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CHAPTER 57

Law

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Western scholarship (even when written by Muslims) has rarely presented Islamic law in such a way as to demonstrate its values rather than the values of the observer. It is legal practice in the Western sense (which admittedly corresponds to the special concerns of some Muslim jurists) that dominates the standard introductions to the subject: Schacht (1950), Linant de Bellefonds (1956) and Fyzee (1964). Certain features of Muslim juristic discourse, those perhaps which are most revealing of its nature and its intentions, are in such works disregarded in favour of a search for practical rules (certainly present, but strangely hard, sometimes, to find).

The problem may be exemplified by reference to two excellent works of scholarship which appeared in the late 1980s. Nabil Saleh, in his *Unlawful Gain and Legitimate Profit in Islamic Law*, pursues an aim which he shares with many modern Muslims, namely that of "reasserting *Sharī'ah* as a valid and sensible corpus of commercial and civil laws" (1986: 4). What he wants to achieve is "a financial system based on Islamic ethics", the subject matter of his final chapter. What stands in his way, and it does stand in his way, is the tradition of Muslim juristic writing. He goes through it honourably; but its variation, its complexity, its extravagant exploration of detail, its constant citation of different authorities, its apparent irrelevance, sometimes, to practice, its cunning and witty accommodation, sometimes, to practice: all these things make his task difficult, and will alert his readers to the fact that "a valid and sensible corpus of laws" is not quite what these jurists had in mind. Baber Johansen's book *The Islamic Law on Land Tax and Rent* (1988) centres on a set of legal concepts which were exploited by (amongst others) the Ottoman jurist Ibn Nujaym (970/1563), in Egypt, as an expression of his opposition to certain government tax-collecting initiatives. (These were justified in turn by a different manipulation of the same concepts.) Johansen's depiction

of development, juristic manipulation and social consequence is revealing, but revealing of something that is particularly interesting to Western scholarship, namely the use of the law in a political situation.

Ibn Nujaym did indeed produce a treatise which had direct relevance to the politics of his day. But when he transferred the arguments of that treatise to his great compendium of the law, *Al-Baḥr al-rā'iq*, the nature of the arguments changed. First, they took their place as a tiny part of the whole that is the law (by no means an insignificant message), and, second, they ceased to have an immediate activist import. They became a part of the tradition. They were thus of course preserved and might be used again, but, in their new context, they had become an element in a pattern, a pattern constituted primarily by citations from earlier authorities. (What a Muslim law-book characteristically reveals is the tradition.) In cases of established dispute, Ibn Nujaym may have had preferences, but his literary procedure was such as to open up to his readers what the tradition had discovered, through a pattern of argument and counter-argument that represented centuries of juristic effort and juristic debate. The concepts of the law were explored through the tradition's provision of scholarly analysis.

The centripetal (if rather distant) focus of scholarly comment was revelation. That consideration suggests a preliminary definition of Islamic law: it is a hermeneutic discipline which explores and interprets revelation through tradition. The last two words of that definition are the most important. For the most obvious shaping factor, in any work of Islamic law, is its engagement with the past of a particular tradition, and its loyalty to it. So much is this true that the tendency of the following pages will be to modify that definition, and suggest rather that Islamic law is a discipline that explores tradition, and uses tradition to discover (and limit) the meanings of revelation.

No one would deny that the explorations of the law were intended to influence, and might be used sometimes to control, practice; but the great exponents of the tradition would not, I think, admit that their work was valueless just because no one paid (practical) attention to it. The impulse to explore the law was (also) for its own sake, as an act of piety complete in itself, and so intrinsically a part of the religious perceptions of the Muslim community, that they hardly gave it (what the modern analyst has none the less to discover) explicit articulation.

The connotations of the phrase "Islamic law" are in part a product of Western perceptions and have been introduced now to Muslim societies through linguistic calques like Arabic *al-qānūn al-islāmī*. There is no corresponding phrase in pre-modern Muslim discourse. There, the two terms which expressed the commitment of the Muslim community to divine law were *fiqh* and *Sharī'ah*. The first of these is the easier to define.

It always refers to the human, and more or less academic, activity of exploration, interpretation, analysis and presentation of the law, whether this takes place in books, in schools, in the mind or in formal response to a specific question. It is possible to write *fiqh*, to teach and study it, to think (about) it and to manipulate and apply its concepts. *Sharī'ah*, on the other hand, is a word whose connotations are divine. It can be used very loosely and broadly to refer to the Muslim religion, because it is God's religion. It connotes God's law even when the details of the law are unknown or immaterial. It inspires loyalty and commitment in a way that the word *fiqh* does not. In a very narrow and specific sense it can refer to God's law as an ideal: that which is somehow contained within revelation, that which the *fuqahā'*, practitioners of *fiqh*, are trying to find through their explorations and analyses. And it is sometimes used to denote the same things as are denoted by the word *fiqh* (books of *fiqh*, books of *Sharī'ah*), but with that added sense of religious loyalty which comes from its association with God and truth. In modern academic analysis of Islamic law, the word *Sharī'ah* is of little use: what we can study and describe is always *fiqh*.

