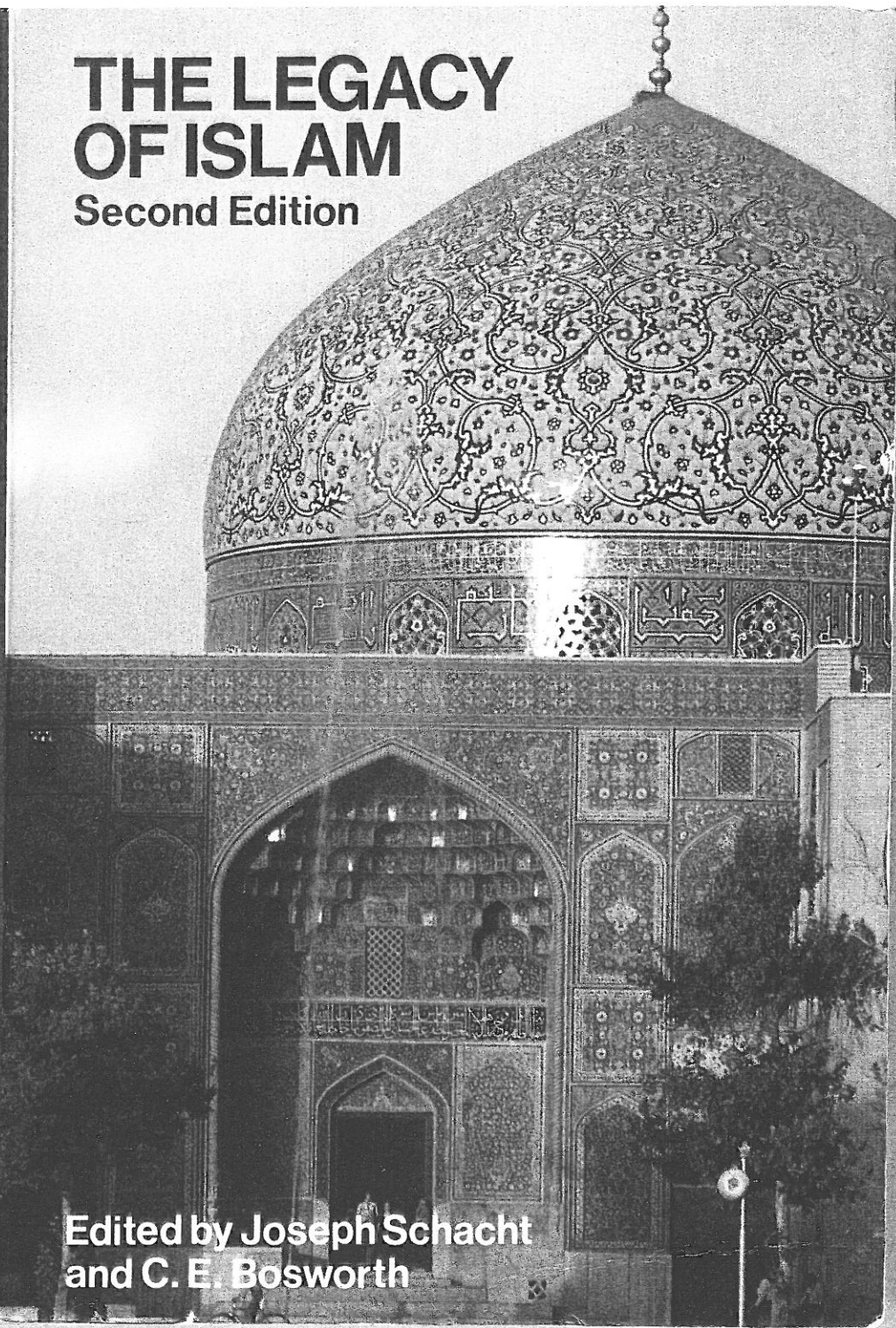
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IX

LAW AND THE STATE

(A) ISLAMIC RELIGIOUS LAW

ONE of the most important bequests which Islam has transmitted to the civilized world is its religious law, the *Shari'a*. It is a phenomenon so different from all other forms of law that its study is indispensable in order to appreciate adequately the full range of possible legal phenomena. I will not therefore attempt, within the limits of this section, to trace its history or to describe its salient institutions, but shall concentrate on showing those of its features which make it this unique phenomenon.

Islamic law is the totality of God's commands that regulate the life of every Muslim in all its aspects; it comprises on an equal footing ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules, details of toilet, formulas of greeting, table-manners, and sick-room conversation.

