Introduction

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It is unfortunate that these four studies, the final reflections of Norman Calder on classical Muslim jurisprudence, cannot be presented here in their intended context. The chapters are clearly part of a larger, unfinished project, but Calder left no suggestion of a 'structure' into which these studies might be slotted. There are no 'introductory remarks' that might ease the reader into the work, preparing him or her for the rigours to come. They were given to Norman's friend and colleague, Colin Imber, for editing as individual files (a task for which he is owed much thanks). Mercifully, and almost as a concession to a less initiated audience, Calder does (at least) open each chapter with an introductory passage. He also makes frequent reference to how a specific point is related to a (perceived) general characterisation of classical Muslim legal literature. These topical comments are buttressed by a few asides and correctives concerning contemporary and past Islamic legal scholarship. Notwithstanding these hints at a more general 'thesis' into which the four chapters fit, greater detail of the stage on which the Calder's analysis was to be set would have been useful. Calder was a structured thinker, and each chapter (both those written and those that perhaps never were) would have had a role. These roles can only be estimated through deduction and inference, and even then with varying degrees of conviction on my part. Principal connecting themes can be identified, but without an idea of the larger context presupposed for these studies, any identification will inevitably be partial at best, skewed at worst. Hence, the following account is presented with more than a little apprehension.

Fortunately, there are other immediate contexts that can do some of the work of the absent plan. First, there are Calder's other writings and the approach exhibited therein.[1] Employing these as a source comes with the inescapable caveat of

[1] All bar one of Calder's journal articles and book chapters have been collected in Norman Calder, *Interpretation and Jurisprudence in Medieval Islam,* J. Mojaddedi and A. Rippin, eds. (Aldershot,

Calder's own intellectual development. Undoubtedly his methodology developed and changed over the nineteen years between his first publication and his death. This development prevents any hard and fast linkages between different pieces of writing. Nonetheless, there are obvious commonalities between the arguments Calder presents in this volume and those he developed elsewhere. The second context that may aid our assessment of these four studies is the field of Islamic legal studies more generally, spanning not only the period up to when these studies were composed (i.e., the year or so before Calder's death in 1998), but also developments in the field since then. The discipline provides the intellectual context in which Calder was writing, and a broader view of the debates within the discipline enables us to picture (albeit imperfectly) how Calder envisaged his approach being applied to other debated topics. With these tools at our disposal, we can present both a (potentially forced) coherence within these four studies and a set of salient themes.

Calder's four final studies could be described as a request to the participants in the then emerging discipline of Islamic legal studies to take the literary quality of the sources they utilise seriously. He is concerned by the growing popularity among researchers of what (in his view) was a rather mercenary use of classical Muslim juristic literature. This literature generally, and two of its genres in particular – *fiqh* (or *ū* *al-fiqh*) and *fatāwā* collections – are seen as sources of legal practice, or of social conditions, without a proper examination of their generic, stylistic and religious features. His concern is that little attention is being paid to the overarching relationship between literature and reality, and, more specifically, this particular legal literature and its contemporary legal/social reality. Before the economic or social historian can use this corpus of literature (with its internal logic and its genres and sub-genres), it needs to be understood on its own terms, and within the intellectual tradition in which it was composed. Only once this preliminary assessment has been carried out can the utility for the (legal or social) historian of these potential sources be assessed. Calder's studies (both here and in his other writings in the 1990s) are first steps in delineating elements in a robust intellectual methodology.

Now, it seems unlikely that Calder would have felt compelled to embark on this analysis and issue this request without the prevalence of an alternative approach within the field. It, therefore, becomes important to examine the disciplinary developments which, I believe, prompted his response. Calder, in this

UK: Ashgate, 2006). His encyclopedia articles are listed in G.R. Hawting, J.A. Mojaddedi, and A. Samely (eds.), *Studies in Islamic and Middle Eastern Texts and Traditions in Memory of Norman Calder*, (Oxford: Oxford University Press, 2000), 10. Calder's book reviews are listed and analysed in the Afterword to this volume.