Fiqh is most obviously available to us as a tradition of literature, though, behind this, there is a tradition of thought and of education, and some kind of aspiration to social control. There are two major types of *fiqh* literature, that known as *furū' al-fiqh* (branches) and that known as *uṣūl al-fiqh* (roots). The former sets out, or appears to set out, concepts and rules that relate to conduct, and arguments about them. Its headings are purity, prayer, fasting, alms, pilgrimage (the essential acts of worship, *'ibādāt*, and invariably the first five books of a work of *furū'*) and then such topics as warfare, marriage, divorce, inheritance, penalties, buying and selling, judicial practice, etc., in variable order. The whole is a conceptual replica of social life, not necessarily aspiring to be either complete or practical, but balanced between revelation, tradition and reality, all three of which feed the discussion and exemplify the concepts. The literature of *uṣūl* identifies the divinely revealed sources of the law (Qur'ān and *Sunnah*), auxiliary sources (like consensus – *ijmā'*), and the hermeneutic disciplines which permit the complex intellectual cross-reference between revelation, tradition and reality which is exemplified in a work of *furū'*. The hermeneutic disciplines are historical and biographical (related to abrogation and to the reliability of those who transmit *Sunnah*), linguistic, rhetorical and logical. The linguistic and rhetorical sciences were in the developed tradition finely articulated, and presented usually under simple antithetical headings: command and prohibition, general and particular, absolute and qualified, metaphor and truth, etc. The application of logic to revelation usually meant analogy (*qiyās*) and was variously developed by different schools and individuals. The Shi'ite tradition was inclined to reject analogy as a systematic means to develop

the law, but shows a corresponding complexity in the application of other types of rational argument. Books of *uṣūl* characteristically culminate in a discussion of *ijtihād*, a term implying the exercise of the utmost effort to discover a particular item of the law through application of the hermeneutic rules (Calder (1983 and 1989); Hallaq (1984 and 1986)). It is probably true that the literature of *furūʿ* is larger than the literature of *uṣūl*, and more characteristic. (In the present chapter, and for reasons of space alone, the last two sections will be devoted exclusively to *furūʿ*.)

There is a third type of literature which has a role in the public presentation of Divine Law. It is that known as *ṭabaqāt* or "generations". Biographical in form, diachronic in organization, such books demonstrate the continuity of the tradition and the moral and intellectual status of its participating scholars. Their message is theological, though about history; it is that the lives and works of individual scholars derive meaning and significance from their place within an ongoing tradition of juristic thought. This is in fact the ubiquitous message of Islamic juristic literature: individual jurists are not engaged in a private dialogue with revelation, they are the heirs to a tradition. The discovery of meaning in revelation depends on conformity to that tradition. The *ṭabaqāt* literature defends, and of course defines, the tradition.

The five major schools of Islamic jurisprudence, the four Sunni schools (Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī) and the Imāmī (Twelver) Shiʿites, have expressed themselves through the same three literary types. A broad formal description of the works produced within one school (or tradition) will suffice (to a degree) for all, in spite of the many points of detail that mark their differences. All traditions also produced some specialist treatises and monographs, which can usually be accommodated within the three broad literary types identified above.

The *ṭabaqāt* literature has another, perhaps more prosaic, function. Books of this type vary from the extremely schematic list of names, dates, formal virtues, teachers, students and books produced which is the minimal requirement, to great sequences of anecdotes which, collected and juxtaposed on artistic principles, are intended to educate. (The *Ṭabaqāt al-shāfiʿiyyat al-kubrā* of al-Subkī – a Shāfiʿī jurist, d. 771/1370 – is an example of the latter type.) The education, reflecting the artistic impulse which works through contrived juxtaposition and variation, is miscellaneous, but is mostly about the law. Truths about the law which find academic, formal, complex articulation in works of *furūʿ* or *uṣūl* are rendered here through anecdote, sometimes witty, through poetic citations, through the recognition of scholar-heroes, through wondrous resolutions of tricky problems and through a vocabulary of description which carries subtle (or not so subtle) messages about the aims of the tradition.

Abū Ḥanīfah (150/767) was in the mosque one day, surrounded by a group of students who were shouting and arguing. "What, can't you

keep them quiet in the mosque?" muttered an irritable passer-by. "Leave them," said Abū Ḥanīfah, "for only thus will they learn *fiqh*." The historicity of the story is immaterial; its message is about the nature of the law – something to be argued about. The same Abū Ḥanīfah was holding a session one day in Mecca, when he was approached by a man from Khurasan. "I am owner of considerable wealth," said the man, "and I have a son. I am inclined to provide him with a wife and to set him up in comfort. But I fear he will divorce her and so squander my wealth. I could buy him a slave-girl and provide him thus with a household, but he might free her and so again squander my wealth. What shall I do?" "Take him to the slave-market," said Abū Ḥanīfah, "and when a particular girl catches his eye, buy her for yourself, and then marry her to him. If, then, he divorces her, she returns to your ownership; and if he frees her . . . well, he can't, for she is yours." The teller of this story was delighted not just by the reply but by the immediacy of Abū Ḥanīfah's response (Dhahabī: 21, 22).

No conclusions may be drawn from this about marriage practice and family problems in third/ninth-century Khurasan. The story is a show-case for the exploration of concepts. It is generated by the dual system of acquisition of rights to legitimate sexual intercourse in Islamic law: marriage and slavery. A master has rights to intercourse with a slave-girl, unless she is married to another; he may in appropriate circumstances transfer those rights to another; only the owner of a slave can set her free; etc. The story can be explained by listing the relevant rules of law. It was preserved and valued because the legal concepts here set to work are embedded in a narrative fragment which has an earthy humour, and because they are neatly manipulated as a display of skill.

