

BOOK REVIEWS

A HISTORY OF ISLAMIC LAW

Paperback Edition 1978

by Professor N.J. Coulson

[Edinburgh: Edinburgh University Press, 1978]

Professor Coulson's History of Islamic Law was first published in 1964. It is now published in a paperback edition without any revision or addition. This to a certain extent detracts from its value and the general reader, for whom it is presumably meant, might be misled into thinking that there have been no advances in this field since 1964. Professor Coulson is the Professor of Oriental Laws at the School of Oriental and African Studies, University of London and is acknowledged in the West as an authority on Muslim Law.

In the introduction to the book Professor Coulson tries to set out the role of legal history in Muslim jurisprudence. He says that Muslim jurisprudence, in its traditional form "provides a much more extreme example of a science divorced from historical considerations. Law in the classical Islamic theory is the revealed will of God, a divinely ordained system preceding and not preceded by the Muslim State, controlling and not controlled by Muslim Society". Prof. Coulson knows, of course, that there are traditional books on the history of the Islamic Law but he says that these merely dealt with the process of growth of the discovery and function of the divine law. The process is "seen in complete isolation from the historical development of society as such. The role of the individual jurist is measured by the purely subjective standard of its intrinsic worth in the process of discovery of the Divine command. It is not considered in the light of any external criteria or in its relationship to the circumstance of particular epochs or localities. In this sense the traditional picture of the growth of Islamic Law completely lacks the dimensions of historical depth". "Muslim Legal Philosophy" he says "has been essentially the elaboration and the analysis of the Sharia Law *in abstracto* rather than a science of the positive law emanating from judicial tribunals. In short the function of Muslim juris-

prudence has always been, with one notable but limited exception, to tell the courts what they ought to do, rather than to attempt to prophesy what they will in fact do". Legal history in the Western sense simply did not exist.

It is clear that Prof. Coulson would like to pour the Islamic Law into the mould of Western concepts of law. We should study Islamic Law from the point of view of the positive school, the historical school and the realist schools of jurisprudence – in these respects Islamic Law and Muslim jurists are found wanting, so there is need for a history of Islamic Law on the Western model. All these of course are alien to the Muslim concept of law.

Prof. Coulson however refers to two developments in the present century which require a radical revision of the traditional attitude. First he refers to the thesis of the origins of Shariah Law formulated by Joseph Schacht which he says "is irrefutable in its broad essentials and which proves that the classical theory of Shariah Law was the outcome of a complex historical process spanning a period of some three countries". Prof. Coulson does not, it is clear, accept Schacht's thesis in full and later in his book at pp. 64–68 he goes to the extent of showing that Schacht's conclusions are not always to be accepted. We will return to this later but for the moment we might note that Western Scholarship in this respect has ignored the work which has been done recently by Muslim Scholars like Prof. Hamidullah, Prof. S.M. Yusof and Dr. Azmi, which seem to show that the thesis followed by Schacht is based more on fanciful deductions than on facts. The second development referred to by Prof. Coulson is the "legal development in the Muslim world over the past few decades, particularly in the Middle East, where "the substance of the Sharia family law as applied by the Courts has been profoundly modified and to a large degree successfully adapted to the needs and the temper of society". He points out the fundamental distinction between the modern Muslim legal philosophy and classical jurisprudence. "According to the classical tradition law is imposed from above and postulates the eternally valid standards to which the structure of state and society must conform. In the modernist approach law is shaped by the needs of society; its function is to answer social problems". Social engineering is a fitting des-

cription of modernist activities but he points out in Islam the needs and aspirations of society cannot be the exclusive determinant of the law; they can legitimately operate only within the bounds of the norms and principles irrevocably established by the Divine command". In this respect one might note that the trend in many Muslim countries today is to return to the basic Islamic Law. The function of law is seen not as a mere effort to mirror the needs of society, but rather to influence society to find a better way of life, in the light of the teachings revealed to mankind. However Prof. Coulson is concerned with Western Scholarship. Western Scholarship he says has demonstrated that Sharia Law originated as the implementation of the precepts of divine revelation within the framework of current social conditions, and thus provides the basis of historical fact to support the ideology underlying legal modernism. Once the classical theory is seen in its historical perspective, as simply a stage in the evolution of the Sharia, modernist activities no longer appear as a total departure from the one legitimate position, but preserve the continuity of Islamic legal tradition by taking up the attitude of the earliest jurists and reviving a corpus whose growth had been artificially arrested and which had lain dormant for a period of ten centuries". "Legal modernism" is no longer fashionable in Islam and so Prof. Coulson's second reason for the "radical revision of the traditional attitude" also fails. It is true that the Muslim jurist of today cannot afford to be a bad historian, but the notion of the Muslim jurist as to the function of history differs from that of Prof. Coulson and other Western Scholars. Islamic Law has not developed in the Western sense – the law was completed in the lifetime of the Prophet and we need to understand how the law was formulated and applied in his lifetime and in that of his successors, so that we can learn how to apply it in our times.

