Islamic Law and Religion

7 – 8 Rabiʿ al Ākhir 1414 / 24 – 25 September 1993
Yale University, New Haven, Connecticut

Although the seminar's presentations were not centered around a single issue in Islamic law, two common purposes were apparent: to explore the nature of change in Islamic law and to understand the relationship between religious authority and the practice of the law.

It is useful to begin with the presentation of Abbas Amanat (Yale University) on the history of modern Shiʿi law, since he was the only speaker who held to the characterization of Islamic law (at least in modern Iran) as removed from practical life, concerned with insignificant details of ritual, and heir to a textual tradition reduced to commentaries on commentaries. Amanat decried the fact that the Iranian ulema missed the opportunity in the nineteenth century to reform significantly the legal system. He argued that the success achieved by the religious scholars in instigating the tobacco boycott of 1891 should have mobilized them to call for significant institutional changes in Iranian law. Yet with the end of the boycott, the scholars returned to the same old business of speculating on questions irrelevant to the needs of a changing society.

Amanat admitted in the question and answer period that the ulema were restricted by political circumstances; indeed they may not have survived to seize control of the government in our times if they had pressed for reform too quickly. This is an issue that has not been explored sufficiently in the history of Islamic law: when jurists had no direct coercive power over governments, how did they use their moral authority to effect change? No doubt there were always individuals who had few scruples about endorsing whatever the ruling elite desired, yet there were others who pressed for change when they calculated that such pressure could be effective. Close biographical studies of individual scholars in their social and legal milieux can help answer such questions.

Medieval theories legitimizing the legal authority of Muslim rulers, no matter how they assumed power, have been seen as a rationalization or a necessary accommodation to a bad situation. While this theory is best known in its elaboration by al Māwardī and other Sunni theorists, Said Amir Arjomand (University of Chicago) noted that Sharīf al Murtaḍā held this view in the Buyid period. But later, when Jaʿfarī jurists were excluded from political power, they were also freed from the theoretical necessity of sanctioning de facto rulers. At this point, the theory of the "hidden imam" became very handy in a new scheme to sanction the authority of Shiʿi jurists. While Sunni public officials, including judges, were theoretically deputies of the caliph—hence the legitimacy of the former depended upon the legitimacy of the latter—Shiʿi jurists claimed to be deputized by the hidden imam himself. Thus it was the jurists, not the rulers, who, for example, were authorized to oversee the marriage of young women who had no guardian. In this way, Shiʿi political theology allowed the transference of increasingly more authority to the ulema.

In direct contrast to these trends in Shiʿi theory, jurists in the Ottoman Empire were coming under tighter government control. Cornell Fleischer (University of Chicago) discussed the reign of Sulaymān "al-Qānūnī" (1520-66) when the institutionalization of law took a decisive step. What resulted, said Fleischer, was a transference of sacrality from individuals and texts to institutions. In this system, justice came to be defined as the right of elites to security of status and position. While he did not discuss this issue further, his presentation suggests that the reason for the muftis' conservatism about new technologies had less to do with their being anti-western than with their sympathies for fellow state employees who were worried about employment security.

Frank Vogel's (Harvard University) observations about Saudi courtrooms made it clear that there are benefits to procedural practices that allow a fair degree of judicial discretion. He described the great skill with which judges allowed parties to work out their problems in the courtroom and gently directed them toward reconciliation. In most cases, witnesses did not have to be called and cases did not have to be tried; rather, the judges used the pretrial to allow the parties to argue freely with each other until they resolved their dispute. In this characterization, the Saudi civil court functions in the first instance as a place for mediation and reconciliation. One of the factors that makes the judges strive to encourage a reconciliation is their pious fear of making a wrong judgment and the risk of harming their own souls.

