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Author(s): Zouhair Ghazzal

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Islamic Law in Contemporary Scholarship

ZOUHAIR GHAZZAL

Loyola University Chicago

DESPITE THE IMPORTANCE OF LAW in societal formations, and what looks like a revival in the field of legal studies, Islamic law is still by and large accessible to only a small group of specialists, and thus cannot claim a large audience even within Islamic and Middle (Near) Eastern studies, not to mention the much broader European and American legal scholarship. There are various reasons for such isolation, which are too complex to enumerate in a summary fashion, but which mostly involve the way the scholarship has evolved in the last few decades in Islamic societies, Europe, and North America, and which reflects the nature of Islamic law. First, unlike Roman law and all the continental codes that followed, and unlike the English and American common-law systems, what is commonly referred to as 'Islamic law' does not stand out as an organized set of codes, statutes, or even precedents. Instead, the body of Islamic law, which stretches over many centuries, has spawned several schools known as the *madhāhib*, so that a modern scholar who needs to look at the legal framework of, say, an institution of the early 'Abbasid period would have to dig hard into the labyrinth of the *fiqh* manuals only to realize that layers of interpretations follow each opinion, making it unrealistic to limit the 'law' to a set of codified norms. Second, modern scholars tend to look skeptically at the large corpus of Islamic law precisely because of its prescriptive nature and its uncertain historical evolution. We have consequently made little progress in assessing the nature of judicial decisionmaking and how the normative values prescribed by jurists affect it. Third, throughout the twentieth century, the majority of Islamic and Middle Eastern societies have adopted a new set of codes, a process that began in the second half of the previous century with Ottoman reforms, and which for the most part were derived from European civil-code systems. Since the implications of this rupture with the past have attracted little attention from scholars, the relevance of the classical legal systems is the biggest issue of concern here: will the transplanted systems utterly eclipse the various Islamic legal schools, or will there be a revival of the legal schools so as to make up for the inadequacies that result from the civil systems? Indeed, a lot needs to be done before more comprehensively elaborated codes are drafted, in particular in such domains as property, contract, and tort, which, under present conditions, seem like a hybrid mixture of Ottoman feudal practices and modern but poorly implemented Western notions.

In this context, I would like briefly to discuss some of the recently published findings of Johansen, a leading authority on the Ḥanafī *fiqh*.¹ Even though Johansen's book is no easy reading to the non-specialist, it nonetheless proposes in a long introduction an historical and critical overview of the scholarship throughout the twentieth century, which should be of interest to laymen and specialists alike. As to the thematically assembled articles, they could be read in different orders, depending on the reader's interests and knowledge of Islamic law.

¹ Baber Johansen. *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999).

The notion of 'contingency' associated with the title of this collection of essays refers to the idea that the various *madhahib* that developed in Islamic law all assume that the *fiqh* in its interpretation of the revelation and in its prescription of normative rules for human conduct presumes the fallibility of reason, and hence ipso facto accepts the multiplicities of textual interpretations and their contingent character. Then, following both Max Weber and Joseph Schacht, Johansen accepts Islamic law as 'sacred law' in that its 'rationality,' associated with a quasi-oracular justice, prohibits it from being a fully rationalized system the way some modern legal systems are. But as Johansen reminds his readers in his long introduction, both notions—those of contingency and sacred law—are yet to receive full acceptance in western scholarship. Johansen construes his argument historically in terms of some of the most prominent representations of Islamic law in modern scholarship.

Even the idea that the *fiqh* is a legal system has not been widely accepted. Thus did the Dutch scholar Christiaan Snouck-Hurgronje, who together with Ignaz Goldziher inaugurated modern scholarship on the *fiqh*, claim that the *fiqh* was neither a legal system nor has any practical significance outside the field of liturgical acts and the like. Thus, by assuming that the *fiqh* is a deontology, Snouck-Hurgronje construed the system to function as an undifferentiated mass of normative rules under the control of religious norms. Not only did the differences among the *madhahib* consequently become insignificant, but more important, even the different branches of '*ibadat* and *mu'amalat*' are then subsumed under an identical set of principles, which by definition must be tied to religious norms.

It was only thanks to Weber that the *fiqh* became finally perceived as 'sacred law.' Weber associated Islamic law with other legal systems such as rabbinic and canon laws, and Chinese and Hindu laws, which he labeled as 'sacred.' Weber coined the term 'substantive rationality' to describe the rationale behind such systems. He argued that despite their religious character such legal systems do have a rationality of their own in that they might share a set of systematized norms and procedures. Nevertheless, in the final analysis a great deal of judicial decisionmaking depends on extra-legal influences. Weber was thus interested in such systems precisely because of the difficulties they encounter in becoming modern, that is to say, 'formally rational.'