In dealing with the Quranic Legislation in Chapter 1 of his book, Prof. Coulson seems to accept the fact that the Holy Quran was revealed to the Prophet Mohammed and it is the primary source of Islamic Law. "The principle that God was the only lawgiver and that His Command was to have supreme control over all aspects of life was clearly established". Prof. Coulson however emphasises what he calls the omissions in the Quranic Legislation. For the Muslim the Quran is the complete guide for everything and strangely enough Prof. Coulson does

not mention the part played by the Prophet in interpreting explaining and applying the teachings of the Holy Quran. He takes the view that the lacunae in the Quranic legislation were filled in by the customary law and in later times by the operative parts supplied by succeeding generations.

Chapter 2 deals with the Legal Practice in the First Century of Islam. Prof. Coulson points out that during the Medinan period the principles of the Quranic legislation were developed by the Prophet and his successors to the degree that was required by the practical problems confronting the Muslim Community. Prof. Coulson makes the mistake of saying that "The Caliphs also had the power of positive legislation" – in fact the Caliphs relied on the Holy Quran and on the Sunnah of the Prophet and only in the absence of guidance from the Holy Quran or the Sunnah did they resort to consultation and reasoning to arrive at a solution in line with the teachings of the Holy Quran and the Sunnah.

In the same chapter Prof. Coulson deals with the Umayyad period, where he says the basic policy was the preservation of the existing administrative structure in the provinces. The task of the Umayyads according to Prof. Coulson was to establish a practical system of legal administration not a science of jurisprudence. Both Prof. Coulson and Schacht before him seem to date the beginning of Islamic jurisprudence from the Umayyad period. Schacht say "The starting point of Muhammadan jurisprudence is not only popular practice under the Umayyads – it is often the administrative practice of the Government". Yet later on in his book Prof. Coulson says "Islamic jurisprudence began not as the scientific analysis of the existing practice of courts whose authority was accepted but as the formulation of a scheme of law in opposition to that practice". For the Muslim of course Islamic jurisprudence begins with the Holy Quran and the Sunnah of the Prophet and the Umayyad period is seen as the time when the practice of the Government and the Muslims began to diverge from the principles of Islamic doctrine and law – when it came to be no longer safe to rely on the practice as a mirror of Islamic Law and when therefore scholars had to emphasise the fundamental teachings of Islam and in order to do so to go back to the original sources. In the early period the Muslims accepted the practice as the correct application of the Muslim Law – but later when it became no longer safe to do so

– the scholars began to seek the justification for the right practice in the texts of the teachings of the Holy Quran and Sunnah.

In Chapter 3 Prof. Coulson deals with the jurisprudence in embryo – the Early Schools of Law. Here again Prof. Coulson in line with the thesis of Schacht minimises the part played by the Holy Quran and the Sunnah. He says “It should be stressed that there was no suggestion at this stage that the Prophet was other than a human interpreter of the divine revelation”. Thus he says there were many occasions on which the law expressed in “the reported precedents of the Prophet was rejected by the early Medinan Schools when it ran counter to their currently accepted doctrine”. This view cannot be accepted by Muslims. As pointed out by Dr. M.M. Azmi the overruling authority of the Sunnah of the Prophet as the basic source of law is accepted by all from the earliest days of Islam. (cf. *Studies in Early Hadith Literature* p. 250).

In Chapter 4 Prof. Coulson deals with Imam Shafii whom he calls the Master Architect. “Ash – Shafii’s emphasis upon the authority of the Prophet as a law-giver is the mainstay and dominating theme of his doctrine”. His fundamental thesis he points out is that “the supreme manifestation of God’s will lay in the Sunnah or practice of the Prophet and the function of human reason was subsidiary and complementary”. Prof. Coulson tries to make out that this view is something new – in fact it had been accepted even before Shafii and as Prof. Coulson points out was readily accepted by all other Muslim scholars.

In Chapter 5 entitled “Concluding stages of Growth” Prof. Coulson deals with the legal development after Imam Shafii. The outstanding feature of the period he points out is the growth of a separate science of traditions with a literature of its own. “Specialist Scholars devoted themselves to the process of collecting documenting and classifying traditions. They were not jurists in the full sense of the term but rather law reporters, who provided the raw material which it was the task of the lawyers then to evaluate and integrate within the wider scheme of jurisprudence”. In this Chapter Prof. Coulson deals with the thesis of Joseph Schacht which he says “is irrefutable in its broad essentials”. It is in this respect that both Prof. Coulson and Schacht goes against the Muslim tradition. It is a pity that in

this respects Western Scholars seem to ignore the work of Muslim scholars like Prof. Hamidullah, Prof. S.M. Yusof and Dr. M.M. Azmi, to mention only those who have written in English. Dr. Azmi in particular has shown that Schacht's thesis is unacceptable. Schacht's thesis is essentially based on his theory that the Holy Quran and the hadith are referred to as sources of Islamic Law only at a late stage of the legal writing that has come down to us. Earlier scholars did not refer to the hadith as the basis of their teaching. Therefore says Schacht the hadith must have been invented to support the teaching and the doctrine at a latter stage.