In developed Islamic societies (say, from the fifth/eleventh century onwards, but also before this) the only formal, public system of education had as its major components the teaching of revelation and the teaching of the law, that is the schools of law. There were ancillary disciplines, and various means of secular and private education, but most educated members of Muslim society had as their primary currency of cultural exchange the concepts of the law. Through these they shared their leisure time, and created conversation, wit and public display; and through these they were able to analyse their society and their religion, to express their personal and their public piety and to devise various modes of social control. *Fiqh* was a multi-functional discipline. In the way that it possessed the lives of Muslims, it was challenged and in the end complemented only by the structures of Sufism. These two disciplines, at an intellectual and a practical level, were the primary modes of Muslim self-realization prior to the modern period. They could, without lack of piety, be experienced as humorous or serious.

There were of course differences of approach within schools and across schools. The Ḥanafī school in particular enjoyed the law, willingly explored its concepts through hypothetical cases and far-fetched problems and lent itself to cunning contrivances (*ḥīlah*) which exploited the letter of the law in order to uncover its tolerant spirit (or not, as the case may be). All the traditions did this to some degree, the Ḥanbalīs being perhaps the most conservative and piously serious; and all were aware of the dangers of these attractions. The Mālikīs polemically frowned on the Ḥanafī predilection for hypothetical cases, but acknowledged the temptations even as they preserved (created?) the following story. An Iraqi (i.e. Ḥanafī) asked Mālik (179/795) about a man who had sexual intercourse with a dead chicken, which then produced an egg, out of which came a chick; is it permitted for him to eat the flesh of the chick? Mālik's recorded reply is remarkably mild, all things considered (al-Qāḍī 'Iyāḍ (1967): 150–1).

Islamic law, in the thousand years or so of its cultural dominance, was the product of a highly sophisticated civilization. It was intimately related to an educational system which was more or less homogeneous throughout all pre-modern Muslim societies. Its long-term flourishing was due to the inherent flexibility of a conceptual structure which served to describe revelation, tradition and society. If the main aim of the structure was religious, indeed theological (an articulation of the hermeneutic relationship between the ongoing Muslim community and the ever more distant moment of God's direct intervention in human affairs), that does not exhaust the social functions it served. These might be explained in terms of the cultural needs of a sophisticated society, and probably cannot be explained in terms of the historical origins of Islamic law. None the less explanations in terms of origins have been characteristic both of the Muslim tradition and of the Western scholarly tradition.

The distant origins of Islamic law are strictly inaccessible, in the sense that they belong to a period for which we have no written records. The earliest surviving juristic texts are a number of works ascribed to named authorities of the late second/eighth and early third/ninth centuries. These works already show distinct school orientations, covering three major (and several minor) traditions, the Ḥanafī, the Mālikī and the Shāfi'ī. Literary evidence for the existence of a Ḥanbalī school of law is hardly available before the latter part of the third/ninth century, and for an Imāmī Shi'ite school, the early part of the fourth/tenth. If the Muslim tradition has a historical theory (and it might be more accurate to say that the Muslim tradition offers a schematic paradigm whose function is educative) it is as follows. The words and deeds of the Prophet (his *Sunnah*) were preserved, in the form of discrete anecdotes (*Ḥadīth*), which were transmitted orally through the generations. These were the source of juristic

discussion which was eventually transformed, via the notably creative contributions of Abū Ḥanīfah, Mālik, Shāfi'ī, Ibn Ḥanbal and, for the Shi'ites, such figures as the Imām Ja'far al-Ṣādiq, into the legal schools we now know. Development within the schools is acknowledged, e.g. by generalized reference to early scholars and later ones (*al-mutaqaddimūn, al-muta'akhkhirūn*), but never explored. Each school is concerned to demonstrate that its tradition can be harmonized with revelation (which is not the same thing as asserting that *Ḥadīth* are in fact, historically, the source of tradition). Historical considerations are almost entirely irrelevant to the aims of Muslim juristic writing.

By contrast, Western scholarship has amongst its foremost achievements Joseph Schacht's *The Origins of Muhammadan Jurisprudence* (1950). (The epithet is justified perhaps by the Muhammadocentric nature of Muslim juristic discourse.) His key observation is simply that the earliest legal texts (especially those of the Ḥanafī tradition) are not notably interested in relating law to Prophetic *Ḥadīth*, whereas later texts (especially those attributed to Shāfi'ī – 204/820) argue systematically that Prophetic *Ḥadīth* are the only justification for juristic rules. Islamic law, he thought, emerged in local Muslim communities as a discursive presentation of local custom (which may well have been thought of as Prophetic), and was only later transformed into a hermeneutic discipline requiring constant cross-reference between rule and *Ḥadīth*, i.e. between law and revelation (for *Ḥadīth*, like Qur'ān, is part of the revelation and quantitatively by far the greater part). A corollary of Schacht's theory is that much, indeed the bulk, of *Ḥadīth* material will be found to be the result of a search for justification, either of the pre-existent schools of law or of those who opposed them. This is perhaps confirmed by the fact that the literary production of *Ḥadīth* collections is mostly posterior to the life of Shāfi'ī, the earliest collection of great authority being that of Bukhārī (256/870).

Historically this means that the Muslim community was, from the late second/eighth to the early fourth/tenth centuries, engaged in a process of self-definition which was intensely focused on the components of and the relations between revelation (Qur'ān and *Ḥadīth*) and the various legal traditions. The literary witness to this process, according to Western scholars, was a number of juristic texts ascribed to early masters, an indeterminately large body of Prophetic *Ḥadīth*, and – perhaps – the canonical text of the Qur'ān (Wansbrough 1977). The stress on community creativity required by this model of historical development has been found theologically repugnant by many Muslims. It is none the less likely to be (broadly) true, and might not be intransigent to some developments of traditional theology. When the situation stabilized, so did the existential task. The Muslim community was committed to a number of divergent juristic traditions which, through polemical debate, had acquired a common sense of methodological purpose. That was the foundation of

Islamic law: a set of legal traditions more or less mutually self-recognizing (the Imāmī Shi'ites never quite fully integrated) and committed to the task of justifying tradition (and developing it) by reference to revelation. The literary products of the formative, pre-Classical period, though held in great veneration, are not the greatest achievements of the traditions. In spite of an insistence (not just Western) on the terminology of decline, the great achievements of Islamic jurisprudence are probably spread fairly evenly from the mid fourth/tenth to the thirteenth/nineteenth centuries.