Schacht, the leading authority on Islamic law in the twentieth century, accepts Weber's notion of 'substantive rationality' and pushes it even further so as to show more thoroughly the coherent system of norms. But Schacht, like Weber before him, did not differentiate between various types of norms, so that here again the distinction between the normative values of the '*ibadat* and *mu'amalat*' and the significance of such a differentiation has been underestimated and never worked out fully. Thus Johansen sets his own program within the tradition of both Weber and Schacht in that he accepts Islamic law as a sacred law maintained by the contingent character of the jurists' opinions; but he also demarcates himself from them on at least two grounds. First, he argues that Islamic law could not possibly be rationalized as a legal system under one coherent set of norms. Indeed, an acknowledgement of differentiation between various sets of norms, such as those originating from the '*ibadat* and *mu'amalat*,' is a necessity and no historical enterprise worthy of that name could do without it.

Second, he believes that a similar type of differentiation must be acknowledged between the various *madhahib* so as not to falsely assume that their differences are either insignificant or marginal to legal doctrine. In short, Johansen acknowledges the complexity of the historico-legal approach by means of an internal process of differentiation of the various sets of norms that make up the various branches of Islamic law. Only by looking at the rationale behind those normative values rather than subsuming them under one another can we fathom the complexity of the Islamic legal systems.

It is impossible, due to space limitations, to go over any of the articles grouped together for the purpose of illustrating Johansen's work method of the history of the *fiqh*. However, and considering that much still needs to be done before we seriously test Johansen's hypotheses and see their implications mainly regarding the historical nature of the differentiation within the normative levels of the *fiqh*, on the one hand, and the various *madhahib*, on the other, my preoccupation at this stage has more to do with some challenging assumptions behind the preliminary findings than with the general outline of the project. One such assumption which emerges most clearly in the article on "The Case of the Land Rent," which in turn is based on Johansen's previous work on "Islamic law on land tax,"¹ is the idea that legal doctrines do adapt to their own specific periods, meaning that they share a historical becoming of their own, constrained partly by their own internal logic and partly by the socio-economic and even political developments within a particular society. Johansen tests his views in the Ottoman period and brings together a combination of hitherto forgotten Hanafī texts from the *shuruh*, *fatāwa*, and *shari'a* court records, thus not limiting himself only to the *usul* and *mutun*, which tend to be more resistant to historical change. He is thus able to show that by and large the classical Hanafī notions of tax and rent did not hold for the Ottoman Empire, and that the *fuqaha'* acknowledged the transformation. Such a willingness to show the 'historical' nature of the *fiqh* characterizes all the articles in *Contingency in a Sacred Law*.

There is a problem, though, which is that while one always can detect 'change' in one way or another and in various combinations of texts, the significance of a particular transformation at a specific juncture is unclear. Thus, to return to Johansen's thesis on Ottoman rents and taxes, one should ask whether the legal fiction of the death of the *kharaj*-payer and the consequent legitimation of ownership of sultanī lands (*mirī*), which were supposedly "private" (*milki*), was by itself enough of a discursive achievement to label it as a significant shift in Hanafī legal doctrine. The problem here is that even if we assemble all relevant *shuruh* and *fatāwa*, the undeniable truth is that Hanafī practice in all its forms fails to provide us with anything coherent, systematic, and meaningful regarding either the *miri-iltizam* system or its predecessor. Not only are such texts inferior to the systematic treatises on *kharaj* from the classical period, but few of the jurists in Greater Syria and Egypt, who were the leading scholars of their time, dared to follow the precepts of sixteenth-century Istanbul *muftis* regarding the obsolete character of the classical taxation system. Instead, many of the

¹ Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (London, 1988).

texts plainly show an unwillingness to fully acknowledge the new Ottoman land-tenure system, which was part of what the *Ḥanafīs* commonly referred to as the *maṣāliḥ mursalah*; that is to say, a set of public interest regulations imposed on a de facto basis as part of bureaucratic policies. Because such notions as property and contract did not develop in a way that would have accommodated the transformation of the land-tenure system, the Ottoman *sharī`a* courts had to develop all kinds of procedural fictions in order to shelter the newly emerging forms of contractual settlements. Thus, in a strange way, legal doctrine and the practices of the courts did finally come together, but not in terms of the conceptual transformations that Johansen would like us to believe.

The merging of doctrine and courts allowed the system to survive for several centuries, until the mid-1850s when newly drafted codes, based in turn on Napoleonic codes, were implemented. Had *Ḥanafī* doctrine worked out an incremental reformulation of its concepts, such a harsh break might have been avoided. Which brings us to the issue regarding the historicity of legal doctrines: considering that even for such domains as contract, property, and taxation, the congruence between legal doctrine and societal factors is not easy to discern, one would imagine that the *ibadat* normative values should pose an even more serious challenge to the legal historian. In fact, it is one thing to establish that a set of ideas share a common history, and it is another to prove that they are congruent with an historical phenomenon. Western legal scholarship is beginning to question the association between codes and societal conditions, and develop several working hypotheses on the complexities of such relationships, and we should be skeptical of those who argue that everything has to fit within a well construed and evolutionary historical path.