Islamic law is the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself. Theology has never been able to achieve a comparable importance in Islam; only mysticism was strong enough to challenge the ascendancy of the Law over the minds of the Muslims, and often proved victorious. But even at the present time the Law, including its (in the narrow sense) legal subject-matter, remains an important, if not the most important, element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western ideas.

Islamic law is a particularly instructive example of a 'sacred law', but even the two other representatives of a 'sacred law' which are historically and geographically nearest to it, Jewish law and canon law, are sensibly different. Islamic law is much less uniform

than both. It is the result of a scrutiny, from a religious angle, of legal subject-matter which was far from uniform, comprising as it did the various components of the laws of Arabia and numerous elements taken over from the peoples of the conquered territories. All this was unified by being subjected to the same kind of scrutiny, the impact of which varied greatly. This inner duality of legal subject-matter and religious norm is additional to the outward variety of legal, ethical, and ritual rules which is typical of a 'sacred law'. Jewish law was buttressed by the cohesion of the community, reinforced by pressure from outside. Canon and Islamic law, on the contrary, are dominated by the dualism of religion and state, where the state is not, in contrast with Judaism, an alien power but the political expression of the same religion. But their antagonism took on different forms; in Christianity it was the struggle for political power on the part of a tightly organized ecclesiastical hierarchy, and canon law was one of its political weapons. Islam, on the other hand, was never a 'Church', Islamic law was never supported by an organized power, consequently there never developed a real trial of strength; there merely existed a discordance between the sacred law and the reality of actual practice of which the regulations framed by the state formed part, a gap more or less wide according to place and time, now and then on the point of being closed but continually reasserting itself.

There were two important changes of direction within the history of Islamic law; one was the introduction at an early date of a legal theory which not only ignored but denied the existence in it of all elements which were not in the narrowest possible sense Islamic, and which reduced its material sources to the Koran and the example of the Prophet; the second, which began only in the present century, is modernist legislation on the part of contemporary Islamic governments, which does not merely restrict the field in which the sacred law is applied in practice but interferes with the traditional form of this law itself. Again this interference does not take the form of a struggle for power between competing organizations; it poses itself not in the terms of replacing the sacred

by a modern secular law but of renovating its traditional form, and the postulate that Islam as a religion ought to regulate the sphere of law as well remains unchallenged.

Islamic law came into being and developed against a varied political and administrative background. The lifetime of the Prophet was unique in this respect; it was followed by the turbulent period of the Caliphs of Medina (632-61). The rule of the Umayyads, the first dynasty in Islam (661-750), represented, in many respects, the consummation of tendencies which were inherent in the nature of the community of Muslims under the Prophet. During their rule the framework of a new Arab Muslim society was created, and in this society a new administration of justice, an Islamic jurisprudence, and through it, Islamic law itself came into being. The Umayyads were overthrown by the 'Abbāsids, and the early 'Abbāsids attempted to make Islamic law, which was then still in its formative period, the only law of the state. They were successful in so far as the *qādis* were henceforth bound to the sacred law, but they did not succeed in achieving a permanent fusion of theory and practice, of political power and sacred law. The result was that Islamic law became more and more removed from practice, but in the long run gained more power over the minds than it lost in control over the bodies of the Muslims.

There followed the gradual dismemberment of the Islamic Empire which was well on its way by about the year 900. Now Islamic law profited from its remoteness from political power; it preserved its stability and even provided the main unifying element in a divided world of Islam. Having until the early 'Abbāsīd period been adaptable and growing, Islamic law from then onwards became increasingly rigid and set in its final mould. This essential rigidity helped it to maintain its stability over the centuries which saw the decay of the political institutions of Islam. It was not altogether immutable, but the changes which did take place were concerned more with niceties of legal theory and the systematic superstructure than with positive law. Taken as a whole, Islamic law reflects the social and economic conditions of the early

'Abbāsīd period, but has grown more and more out of touch with later developments of state and society.

The modern period, in the Western sense of the term, saw the rise of two great Islamic states on the ruins of the previous order, the Ottoman Empire in the Near East and the Mogul Empire in India; in both empires in their heydays (the sixteenth and the seventeenth century respectively) Islamic law enjoyed the highest degree of actual efficiency which it had ever possessed in a society of high material civilization since the early 'Abbāsīd period. The symbiosis, in the wake of Western political control, of Islamic law and of Western law in British India and in Algeria (starting in the eighteenth and in the nineteenth century respectively) gave birth to two autonomous legal systems, Anglo-Muhammadan law (on this see above, Chapter III (C), p. 139) and *Droit musulman algérien*. Finally, the reception of Western political ideas in the Near East has provoked, in the present century, an unprecedented movement of modernist legislation.