The literature of *furū'* may be analysed as displaying two major types: *mukhtaṣar* and *mabsūṭ*, the former term designating an epitome or digest of the law, the latter an expansum or broad exploration of the law's details. The terms are given by the tradition, where they figure frequently as the titles of specific books: the *Mukhtaṣar* of Marwazī (Ḥanafī, 334/946), *al-Mukhtaṣar al-nāfi'* by 'Allāmah al-Ḥillī (Shī'ī, 726/1325), the *Mabsūṭ* of Muḥammad ibn Ḥasan al-Ṭūsī (Shī'ī 460/1067) or of Sarakhsī (Ḥanafī, 483/1090). They are also used by Muslim writers as I use them here, to designate types of literature. Even when the terms are not used, the typology is explicitly recognized and its components successfully indicated. Of the Yemeni scholar Ibn al-Muqri' (838/1434) it is recorded that he produced a work known as the *Irshād*. "It is a precious book on Shāfi'ī *furū'*, elegant in expression and sweet in diction, extremely concise and dense with meaning. He himself wrote a commentary on it, in which he flew to the circumambient horizons" (Shawkānī (1929), i: 43). Shawkānī's contrast between the *Irshād* and its commentary indicates precisely what I have in mind by distinguishing *mukhtaṣar* and *mabsūṭ*.

The earliest *mukhtaṣar*s were produced in the fourth/tenth century. The four major Sunni schools all produced at least one significant *mukhtaṣar* in this period. They are generally useful works, not notably refined. Some of them (say, the Ḥanafī *mukhtaṣar*s of Ṭaḥāwī (321/933) and Marwazī (334/946)) have survived only because they were incorporated into later and more important commentaries (*mabsūṭ*). Some have a functional adequacy which has secured for them centuries of practical (educative) use, notably the *Risālah* of the Mālikī scholar Ibn Abī Zayd al-Qayrawānī (386/996). The Shi'ah produced no similar work earlier than the *Nihāyah* of Ṭūsī, whose late date reflects the relatively late emergence of the Imāmī Shi'ah both as a definitive sectarian group and as a group committed to the normative Muslim discipline of the law. These early *mukhtaṣar*s are significant in at least three different ways. Firstly, they are the product of authors who were consciously aiming at analytic control of their material, presentational elegance and some formal artistry. They were successful only to a degree but the sense of authorial personality and achieved personal control is of considerable

importance. Secondly, and in some degree of contrast, these works are summaries of a school achievement and express a school loyalty. They rise above the polemical difficulties and the methodological complexities of third/ninth century debate to state the basic programme of concepts and rules which define their school, their tradition, their loyalty. Thirdly, they are functional: they serve the needs of a curriculum, being clearly intended as primers for students, and requiring elucidation and explication from teachers. These are the forerunners of a literary tradition, intimately associated with an educational programme and a social elite whose members, sharing their knowledge of the law, were enabled to analyse, enjoy and give formal religious dignity to the society they lived in.

The genre of *mukhtaṣar* was fundamentally educative. Such works explained the basic concepts and structures of the law, while giving only hints as to how these could be applied or explored. Initially, writers aimed only at a classical elegance of exposition. Their works are marked by restraint and by sufficiency. Their concerns were to choose and to exemplify the basic concepts in order to create a vehicle that would successfully convey its educative message. Meticulous organization and careful recourse to divisions and subdivisions were prerequisites for successful literary production within the genre. It was a limited genre. The concepts of the law did not change through the centuries (though their application might). The (theologically guarded) sanctity of tradition ensured that the production of a single masterpiece, in Classical format, would dominate subsequent efforts, sometimes for centuries. Within the Ḥanafī tradition, the neatly decisive work of Qudūrī (428/1037) lent in various degrees elements of form, order, structure and locution to the succeeding masterpieces of Mawṣilī (683/1284), Nasafī (710/1310, or 701) and Shurunbulālī (1069/1659). Those who were trained in the discipline, who already knew the law, would find pleasure in such works in recognizing the formal skills of the writer, attested through neat deployment, subtle shifts in order, conceptual density and uncluttered precision.

Qudūrī, in his *Mukhtaṣar*, began his section on alms (*zakāt*) thus:

> *Zakāt* is mandatory for the free man who is Muslim, mature and sane; if he owns a minimum quantity of goods, with exclusive ownership; and if he has had them for a year. Children, the insane, and slaves who are buying their own freedom are not subject to *zakāt*. One who is in debt for a sum that equals the value of his possessions is not subject to *zakāt*.

Shurunbulālī, in his *Nūr al-īḍāḥ* offers the following:

> *Zakāt* is the transfer of specified wealth to a specified person. It is incumbent on the free man who is Muslim, subject to divine

> command, and owner of a minimum quantity of goods, whether in the form of coinage, metal, ornaments or vessels; or in the form of trade goods whose value is equal to the minimum quantity; if he is free of debt and after provision of his basic needs; the minimum quantity being of goods which are productive, or potentially so.