Bernd Radtke (Utrecht University) talked about the position of the nineteenth-century "neo-Sufis" Aḥmad al Tijānī, al Ḥajj ʿUmar, and Aḥmad ibn Idrīs, on the question of ijtihad. Radtke argued that these Sufis never opposed the validity of the Shariʿah; what they rejected were

the claims to authority made by the *mujtahid*s. At a time when taqlid was demanded and ijtihad was restricted to a few select individuals only, the Sufis reacted by declaring taqlid to be a sin and ijtihad to be of limited or no validity. Ibn Idrīs, in his *Risā'il al Radd 'alā Ahl al Ra'y* (unpublished manuscript) said that *fahm* (intuitive understanding based on *taqwā*) must be used instead of ijtihad to determine the will of God in a matter that had not been made explicit in the Qur'an and the Sunnah.

Bernard Weiss (University of Utah) discussed the usage of the terms *istiftā'* and taqlid in the theoretical treatise of Sayf al Dīn al 'Āmidī. According to al 'Āmidī, it is the duty of a *mujtahid* to seek his own solutions to a problem—to quote the opinion of another scholar is taqlid, and it is reprehensible when it involves *mujtahid*s who are peers. We might note that while his condemnation of taqlid is shared by most modern Muslims, this judgment may be preliminary, for it is clear that the term "taqlid" did not signify one practice that was uniform throughout the Islamic world. At the same time, some practices that appear to be taqlid-based could have involved a great deal of independent judgment and resulted in new legal interpretations.

This was suggested by the presentation by David Powers (Cornell University) on the fatwa collection of the fifteenth-century Mālikī jurist al Wansharīsī. Powers traced the genealogy of a fatwa elicited from al Wansharīsī by a judge who had to rule on a case of *tawlīj*. This jurist included a transcription of the judge's request with his own responding fatwa in the collection. On the surface, al Wansharīsī's fatwa appears to involve elements of taqlid: he cites no proof from Qur'an or hadith, but bases his argument on the opinions of two major medieval jurists and other legal cases. Nevertheless, he exercises his judgment in deciding which precedents apply to the case he is considering and which precedents are sound, for he cites alternative points of view within his school, only to reject them. The proofs from Qur'an and sunnah, while not made explicit, are implied, for al Wansharīsī, at least, is aware of the textual basis for the precedents he cites.

Another interesting issue is the way in which al Wansharīsī transformed the specific aspects of the case into a generalized description and stripped from his reply any details that were not necessary for understanding the legal issues at hand. This shows that fatwas are generalized responses to specific legal cases, and it is therefore hasty to conclude that just because they are couched in general terms they have no basis in specific historical situations.

This point was argued strongly by Wael Hallaq (McGill University) who has closely analyzed medieval *furū'* (particular instances of case law) texts. Hallaq showed how these texts retained an organic connection with contemporary life by their inclusion of fatwas. This was most commonly

done by submitting "primary fatwas", which were detailed and specific, to a process of *tajrīd* (abstraction) and *talkhīs* (condensing). The result was a "secondary fatwa" that could be used in a legal text for reference end instruction. Commentaries (*shurūh*) and marginal notes (*hawāshī*) were used to add cases that had become relevant to contemporary life. At the same time, *furū'* texts were reedited to exclude issues that had become irrelevant. Muhiy al Dīn al Ramlī applied this selective process when he chose to publish only those fatwas of his father that were not included in other contemporary works and were relevant to his time. The overwhelming preference given in these works to later opinions shows that taqlid was not so much a slavish imitation of previous solutions but a requirement for consistency within a legal school.

Hallaq concluded that the genres of commentaries and marginal notes are evidence of growth and change in Islamic substantive law. We might further suggest that the frustration of a modern reader with the dense nature of these works results from a lack of appreciation for the function *furū'* texts served in society. These works were not intended to be self-sufficient textbooks, but rather aids in instruction and sources of reference. While cryptic to the modern reader, the contemporary user of these works, being immersed in this genre, would have had much less difficulty with them.

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