The Influence of Western Legal Heritage on Islamic Religious Law in Modern Times

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Since Sept. 11th up to the present moment, the Muslim belief and the Muslim culture became a favourable target, against which fierce campaigns of hostility had been launched by some western circles, headed by the new conservative regime of the USA leadership represented by the Bush administrative team. Though one can understand the wrathful reaction of the US against the brutal and unjustified attack against the Twin Towers of New York, one can find no rational justification of such massive hostile campaigns against Islam as a religion and doctrine of belief. At the same time one can find no legitimate excuse or even a moral pretext for such assault against some Muslim countries and some Muslim nations, like the Afghan people and later against the Iraqi people. The military assaults resulted in heavy loss of life of innocent people, estimated at tens of thousands sofar.

In this paper I will try to shed light on but one aspect related to the legal doctrine of Islamic Laws, termed as the Sharīʿa system. It aims to prove the civilized trend and the human orientation characteristic to Islam which the anti-Islamic propaganda systematically attempts to distort or even to deny.

It aims also to show to what extent the doctrine of Islam is liable to adapt itself to changeable circumstances, proving its capability to borrow from foreign cultures and the other religious doctrines. The liability of change which distinguishes the Islamic Sharīʿa, provided by the principle of

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imitation, known as the *taqlīd* principle, had been the most effective means to achieve this goal.

The Modern history of Islamic people which knew different types of contact between Modern Muslim societies and Western Societies, especially those in Western Europe, since the second half of the 19th century, is witness to such interaction which resulted in drastic changes in judicial system rather than in religious judgments. These changes were sometimes totally westernized. In some legal cases, the adopted decisions had no connection with any Islamic concept and seemed alien to Islam. Examples of such decisions will be introduced within the following presentation.

From the nineteenth century onwards, there grew up an increasingly intimate contact between Islamic and Western civilization, and legal development was hence-forth conditioned, by the novel influences to which Islam thus became subject. During the Middle Ages, the structure of Muslim society had remained basically static, and for this reason *Sharīʿa* law had proved able to accommodate itself successfully to such internal requirements as the passage of time had produced. But the pressures which now arose from without, confronted Islam with an entirely different situation. Politically, socially, and economically, Western civilization was based on concepts and institutions fundamentally alien to Islamic tradition and to the Islamic law which expressed that tradition. Because of the essential rigidity of the *Sharīʿa* and the dominance of the theory of *taqlīd* (or strict adherence to established doctrine), an apparently irreconcilable conflict was now emerged between the traditional law and the developed needs of Muslim society, in so far as it aspired to organize itself by Western standards and values. Accordingly there seemed, no alternative but to abandon the *Sharīʿa* and replace it with laws of Western inspiration in those spheres where Islam felt a particular urgency to adapt itself to modern conditions. Any

understanding, therefore, of the nature of modern Islamic legal practice first requires an appreciation of the extent, and the manner in which, laws of European origin came to be adopted in the various territories of Islam.

The relationships between Muslim and Western states were naturally in the fields of public law and of civil and commercial transactions, which proved particularly prominent. It was precisely here that the deficiencies of the traditional Islamic system, from the standpoint of modern conditions, were very apparent. A lot has been said about the law of civil obligations, generally to indicate its total inadequacy against modern systems of trade and economic development. Equally insupportable to the modernist view, was the traditional form of criminal jurisdiction; not only the cause such potential penalties as amputation of the hand for theft, or stoning to death for adultery were offensive to humanitarian principles; nor because the notion of homicide as a civil injury, was no longer suited to a state organized on a modern basis; but more particularly because modern ideas of government could not tolerate the wide arbitrary powers vested in the political sovereign under the *Sharīᶜa* doctrine of "deterrence" or *taᶜzīr* in the *Sharīᶜa* legal institution.

European law-criminal and commercial-had a foothold in the nineteenth-century Ottoman empire through the system of Capitulations, by which the Western powers ensured that their citizens resident in the Middle East would be governed by their own laws. This brought about a growing familiarity with European laws particularly when, as in the realm of commercial transaction, they were applied in mixed cases involving Europeans and Muslim traders. Naturally, therefore, it was due to the laws applied under the Capitulatory system that Middle Eastern authorities turned to necessitate the superseding *Sharīᶜa* traditional law. At the same time the adoption of these European laws as a territorial system, meant that foreign

powers might acquiesce through the capitulation imposed on local authorities, a growing influence, had affected national sovereignty.

As a result of these considerations a large-scale reception of European law was effected in the Ottoman empire by the *Tanzimat* or the famous reforms of the period 1839 – 1876. The Commercial Code promulgated in 1850 was in part a direct translation of the French Commercial Code, and included provisions for the payment of interest. Under the Penal Code of 1858. which was a translation of French Commercial Code, the traditional *ḥadd* or defined punishments of *Sharīʿa* law were all abolished except that of the death penalty for apostasy. There followed a Code of Commercial Procedure in 1861 and a Code of Maritime Commerce in 1863, both of which, again, were basically French laws. To apply to these Codes a new system of secular, or *Nizamiyya*, courts were now established, for these courts the basic law of obligations was also codified, in the compilation known as the *Majalla or Mejelle*. For, although the substance of this Code owed nothing to European sources, but was derived entirely from Ḥanafī law. Codification, of course, was also intended to achieve uniformity in the application of the law, in view of the widespread divergencies of juridical opinion recorded in the *Sharīʿa* texts.