Clause by clause the concept of *zakāt* attracts layers of qualification which become densely suggestive of the problems that attend on God's command. It is highly unlikely for most Muslims, most of the time, that their actual performance of this duty conformed to this type of approach. A practical casualness is not at all incompatible with the conceptual search for qualified meaning and precise significance that is articulated by these carefully juxtaposed clauses. The grammatical and terminological density of the originals is weakened in the translations, which involve about twice as many words as are used in the Arabic texts. A careful reading however should induce some consciousness of how the later text has grown out of, and in some degree, away from, the first. The reader should be aware of the increased specificity, the thorough concretenes of "coinage, metal, ornaments, vessels", etc., and the neat placing of "provision for his basic goods". It is entirely appropriate to feel dissatisfied with "trade goods whose value is equal to the minimum quantity" (should it not be "equal to or greater than"?), and then to consider that the missing words would really, perhaps, be superfluous – as nothing at all should be in this kind of work. Between the first text and the second the law has not changed. What has bothered and interested the jurists is their ability to catch the law in a network of words. The syntactic disjuncture that places the final clause in Shurunbulālī's text is conveyed in Arabic by a variation in adjectival agreement which compels admiration for its marriage of concision and complexity. It is precisely this that the jurists wanted to achieve.

Clearly the genre lent itself to mannerism. With the passage of time, it inspired numerous masterpieces of structural, conceptual and syntactic dexterity that dazzle the reader as they invite him or her to share and delight in the writer's virtuoso mastery of a discipline. The mannerist works, unlike the "Classical" ones, do not have the immediate aim of explaining and elucidating the law; they are quite as likely to hide it, in order to entice the reader into that recreative exercise that consists in unpacking the meanings that have been meticulously – but never with recourse to vagueness or generalization – embedded in the intricate texture of language. One of the most successful such works (not in fact unduly tortuous) is the *Mukhtaṣar* of the Mālikī scholar Khalīl ibn Isḥāq (776/1374). From the time of its production till the thirteenth/nineteenth century, it dominated the Mālikī schools of North Africa and was universally recognized as a jewel.

> *Zakāt* is mandatory / on the specified minimum / of flocks / subject to ownership / and the passing of a year / both complete / whether provided with fodder / or working / or product of breeding / but not of coupling with wild beasts; / increase is included / though before the year by only a day / but not on less [than the minimum] . . .

"Woven on a magician's loom" said Ibn Ḥajar al-'Asqalānī (852/1448), trying to convey this work's patterned complexity (1966, 2: 175). The style is (part of) the message, and it should not be disregarded in a search merely for the rules. (These can be learnt elsewhere, and cannot be easily learnt from Khalīl.) Such books say that the law is a delight and a pleasure, and that it is a tortuous and inextricable mystery; they create perplexity and the joy of achieved understanding; they lead the mind away from the messy and the mundane to at least a momentary vision of perfection; and they are witty. The last quality seems inherent in the distancing effect of any virtuoso performance, and owes much to the ironic gap that opens between life and its consciously contrived juristic image.

For centuries young Muslims, aspiring to be educated, had to learn such books off by heart. It might now be lamented that this was a sacrifice of young and enquiring minds. But this was also, potentially at least, an invaluable cultural provision, and, if the text remained in the mind as a recourse, it was a constantly available solace and pleasure.

The multi-volume *mabsūṭ*, by contrast with the slim *mukhtaṣar*, is easy to recognize: their authors, like Ibn al-Muqri', "fly to the circumambient horizons". They multiply the details of the law. They may even (though it is not the most characteristic feature of these books) find the opportunity to relate the concepts of the law to the particular circumstances of their time.

Marwazī, Ḥanafī author of an early *mukhtaṣar*, distinguished between legitimate governors and "outlaws" (*khawārij*). If the former collected *zakāt*, while providing the people with adequate military protection, the duty of the people to pay *zakāt* was thereby accomplished. If, however, the outlaws despoiled the people of their goods, while claiming it was *zakāt* (but in fact using the ill-gotten goods for ill-advised ends), the duty of the people *vis-à-vis* God was not accomplished, and they should repeat their distribution of *zakāt*. This was hardly a friendly rule for the people, who, in the last case, were first despoiled, then had to pay their religious duties! Marwazī however may not have had "real" consequences in mind (he derived his rules in any case from the books before him). Engaging the concept *zakāt* with the additional concepts of governors and outlaws was a heuristic device, permitting exploration of the significance of *zakāt*.

The later jurist Sarakhsī, in his *Mabsūṭ*, a commentary on Marwazī, managed to free the people from their double burden.

> As to the collections made by the sultans of our time, these tyrants . . . Marwazī did not deal with them. Many of the religious leaders of Balkh promulgate the ruling, with regard to these governors, that payment is required a second time, in order to fulfil the duty due to God, as in the case of land attacked and conquered by outlaws. This is because we know that they do not distribute the collected wealth as it should be distributed . . . The more valid view is that these illegitimate collections fulfil for the owners of wealth the duty of *zakāt* – as long as they formulate, at the moment of paying, the intention of giving alms to them [i.e. to the unjust sultans]. This is because the wealth that they possess is the property of the Muslims, and the debts they owe to Muslims are greater than their own wealth. If they returned to the Muslims what they owe them, they would possess nothing. Accordingly they have the status of the poor [and are therefore legitimate recipients of *zakāt*].
>
> (Sarakhsī (1986), 2: 180)

This is a *ḥīlah* (a juristic contrivance), and a joke. At least a quiet smile is appropriate on recognizing how Sarakhsī exploits the idea of debt to render the luxurious tyrants into the category of the poor, who are the rightful recipients of *zakāt*. Here he has clearly an eye on reality, and has arranged (and developed) his concepts for the achievement of particular ends. The development of the law by the discovery of new conceptual distinctions (tyrants, added to governors and outlaws) and by the acknowledgement of dispute (*ikhtilāf*) is characteristic of how the traditions, all of them, expanded.