Dr. Azmi has stated some objections to Schacht's thesis at pp. 253-254 of his book "Studies in Early Hadith Literature" he states—

"According to Schacht ". . . The best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed".

There are many problems which need to be solved before accepting this theory.

1. *Contradictory Statement*

First of all there seems to be the contradictory statements of Schacht. He says that two generations before Shafi'i, reference to the tradition of the Prophet was the exception. Furthermore, according to him, all these ancient schools of law offered strong resistance to the traditions of the Prophet. In view of the above statements what could have made, reference to traditions of the Prophet, imperative even if it existed. Either his two earlier statements are wrong, or this whole chapter is irrelevant for the purpose.

2. *The Theory Against Human Nature.*

The other fundamental objection to this theory is that this is against human nature. Who can claim that he has all the knowledge of the subject and nothing is missing. Therefore, if a tradition is not quoted by a certain scholar, how does it prove that it did not exist?

3. *Chaos in Terminology*

Moreover he gives the title of 'The Growth of Legal Tradition',

yet he fills it up with a number of ritual traditions. The other drawback is that he has put the *Athar* of Successors and Companions under the name of Traditions. When he speaks about the '*Sunnah*' he translates it as "the living tradition of ancient schools" and when he speaks about the legal decision of the scholars, then he puts them under the aegis of tradition, which causes more chaos and does not give a fair picture of the subject."

Prof. Coulson himself says "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 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. From a practical standpoint and taking the attendant historical circumstances into account, the notion of such a vacuum is difficult to accept". He has also given two examples which show that even accepting the thesis of Schacht his conclusions are not always correct. Prof. Coulson then concludes "Traditions especially those which deal with the obvious day to day problems arising from the Quranic laws may well represent at least an approximation to a decision of the Prophet which had been preserved initially by general oral tradition. If this practical premise is accepted then it is a reasonable principle of historical enquiry that an alleged ruling of the Prophet should be tentatively accepted as such unless some reason can be adduced as to why it should be regarded as fictitious". Muslim Scholarship would go further. The research of scholars like Prof. Hamidullah and Dr. Azmi has shown that collections of hadith existed from the earliest times and that the subsequent collections of hadiths were only an extension of the work that had already been done. These early collections have also shown that the hadith included in the later collections are authentic records. Western Scholars minimise the importance of the Science of "isnad" which was developed by the Muslim Scholars — they ignore the piety and sense of dedication which led the Imams of hadith to devote their lives to the collection and shifting of the hadith, which has left for us a rich legacy of the record of the Holy Prophet, to which there is no parallel anywhere else.

It is not proposed to deal in detail with the rest of the book. In Part Two Prof. Coulson deals with the Legal Doctrine and Practice in Medieval Islam and in Part Three with Islamic Law in Modern Times. The book concentrates on development in the Arab countries and in India and Pakistan; little attention is paid to developments in Indonesia and Malaysia. The only reference to Indonesia is at page 154 where it is stated wrongly that "custom continued to govern the general field of private law". The development in Muslim countries is dealt with only up to 1964 and more recent developments are therefore not covered.

In his conclusion Prof. Coulson refers to the two principal features of modernist legal activities which command attention. He concludes "In combination therefore with the opportunist character of modern jurisprudential method, the nature of the substantial references themselves lends a general air of transience and instability to current Islamic Law. The fortress of the traditional law has been breached beyond repair, but the complex structure that has taken its place does not yet rest upon the same solid foundations and its substance is almost volatile by comparison". At the end of this Chapter he says "Freed from the notion of a religious law expressed in totalitarian and uncompromising terms, jurisprudence would approach the problem of law and society in a different light. Instead of asking itself, as it has done since the tenth century and still generally does today, what concessions must be wrested from the law by the needs of society, its new terms of reference would be precisely the opposite: to determine what limitations religious principles set upon society.

Radical though the break with past tradition which such an approach involves might be, it is nevertheless a break with a particular construction of the religious law and not with its essence. This, at any rate, would seem to be the only realistic basis for future development and the only alternative to a complete abandonment of the notion of a law based on religion. Law, to be a living force, must reflect the soul of a society; and the soul of present Muslim society is reflected neither in any form of outright secularism nor in the doctrine of the medieval text books."

Prof. Coulson and Western Scholars cannot understand that the need for the Muslims today is to return the teachings of the

Holy Quran and the Sunnah and to apply these teachings to society. As the Holy Quran advices the Muslims to the effect – “O you who believe, obey God and obey the Messenger and those in authority among you. If you should quarrel about anything, refer it to God and the Messenger, if you believe in God and the Last Day. That is better and fairer in the issue”. (Quran 4:62).

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