All this applies essentially not only to the law of the orthodox or Sunnī majority but to the laws of the Shī'is and of the Khārijis as well. Particularly with regard to the Shī'is, it might be thought that their political doctrine should have led to the elaboration of an essentially different doctrine; but this was not the case, and their positive law, as that of the Khārijis, developed in close contact with that of the Sunnīs, just as their respective communities for much of the time remained in close social and cultural contact with each other, and it underwent only some more or less external modifications which were made necessary by their particular religious doctrines. Only the law of inheritance of the Shī'is represents an independent systematization of the common principles found in the Koran. The Šafavīd Shahs of Persia, whose empire for some time rivalled that of the Ottoman Sultans, were never willing or able to enforce Shī'ī religious law to the same degree as their western neighbours or the Mogul emperors with regard to Sunnī law.

The central feature which makes Islamic religious law what it

is, which guarantees its unity in all its diversity, is the assessing of all human acts and relationships, including those which we call legal, from the point of view of the following concepts: obligatory, recommended, indifferent, reprehensible, forbidden. Law proper has been thoroughly incorporated in this system of religious duties; these fundamental concepts permeate the juridical subject-matter as well. It might therefore seem as if it were not correct to speak of an Islamic law at all, as if the concept of law did not exist in Islam. The term must indeed be used with the proviso that Islamic law is part of a system of religious duties, blended with non-legal elements. But though it was incorporated into that system, legal subject-matter was not completely assimilated, legal relationships were not completely reduced to and expressed in terms of religious and ethical duties; the sphere of law retained a technical character of its own, and juridical reasoning could develop along its own lines. That the concepts allowed/forbidden and valid/invalid were to a great extent coextensive made it possible for this last pair, together with the kindred concept of a legal effect, to be fitted into the system. There exists, thus, a clear distinction between the purely religious sphere and the sphere of law proper, and we are justified in using the term Islamic law of the legal subject-matter which, by being incorporated into the system of religious duties of Islam, was either materially or formally, but in any case considerably, modified. This legal subject-matter became Islamic law not merely by having considerations of a religious or moral kind introduced into it, but by the much subtler process of being organized and systematized as part of the religious duties of the Muslims. There remains a certain contrast between the legal subject-matter and the principles of its formal organization.

Although Islamic law is a sacred law, it is by no means essentially irrational; it was created not by an irrational process of continuous revelation (as Shī'i law might have been but was not), but by a rational method of interpretation; in this way it acquired its intellectualist and scholastic exterior. But whereas Islamic law presents itself as a rational system on the basis of material

considerations, its formal juridical character is little developed. Its aim is to provide concrete and material standards, and not to impose formal rules on the play of contending interests. This leads to the result that considerations of good faith, fairness, justice, truth, and so on play only a subordinate part in the system. It also follows that the rules of Islamic law are valid by virtue of their mere existence and not because of their rationality, and calls for the observation of the letter rather than of the spirit.

Islamic law is systematic, it represents a coherent body of doctrine. Its several institutions are well put into relation with one another; the greater part of the law of contracts and obligations, for instance, is construed by analogy with the contract of sale. Furthermore, the whole of the law is permeated by religious and ethical considerations, as we have seen, such as the prohibition of interest (or unjustified enrichment in general), the prohibition of uncertainty, the concern for the equality of the two contracting parties, and the concern for the just mean or average. That the several contracts envisaged by Islamic law resemble one another in their structure so much derives to a considerable degree from the fact that the same concern for the same religious and moral principles pervades them all.

There are two methods by which legal subject-matter can be brought into a system, the analytical and the analogical. The analytical method, the classical example of which is provided by Roman law, leads to the creation of logically organized legal norms in an ascending order. The analogical method leads to the organization of legal subject-matter by parataxis and association. Islamic law represents this latter type of systematizing in great purity, and this corresponds with the type of thinking expressed by the Arabic language. Closely connected with this way of thinking is the casuistical method, which is indeed one of the most striking features of traditional Islamic law. All these features are manifestations of a typical way of thought which pervades the whole of Islamic law and which has determined the organization of the legal subject-matter in all its aspects.