Development in this sense, however, relating the concepts of the law to the particularities of the day, could be only a small part of any given book. In many works of *furūʿ* it is impossible to detect any responses that are particular to a given time and place. Formally such works are timeless. They have two major structural components. The first is the set of concepts that constitute the law. These are explored through the contrasting effects of terminological density and casuistic extravagance. The implicatory richness of a highly technical vocabulary is unravelled by making it work through cases, which may be hypothetical or practical, highly imaginative or trivially stereotyped. The casuistry is heuristic, a device for exploration, and it would, accordingly, be quite wrong to read such works as if they had immediate practical ends (though they sometimes did, and always contained that potential). The time-bound origins of a particular ruling are cancelled. The multiplicity of rulings thrown up by the tradition, or devised by the individual jurist, become

a means to discover the facets through which a legal concept is revealed. Where the tradition offers dispute (*ikhtilāf*), it too becomes a device to achieve a finer and more qualified perception of what a concept implies.

The second structural component of a *mabsūṭ* is revelation and justificatory argument. These are always integrated to some extent in a *mabsūṭ*, but it is a matter of tradition and individual taste how much they are expanded and developed. Both concepts and revelation are theoretically static (in spite of some real development, at least of the former). This literary tradition too, therefore, in time, developed characteristics which might be described as mannerist. To attempt here a history of so large and long a tradition would be vain. The major illustration offered here is taken from the *Muhadhdhab* of the Shāfiʿī jurist, Shīrāzī (476/1083), a work emphatically Classical.

In the following passage, Shīrāzī considers the question how the owner of "hidden" goods (differing from "manifest" goods, flocks or crops, in not being easily accessible to government inspection) should organize the distribution of his *zakāt*. Paragraph division and numbering are mine, but the neatness of the fit is Shīrāzī's. Note how every paragraph is constituted by a rule and the argument which justifies the rule; how the *ikhtilāf* of paragraphs 2.0–2.3 is unresolved.

> Chapter on the distribution of alms
>
> 1.1 It is permissible for the owner of wealth to distribute *zakāt* on hidden goods by himself. Hidden goods are gold, silver, trade goods and precious stones. This ruling is based on the *ḥadīth* from ʿUthmān, that he said in the month of Muḥarram, This is the month of your *zakāt*, so he who has a debt, let him pay his debt, then let him pay *zakāt* on the remainder of his wealth.
>
> 1.2 It is permissible for him to appoint an agent to distribute on his behalf. This is because *zakāt* is a claim on wealth, and it is permissible to appoint an agent to execute it, as with debts between men.
>
> 1.3 It is permissible that he pay his *zakāt* to the Imām. This is because the Imām is the representative of the poor. His status is like that of a guardian to an orphan.
>
> 2.0 On the question which is the best mode of conduct, there are three views.
>
> 2.1 The best mode of conduct is that the owner of wealth should distribute his *zakāt* by himself. This is the evident meaning of the text [i.e. the *ḥadīth* quoted at paragraph 1.1]. Further he is secure in respect of his own paying, but not secure in respect of anyone else paying.

2.2 The best mode of conduct is that he should pay the Imām, whether the Imām is just or unjust. This is because of what is related concerning Mughīrah ibn Sha'bah. He said to a client of his, who had the stewardship of his property in Ṭā'if, What do you do about alms on my property? The client replied, "Some of it I distribute directly as alms, and some of it I give to the authorities." Mughīrah asked what he knew about the latter portion. The client explained, "They buy land and marry women with it." Mughīrah said, "Pay it to them; for the Prophet of God commanded us to pay them." Another reason: the Imām is more knowledgeable about the poor and the extent of their need.

2.3 Amongst our companions there are some who say that if the Imām is just, payment to him is the best mode of conduct, but if he is unjust, then distribution by the owner of the wealth is best. This is because of the Prophet's words, He who asks for it as it should be, let him be given it; he who demands more than he should, let him not be given it. Further, the donor is secure in paying it to a just Imām, but is not secure in paying it to an unjust Imām, for the latter may spend it on his own desires.

(Shīrāzī (1959), 1: 175)

In the *ikhtilāf* of 2.0–2.3 there are three foci of concern: *zakāt* as a personal duty to God, *zakāt* as a communal duty implemented by the Imām and *zakāt* as a functional provision for the poor. The three "best modes of conduct" can be analysed as resulting from the elevation, in sequence, of each of these considerations to a dominant position. Shīrāzī has effectively shown his readers how the Shāfi'ī tradition (his "companions") understood (in this context) the concept of *zakāt*, and how this understanding can be justified by arguments of revelation, of reason and of analogy. If the "best modes of conduct" emerged into the tradition because they were responses to particular situations (as is not unlikely), it is precisely that particularity that has been removed, so rendering the casuistry exploratory and not practical. In the distribution of *zakāt* it is necessary to consider the duty to God, the rights and duties of the governor and the legitimate expectations of the poor. The message is perhaps that no one of these considerations unequivocally overrides the others. This is an abstract analysis of concepts and should not be mistaken for a set of practical rules. If, anywhere in Shīrāzī's work, we could learn anything about, say, the actual practice of his governors (and I think we can't), it would be an accident, and would not represent a part of his purpose in producing this book.