volume and elsewhere, names some of the proponents of the position he is kicking against: Hallaq, Libson,[2] the editors of the important volume *Islamic Legal Interpretation* (Masud, Messick and Powers)[3] and to a lesser extent Reinhart.[4] With the rapid increase of writings in the field in the 1990s (spurred on, from 1994 onwards, by the publication of the specialist journal *Islamic law and Society*), these named individuals were, perhaps, the more prominent of a growing cadre of expertise within the field. Of these, Hallaq's publications have been particularly influential, and it is his work, in particular his important article 'From *Fatwā*s to *ū*', that receives the greatest proportion of Calder's explicit comment. That article is, then, an appropriate place from which to begin. As with Hallaq's previous work, the initial focus in 'From *Fatwā*s to *ū*' is on the inadequacies of established scholarship on Islamic law. Hallaq's target is the (previously) widespread view in Islamic legal studies, illustrated by citations from the writings of Coulson and Schacht, that Islamic law, after the tenth century, was not subject to significant change. Islamic law, according to this old view, was rigid and unchanging after its formative period, and therefore divorced from the exigencies of developing Muslim society. This may or may not be an accurate characterisation of the views of Coulson and Schacht, but the method is familiar to readers of Hallaq's published writings in the 1980s and 1990s. Hallaq's task, as he conceives it, is to disprove this widespread view, and indicate that change did occur in Islamic law and it was certainly not rigid and unchanging in the later centuries. His criticism of Coulson and Schacht here jigsaws nicely with his rejection of the notion that an individual jurist's interpretive activity (*ijtihād*) was theoretically restricted in the post-formative period, most adroitly expressed in his much-cited article, 'Was the Gate of *Ijtihād* Closed?'[5] *Ijtihād*, an individual jurist's effort to discover a legal ruling in a particular case, is associated with independent reasoning and the potential for a jurist to discover new solutions to (both novel and established) issues. If *ijtihād* ceased to be practised

[2] Calder refers to Gideon Libson, 'On the Development of Custom as a Source of Law in Islamic Law', *Islamic Law and Society*, 1 (1994): 131–55, but similar statements can be found in his *Jewish and Islamic Law: A Comparative Study of Custom during the Geonic Period* (Cambridge, MA: Harvard University Press, 2003), 249–50, n. 7.

[3] Muhammad Khalid Masud, Brinkley Messick, and David S. Powers (eds.), *Islamic Legal Interpretation: Muftis and Their Fatwas* (Cambridge, MA. and London: Harvard University Press, 1996), particularly their 'Muftis, Fatwas, and Islamic Legal Interpretation' in that volume, 3–32.

[4] A. Kevin Reinhart, 'Transcendence and Social Practice: *Mufti*s and *Qadi*s as Religious Interpreters', *Annales Islamologiques*, 27 (1993 [1994]): 5–28.

[5] Wael B. Hallaq, 'Was the Gate of *Ijtihād* Closed?', *International Journal of Middle East Studies*, 16 (1984): 3–41. Johansen's view was that this remained a primarily theoretical issue and did not have much to do with actual legal change. See B. Johansen, 'Legal Literature and the Problem of Change', in *Islam and Public Law*, ed. C. Mallat (London: Graham and Trotman, 1993), 29–31 (and in B. Johansen, *Contingency in a Sacred Law*, Leiden: Brill (1999), 446–8.

(i.e., its 'gate' was closed), then the potential for change in the law was minimised (possibly even eliminated). The phrase *insidād bāb al-ijtihād* ('the closing of the gate of *ijtihād*') can be found in some mediaeval sources, and these infrequent references, Hallaq argues, are elevated to historical fact by the contemporary generation of Islamicists (including Schacht, Anderson, Gibb, Tritton, Coulson, Watt, Khadduri and Rahman). The gate, according to Hallaq, was never closed, and the phrase *insidād bāb al-ijtihād*, used by a handful of Muslim jurists, has been misunderstood by these Islamicists. Once *ijtihād* is restored as an element of post-formative Islamic law, legal change becomes possible.