An important criterion of the sociology of law is the degree to which the legal subject-matters are distinguished and differentiated from one another. There is no such distinction in Islamic law. Even a systematic arrangement of the legal subject-matters is lacking. Public powers are, as a rule, reduced to private rights and duties, for instance the right to give a valid safe-conduct, the duty to pay the alms-tax, the rights and duties of the persons who appoint an individual as Imām or Caliph, and the rights and duties of this last. This is all the more significant as the Arabic language possessed an abstract term for 'authority, dominion, ruling power' in the word *sulṭān*, a word which came to be used as a title only from the tenth century onwards; but Islamic law did not develop the corresponding legal concept. For the same reason, the essential institutions of the Islamic state are construed not as functions of the community of believers as such, but as duties the fulfilment of which by a sufficient number of individuals excuses the other individuals from fulfilling them; in fact, the whole concept of an institution is missing. The idea of a juristic person was on the point of breaking through but not quite realized in Islamic law, and this did not happen at the point where we should expect it, with regard to the charitable foundation of *waqf*, but with regard to the separate property of a slave who is being sold not as an individual but together with his business as a running concern.

In the field of what, in modern terminology, is called penal law, Islamic law distinguishes between the rights of God and the rights of humans. Only the rights of God have the character of a penal law proper, of a law which imposes penal sanctions on the guilty. Even here, in the centre of penal law, the idea of a claim on the part of God predominates, just as if it were a claim on the part of a human plaintiff. This real penal law is derived exclusively from the Koran and the 'traditions', the alleged reports of the acts and sayings of the Prophet and of his Companions. The second great division of what we should call penal law belongs to the category of 'redress of torts', a category straddling civil and penal law which Islamic law has retained from the law of

pre-Islamic Arabia where it was an archaic but by no means unique phenomenon. Whatever liability is incurred here, be it retaliation or blood-money or damages, is subject of a private claim, pertaining to the rights of humans. In this field, the idea of criminal guilt is practically non-existent, and where it exists it has been introduced by considerations of religious responsibility. So there is no fixed penalty for any infringement of the rights of a human to the inviolability of his person and property, only exact reparation of the damage caused. This leads to retaliation for homicide and wounds on one hand, and to the absence of fines on the other. There are a few isolated doctrines in some schools of Islamic law which show that the idea of a penal law properly speaking was on the point of emerging in the minds of some Islamic scholars at least, but again, as was the case of a juristic person, it did not succeed in doing so.

Extending equally to the two spheres, the sphere of the rights of God and the sphere of the rights of humans, is the discretionary punishment of *ta'zīr*. The *qāḍī* may punish at his discretion any act which in his opinion calls for punishment, whether it can be subsumed under offences against religion (or morals or good manners) or under torts committed against others. The *ta'zīr* belongs therefore to penal law proper, but even here Islamic law has never envisaged the imposition of fines. (Confiscation, which was frequently resorted to, particularly in early 'Abbāsid times, was a political act and is ignored by the *Shari'a*.) *Ta'zīr* belongs neither to ancient Arabian customary law which was ratified by Islam, nor to Islamic legislation which appeared in the Koran and in the 'traditions'. It was the first Muslim *qāḍī*s in the Umayyad period (towards the end of the seventh century) who found themselves called upon to punish, at their discretion, all kinds of acts which threatened the peaceful and orderly existence of the new Islamic society which was coming into being. But the needs of Islamic society did not stop there, and further extensions of penal law, and the creation of agencies which were to apply them, such as the office of the *muhtasib*, an officer responsible for enforcing

Islamic morals and good behaviour, and the *nazar fi'l-mazālim* or 'investigation of complaints', a jurisdiction parallel to that of the *qādī*, became inevitable. At the time, however, when the functions of these organizations had been well defined and the specialists of Islamic law had to take notice of them, the outlines of the *Shari'a* had already been firmly laid down, and this is why strict theory could admit them, as it were, only on sufferance. Still later developments, such as the Ottoman codes or *kānūn-nāmes*, some of which treat in detail of penal law, were of necessity completely ignored by the theory. The sociological character of this portion of the reality of penal law in Islam has remained constant, although its place in the official theory of Islamic law is not uniform.