In a *mabsūṭ* then, the concepts of the law are explored, often by varying one or several items in a "case" which, at a given point, reveals the significance of the concept. The result of course is that many different

concepts are explored at once in a dense reticulation of argument. Here, in order to illuminate the concept of *zakāt*, Shīrāzī relates it to the concept of "agent" (*wakīl*) (1.2) and to the concept Imām (1.3), and that in turn to the concept of guardianship of orphans. Fully alert readers should begin to ask themselves about the significance of these judgments and might formulate further questions, or cases, which could illuminate the relationship between God, the individual (his or her agent, etc.), the Imām, the poor, etc. It is precisely this multifaceted and more or less hypothetical exploratory activity that constitutes the bulk of a work of *furū'*.

There is none the less a distinguishable third component which is also constitutive of the material contents of a *mabsūṭ*. It is the tradition itself. The exploration of concepts and the relating of concepts to revelation is achieved through tradition, In the passage from Shīrāzī above, we are not to imagine that he himself devised the three "best views"; they were given to him by the tradition, here the Shāfi'ī tradition. His role was to organize and present them in the neat schematic manner that permits the reader to perceive and register their implications. (That this role was creative is not denied.) Often the role of tradition is rendered explicit by reference to named authorities. In the early centuries of juristic writing, the named authorities are likely to be, almost exclusively, the founding fathers of the school tradition, Abū Ḥanīfah and his two pupils dominate the Ḥanafī tradition, Shāfi'ī, Mālik and Ibn Ḥanbal the other Sunni schools. For each of the last three it is commonplace to find that they had two or more opinions about legal problems, or that one of their pupils or colleagues had a well-defended alternative view, worth preserving. A multiple set of authorities and judgments was a prerequisite, for it permitted a concept to be viewed from a number of angles, so engendering complexity (a jurist's delight), and opening up different possibilities of development. The Shi'ite tradition too, when it began to produce juristic literature, called upon a constellation of authorities, as well as a large and diverse set of *ḥadīth* from the Imāms.

With the passage of centuries, the quantity of tradition, the juristic literature itself, became immensely greater than the quantity of revelation. The symbolic importance of the latter was not diminished, but its place in the literature of the law became, necessarily, (even) smaller. Within the school traditions this was not perceived as a problem, though it did prompt, on occasion, fundamentalist reactions, amongst those who felt that revelation rather than tradition should be the immediate source of rules. The prime example of fundamentalist reaction is Ibn Ḥazm, the Literalist (Goldziher 1971), but the tendency recurred from time to time, within various schools, its most notable later representative being the Ḥanbalī Ibn Taymiyyah. Generally, however, inside the schools, the meaning of revelation was discovered through tradition. There is no doubt

about the priority of the latter: the first loyalty of a jurist was to his school which alone revealed (!) to him the meaning of revelation (!). The theological implications of that fact can hardly be overstated.

In literary terms, the theological argument was expressed through a number of devices. In addition to those mentioned above, the most obvious is, perhaps, the use of commentary, supercommentary and gloss. These layered texts (increasingly present as the tradition got older) are in part product of a teaching device, in part reflect a delight in the contrasting effects of epitome and expansion, but mostly are a theological affirmation of commitment to tradition. The content of some early *mukhtaṣar*, embedded within a contemporary *mabsūṭ*, are thereby asserted to be identical with the full complexity of the law as it was understood in the later period. Serving the same purpose was the device of jigsaw puzzle composition. Ibn Nujaym's *Al-Baḥr al-rā'iq* is an example. The text of this work is created out of larger or smaller fragments derived (and acknowledged) from the whole tradition of Ḥanafī juristic writing. Explicit authorial intervention is reduced to a minimum and always takes the form of commentary on a citation. What might interest a Western scholar, the chronological order of these things, is quite disregarded. Though there is no doubt that Ibn Nujaym's complex manipulation of the tradition created something new (if only, sometimes, in form, for that too is part of the message), his methodology was designed to affirm the timelessnes of his conceptual explorations. Cut into the tradition at any point and the whole complexity of the law is there.

The law is a timeless structure of concepts, justified by reference to revelation, and fully present, at least by implication, in any articulation within the tradition, whether in a *mukhtaṣar* or in a *mabsūṭ*. Understanding of the law is achieved through understanding of tradition, not through independent or personal assessment of the meaning of revelation. A deeper understanding of the law (always the same as a greater delight in the law) can be achieved through consideration of the implications of *ikhtilāf* and the possibilities of conceptual subdivision. Direct response to revelation or to reality, though always possible, and sometimes detectable, are not particularly characteristic of how the law as a whole develops. With regard to many aspects of social reality, the juristic traditions are marked not by their aspiration to control and understand reality but by abnegation and indifference to development. Jurists, for example, never considered it their business to analyse the real problems faced by real governments in the creation of administrative and financial systems that would work. The efforts made in that direction were few (e.g. by Māwardī *et al.*, see Lambton (1981)), the achievements limited and the results largely disregarded by the mainstream of all the juristic traditions (Calder 1986). In spite of some remarkable exceptions, the jurists on the whole preferred to analyse the concepts and problems they inherited, rather than to take

on or create new ones (Imber 1982). And they continued to analyse inherited concepts and problems even when these had no bearing on the practical life of ordinary Muslims. No Muslim who studied *fiqh* would fail to learn the taxonomy of camels (in the archaic and frozen vocabulary of the tradition), and the arithmetic of how to distribute *zakāt* on camels, no matter how little the personal need to know this. Knowledge counted. Shawkānī tells us, with evident admiration, that Ibn al Muqri', on one occasion, considered the implications of the dispute within the Shāfi'ī tradition as to the use of sun-warmed water for ablutions: his heads of analysis reached thousands (Shawkānī (1979), 1.43). There may be exaggeration here, but the point is important: a jurist merits praise when he takes a single given problem or concept of the law and by minute analysis reveals its implications, its thousands (!) of facets. The diamond-cutting analogy is not inappropriate, for the effect of (good) juristic prose is one of crystalline clarity and of dazzling virtuosity.