Almost in the same period of time, the impact of the traditional laws of the *Sharīʿa* seems very slight. But while composing the new *Sharīʿa* Codes, Muslim theologians had endeavoured to assert that the foreign rules derived from western codes had been selected on the basis of their general consonance with *Sharīʿa* doctrine.

Moreover, there was a clear tendency among them to show that those provisions included in the new codes, were as wholly divorced from their original sources, namely the European sources of law. Furthermore, looking into the original text of these codes, one can recognize the embryonic

beginnings of the process of islamization of the main foreign elements, exactly the same as had taken place during the first two centuries of Islam. Such process of islamization had opened the door to the Muslim theologians to refer to the customary law prevailed in tribal society or among primitive groups in un-developed areas.

But referring to these sources either tribal or traditional, was solely restricted to the realm of family law, which was termed to include laws of succession, the system of *Wakf* settlements and in most cases the laws of gifts and endowments.

In the context of the interaction between Islamic *Sharīᶜa* law and Western secular law, the majority of Arab and Islamic countries in the Middle East were influenced by this process. Only countries within the Arabian Peninsula remained immune to the European influence. The outstanding examples of states who remained loyal to the traditional *Sharīᶜa* laws were Saᶜudi Arabian Kingdom, the Yemen, and the other principalities of the Persian Gulf. The traditional Islamic law has remained fundamental law up to the present day, with the introduction of but a few superficial modifications, and still governs many aspects of legal institution there.

Egypt, went even further than the Ottoman authorities in the adoption of French law, for apart from promulgation Penal, Commercial and Maritime Codes and setting up a system of secular courts to apply them, it also enacted Civil Codes which were basically modeled on French law and contained only a few provisions drawn from the *Sharīᶜa*.(1)

As a result of these initial steps taken during the Ottoman period, laws of European origin today form a vital and integral part of the legal systems of most Middle Eastern countries. Criminal law and legal procedure are almost completely Westernised, though the last few decades have witnessed a movement away from the French Codes towards other European sources.

In 1926 for example Criminal Code in Turkey was based on Italian law, the Code of Criminal Procedure which followed two years later was of Germanic inspiration. Italian law was also directly adopted by Egypt in the Criminal Code of 1937. As for the law of civil transactions and obligations, this has become increasingly Westernised, throughout the Middle East generally, during the last century. The Ottoman *Majalla* was applicable only in Jordan; it was superseded in Turkey by the adoption of the Swiss Civil Code in 1927, and in Lebanon by the Law of Obligations and Contracts of 1932 which rested squarely on French law, while Syria and Libya have promulgated Civil Codes derived from the Civil Code which came into effect in Egypt in 1949.

This last Code, however, represents a definite departure from the previous practice of indiscriminate adoption of European law, and may be regarded as an attempted compromise between the traditional Islamic and modern Western systems. A great emphasis was laid on the fact that the system's provisions were an amalgam of existing Egyptian law, elements drawn from other contemporary Codes while maintaining the principles of the *Sharīᶜa* itself. As far as the actual terms of the Code itself are concerned, the debt owed to traditional *Sharīᶜa* law was slight, for more than three-quarters of the Code was derived directly from the previous Egyptian Codes of 1875 and 1883.(2) At the same time the insistence of the authors of the Code upon its composite nature and their assertion that the rules of foreign had been selected on the basis of their general consonance with *Sharīᶜa* doctrine evinced a distinctly novel attitude towards the reception of foreign law. There was a tendency to regard the provisions of the Code as wholly divorced from their actual sources, and it might not be too fanciful to see here the embryonic beginnings of a process of the Islamization of foreign elements which had taken place in the first two centuries of Islam. Moreover, since Article I of the Code provides that, in matters not specially

regulated by the Code, the courts should follow "customary law, the principles of Islamic law, or the principles of natural justice", obviously opens the door to a wider reference to *Sharīᶜa* law. It is true that such reference was not likely to have any important concrete results as long as the notion of *Sharīᶜa* law as a fixed and rigid system expressed in the medieval texts prevailed. But recent developments in Sharīᶜa family law, as we shall see, have largely dispelled this notion; and in the light of these developments the recognition of *Sharīᶜa* principles as a formative instrument of civil law may well come to assume an altogether deeper significance and implications.

From the latter part of the nineteenth century onwards, then, the pure *Sharīᶜa* in its traditional form was generally confined in the Middle East to the realm of family law, whose terms should be taken henceforth to include the laws of succession, the system of *waqf* settlements and, in most cases, the law of gift. Only parts of Arabian Peninsula remained generally immune to the influence of European laws. Here, in Saudi Arabia, the Yemen, the Aden Protectorate and the Hadramaut and the various principalities of the Persian Gulf, traditional Islamic law has remained the fundamental law up to the present day and, with the introduction of but a few superficial modifications, still govern every aspect of legal relationships.

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