In 'From *Fatwā*s to *ū* ', Hallaq asserts not only that change occurred, but also that the principal mechanism of change was the fatwa. While readers can, of course, refer to Hallaq's article itself, it is perhaps worth pinpointing those elements of the article that Calder found problematic. A description of the institution of the fatwa need not be rehearsed here (Calder gives such a description in Chapter 4, as do Hallaq[6] and others). Hallaq's argument is that a fatwa (or rather the legal opinion or doctrine asserted by an individual mufti in a fatwa) has the potential to become incorporated into the body of authoritative legal doctrine (*madhhab*) in the post-formative period. This authoritative doctrine is expressed in works of *ū* within a particular legal tradition (Ḥ ī , āfi ī , Mālikī, etc).

There is plenty of evidence that this potential was realised on occasions, and Hallaq provides the reader with a barrage of references to *ū* works in which the authors explicitly state that they are incorporating the fatwas of past (and perhaps even contemporary) learned scholars into their works. The incorporation happened, according to Hallaq, through a process which, given the available sources, is not always entirely recoverable. Nonetheless, sufficient examples of the end result of the process (together with many secondary accounts of it happening), are known to construct a skeletal description of the mechanism. First, the fatwas of either a prominent mufti, or a number of prominent muftis, are collected in a single work. These fatwas (which Hallaq calls 'primary' fatwas) include dates, places, names and other socially specific data that can be an important source to the social historian, but also indicate that the mufti concerned was engaging with reality when practising his legal reasoning. In some collections, the details, present in the original fatwa, are removed by the collator of the fatwa collection (these fatwas, stripped of details are, for Hallaq, 'secondary' fatwas, subjected to a technique known as *tajrīd*). The collections of fatwas then became a source for subsequent *ū* writers. Some of the original wording of the fatwa may survive its incorporation into the *ū* work, though it is also

[6] Hallaq, 'From *Fatwā*s to *ū* ', *Islamic Law and Society*, 1:1 (1994), 29–65.

possible that only the doctrine (or mufti's opinion) survives in the *furūʿ*. Hallaq provides examples of this process from the Mālikī school (including fatwas of Ibn Rushd al-Jadd (d. 520/1126) and their incorporation by al-Kinānī (767/1365) and al-Ḥ ṣṣā (d. 954/1547)).

The fatwas deemed worthy of inclusion, according to Hallaq, were those which ensured that the ū works were up to date, including the latest developments in legal doctrine by the most prominent muftis, and with the most direct relevance to the ū writers' contemporary Muslim society. New legal doctrines, the origins of which can be traced to real fatwas, were incorporated; in parallel, obsolete, irrelevant, 'strange' (i.e., minority) and 'weak' (i.e., unsubstantiated and unsupported) doctrines were removed. The new opinions take their place in the hierarchy of authoritative opinions, and their position depends on a variety of evaluation processes that subsequent scholars carry out (the exact details of this evaluation process need not be repeated here). Since the aim of ū works was to provide a comprehensive expression of the law as proposed by a particular *madhhab*, this expression had to be of some use to the legal functionaries (and consequently, it had to be of relevance to the developing Muslim society). Hallaq concludes that 'the fatwa, reflecting the exigencies of the social order, was *instrumental in the ongoing process of updating and indeed amending* the standard legal doctrine as expressed in the ū '.[7] '[T]he juridical genre of the fatwa was chiefly responsible for the growth and change of legal doctrine in the schools, and our current perception of Islamic law as a jurists' law, must now be further defined as a muftis' law. Any enquiry into the historical evolution and later development of substantive legal doctrine must take account of the mufti and his fatwa.'[8]

I have taken some time to outline Hallaq's presentation in 'From *Fatwā*s to ū ' not only because it has proved influential in subsequent Islamic legal scholarship, but also because it encapsulates a number of assumptions and conclusions that Calder considers either mistaken or at least in need of serious modification. For Calder, Hallaq's erudition and command of the sources was not in doubt. Furthermore, Hallaq is laudably eager to demonstrate (contra the 'orientalists') that post-formative Islamic law is not a mere recapitulation of past glories, but a phenomenon of interest in its own right, with an internal dynamic that demonstrates impressive originality and a level of sophistication which is arguably higher than that found in the early period. Calder's own reading of post-formative Muslim tradition is similarly positive.[9] Rather, Calder's concerns