As regards the formal character of positive law, we can distinguish two extreme cases. One is that of an objective law which guarantees the subjective rights of individuals; such a law is, in the last resort, the sum total of the personal privileges of all individuals. The opposite case is that of a law which reduces itself to administration, which is the sum total of particular commands. Islamic law belongs to the first type, and this agrees with what the examination of the structure of Islamic 'public law' has shown. A typical feature which results from all this is the private and individualistic character of Islamic law. However prominent a place a programme of social reform and of improving the position of the socially and economically weak occupied in the Koran, Islamic law, in its technical structure, is thoroughly individualistic.

Islamic law represents an extreme case of a 'jurists' law'; it was created and developed by private pious specialists. Islamic jurisprudence or *fiqh* did not grow out of an existing law, it itself created the law; and the formation of Islamic law took place neither under the impetus of the needs of practice nor under that of juridical technique, but under that of religious and ethical ideas. At the very time that Islamic law came into existence, its perpetual problem, the contrast between theory and practice, was already

posed. Because Islamic law is a jurists' law, legal science is amply documented, whereas the realities of legal life are much less well known and must be laboriously reconstructed from occasional evidence.

Islamic law provides the unique phenomenon of legal science and not the state playing the part of a legislator, of scholarly handbooks having the force of law. This depended on two conditions: that legal science guaranteed its own stability and continuity, and that the place of the state was taken by another authority, high enough to impose itself on both government and governed. The first was met by the doctrine of consensus, the highest authority among the 'roots' or principles of Islamic jurisprudence, and the second was met by the fact that Islamic law claimed to be based on divine authority.

The influences which Islamic law has exerted on other laws cannot compare in importance with the very fact of its existence. The most remarkable of these influences did not proceed from Islamic law proper but from the customary commercial law which developed under its auspices. Several of its institutions were transmitted across the Mediterranean to medieval Europe, and became incorporated in the law merchant, the customary law of international trade. This is attested by the terms *mohatra* (from Arabic *mukhāṭara*), the evasion of the prohibition of interest by means of a double sale, *aval* (French, from Arabic *hawāla*, transfer of debts), the endorsement on a bill of exchange, possibly *cheque* (from Arabic *ṣakk*, written document), and *sensalis*, *sensale*, Austrian-German *Sensal* (from Arabic *simsār*), broker; also the institution of *commenda* is most probably derived from the identical institution of *qirāḍ* in Islamic law. Another significant but purely formal influence occurred in Islamic Spain where the Christians who had become Arabicized, the Mozarabs (see above, Chapter II, p. 86), adopted the technical forms of Islamic written documents for their own contracts and maintained this custom in Toledo for about two centuries after the Christian reconquest in

1085. At the opposite end of the Mediterranean, Islamic law has exerted a deep influence on all branches of the law of Georgia, including the law of maritime commerce, during a period extending from the Seljuqs to the Šafavids (c. 1100 to 1500). There is finally the effect of Islamic law on the laws of the tolerated religions, the Jewish and the Christian, within the Islamic state. On the Jewish side, it seems that Maimonides (d. 1204) was influenced by some features of Islamic works in the arrangement of the subject-matter of his Code, the *Mishnah Torah*, which is unprecedented in Jewish literature; he also says in his Commentary on the Mishna which he wrote in Arabic (in the Introduction to the so-called Eight Chapters): 'Besides Talmud and Midrash, I have made use of the philosophers old and new, and many others, and one ought to accept truth from whoever expounds it.' But this whole matter has not been thoroughly investigated as yet.¹ On the other hand, it is certain that the two great branches of the Oriental Christian Church, the Monophysites and the Nestorians, did not hesitate to draw freely on the rules of Islamic law, not indeed in the law of family which was ruled by canon law, but in all those subjects which could conceivably come within the purview of the Islamic *qāḍī*, particularly the law of inheritance and the rules relating to pious foundations; for although the Muslims left to those communities, in principle, legal autonomy, it was open to every member who was dissatisfied with the decision of his ecclesiastical tribunal, to bring the case before the *qāḍī* who had, of course, to apply Islamic law. This is true in particular of the 'Codes' which were elaborated in those two churches between the eleventh and the thirteenth centuries but which remained literary exercises without legislative authority before the ecclesiastical tribunals. That the 'civil law' of the *shari'a* should have been incorporated in the laws of a number of contemporary states and become applicable not only to the Muslim but also to the non-Muslim parts of their populations, is really not a legacy of Islamic law but a consequence of the ideology of modern national

¹ I am indebted for this information to Professor S. D. Goitein.

states; the most important cases were those of the territories, and later states, which were detached from the Ottoman Empire after 1918, and of Cyprus; this condition has remained essentially unchanged in Cyprus, Israel, and Jordan.

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