I have said above that *fiqh* is a multi-functional discipline. It is not too difficult to concede that its primary function is theological, though it is not now easy to recover the theological message of these works. Modernist and fundamentalist Islam has lost the taste, and denies the priorities of traditional writing on the law. Sayyid Quṭb (executed 1966), informal spokesman for the Muslim Brothers in Egypt, and widely acknowledged for his Qur'ān commentary, on numerous occasions expressed what many Muslims now feel, namely that the tradition has somehow failed them. "The *Sharī'ah*," he says, "has been revealed in order to be implemented, not to be known, to be studied, and to be changed into culture in books and treatises" (Quṭb (1971), 1: 746). The observation is pertinent because it acknowledges (correctly) that this, or something like it, is what the tradition did. There, again and again, the stress falls on the need to explore the law in order to know it better, and on the need to create elegant and self-consciously artistic literary forms that will reflect the law's complexity. Whereas the pre-modern writers affirm that tradition controls understanding of revelation, modernist Islam tends to say the opposite, that revelation is a means to get rid of the (burdensome and irrelevant) complexities of a tradition which, perhaps, it is implied, has not served the community well. In the course of the thirteenth/nineteenth century, and largely as a result of Islam's confrontation with Western culture, the tradition had been interrupted, and its message lost. The tenuous continuation of the pre-modern juristic tradition was perhaps less tenuous amongst the Shī'ah, where it provided the concepts that inspired the jurists' intervention in the Iranian Revolution of 1978. Generally, however, the emergence of secular education systems and the divergence of the intellectual elite of Muslim societies to other (and frequently more pressing) matters has ensured that the law (or rather *fiqh*, for the

inspirational power of *Sharī'ah*, a concept potentially devoid of detail or specificity, has increased) does not dominate society as it once did.

Quṭb's remark shows that he thinks the *Sharī'ah* (*sic*) exists to be implemented. That stress on loyalty and action, prior to (even independent of) exploratory thought, is part of an activist programme to which he was committed, but it has reverberations throughout modernist Muslim writing, and has affected the perceptions of Western scholars. F. M. Denny is not the only observer to imagine that Islam is better characterized as a religion of orthopraxy than as a religion of orthodoxy (Denny (1985): 98). This is not true, and was traditionally denied by Muslim jurists and theologians. For them, the definition of a Muslim, and the possibility of salvation, depended on faith, not works. For the whole of the Sunni tradition there was no dispute that faith (alone) guaranteed salvation. Works of course were important; Muslims might be punished, according to some temporarily, in Hell, for their failures to conform to God's law (though they might, even then, be saved through the intercession of their Prophet). In practical life, even the simplest, and absolutely undisputed, parts of the law (say, to pray five times a day) are today (and were undoubtedly in the past) often disregarded by some Muslims who, though acknowledging their error, are not (as far as the casual observer can tell) unduly disturbed by their sins, nor rendered doubtful in their conviction of salvation. A Muslim did not have to be a qualified jurist to perceive the law as an ideal.

These remarks, and the general tenor of this chapter, are not intended to deny that the law, and all writing on the law, was expected, in some degree, to influence practice. No jurist was ever oblivious to the fact that conceptual exploration of the law, or theological affirmations about the importance of tradition, had implications for daily life. And every jurist acknowledged his duty, as a member of the learned elite, to provide explicit and unqualified guidance in respect of particular problems that were brought to him by the populace at large. If the jurist Shīrāzī was approached by one who explained his financial circumstances, and enquired about payment of *zakāt*, Shīrāzī would not then sit back to consider the possibilities of the law; he would, as a *mujtahid*, recognize the need to provide an answer. The need to make the law work, to some degree, was universally recognized, and generated bodies of literature distinct from those described in this chapter. Juristic responses to particular questions generated the literature of *fatāwā* (responsa). That literature has its own complexity, which cannot be discussed here. Some parts of the law were more than others integrated into the administrative structures of Islamic society, notably the office of the *qāḍī* and all that appertained to it. Monographs were produced in such fields in which the stress was less on exploring the law, more on the provision of practical advice and rules of expedient conduct. There was even a small and

marginal genre of monographs on the structures of government, little though these, on the whole, attracted the attention of the tradition. Many jurists however participated in government (while many others refused to do so) and tried to create some kind of link between the structures of the law and the structures of practical administration.

But practice, in whatever area or form, could never be more than a clumsy, partial and imperfect realization of the divine command. A fuller (if perhaps still inadequate) expression of that command could be achieved in literature. The literature of the law is an exploration of God's self-revelation to and within a particular human society. In all its forms, aspects and implications it is about a divinely sanctioned social order and the (consequent?) possibilities of human social integration. It is not a description of "real" society, nor the provision of a corpus of sensible, practical rules; it is at least the transformation of these things into a theological argument. As much for modern Muslims as for modern academics the task of mastering that literature and translating its implications into an idiom suited to (soon) the fifteenth/twenty-first century is one that has hardly begun. The cultural complement to juristic literature, with its stress on society, is, within Islam, Sufi literature, which provides a corresponding stress on the private devotional life of individuals. It is in the integration of these two structures that most Muslims – including the jurists, who were frequently also mystics – have, historically, found self-realization as Muslims.

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VIII

Later transmission and interpretation