[7] Ibid., 31 (emphasis in original).
[8] Ibid., 33.
[9] See N. Calder, 'The Limits of Islamic Orthodoxy', in *Intellectual Traditions in Islam*, ed. F. Daftary (London: I.B. Tauris, 2000), 66–86 (especially p. 84, where he describes the 'rich, complex and

were, in part, with the precision (or rather, the lack of it) with which Hallaq had formulated his conclusions:

> It is possible to agree with Hallaq's thesis at its most general – that in some sense or another Islamic law was capable of responding to social change – without feeling that he has characterised well either the basic structures of the Islamic legal system or the modality of its accommodation to change.[10]

Now, challenging the idea that Islamic law did not change between the tenth and nineteenth centuries was a preoccupation of a number of scholars in the 1980s and 1990s. However, the identifications of the mechanisms of 'change' and its relationship with *ijtihād/taqlīd* were topics on which there was little scholarly consensus.[11] A particularly productive line of enquiry has been to focus on legal and social practice, and examine its relationship with legal doctrine. Perhaps the most extensive work in this area has been carried out by David Powers.[12] However, Powers makes only occasional reference to the development of legal doctrine in works of *ū*ʿ. When practice diverged from doctrine, he makes pertinent remarks, but in the end, his analysis is of legal practice and social reality, and how legal doctrine was one (and not always the dominant one) which influenced that practice/reality. One example of his method will suffice: The concentration in Islamic legal studies on doctrine untempered by practice has led scholars to certain conclusions about the practical implications of, say, the rules concerning inheritance. Powers demonstrates (through an analysis of fatwas, legal documents and other social-historical sources) that an examination of legal practice reveals that the range of means whereby an individual's wealth could be distributed after death was not limited to the inheritance rules themselves. Other mechanisms (including the family *waqf*) were available. This gives us a richer notion of the practicality of Islamic law, and certainly mitigates the conclusions of some early orientalists (Hurgronje, in particular) for whom Islamic law was a mere deontology, and not a law

varied tradition' of classical, post-formative, Muslim thought, and that 'the needs of the 20th century hardly indicate that [this tradition] should be restricted'.). See also, N. Calder, 'History and Nostalgia: Reflections on John Wansbrough's *The Sectarian Milieu*', in *Islamic Origins Reconsidered: John Wansbrough and the Study of Islam:* Special Issue of *Method and Theory in the Study of Religion: Journal of the North American Association for the Study of Religion*, 9;1, ed. Herbert Berg (Berlin: Mouton de Gruyter, 1997), 43–73.

[10] See chapter 3, p. 160.

[11] In the period when Calder was composing these chapters, the most significant advance was made through a special issue on *ijtihād/taqlīd*, guest edited by Hallaq, of the journal *Islamic Law and Society*, 3;2 (1997). Calder's contribution was his article, 'Al-Nawawī's Typology of *Muftīs* and Its Significance for a General Theory of Islamic Law', 137–64.

[12] See in particular his collection of studies, *Law, Society and Culture in the Maghrib, 1300–1500* (Cambridge : Cambridge University Press, 2002).

as such.[13] Now Powers's work here operates to an extent in the opposite direction to much Islamic legal scholarship: his aim is to identify practice and relate it to doctrine (and not, or at least only occasionally, vice versa).

A more strident, and perhaps less subtle presentation of the practice-doctrine relationship can be found in the work of Haim Gerber. Gerber, with a focus on the Ottoman period, aims to discover the extent to which Islamic law was rigid and not subject to change or influence in the post-classical period. In his various writings, he aims to demonstrate, in a manner not dissimilar to that of Hallaq, that in the late classical period (on the eve of the intrusion of modernity), Islamic law was not the inflexible system characterised by the old orientalists (Schacht in particular, but Coulson and Gibb also). These scholars were also the targets of Hallaq's criticism in many of his articles in the 1980s and 1990s, and like Hallaq, Gerber's prime piece of evidence against this assumption is fatwas. Whatever the soundness of Gerber's methodology, his conclusions were that the legal decisions of the muftis (such as the famous Ḥ ī Khayr al-Dīn al-Ramlī (d. 1081/1671)) were heavily influenced by their school doctrine, and that they do exhibit *taqlīd*. However, their legal activity is characterised by an openness to change which can be recognised when examining their fatwas:

> Islamic law was not sealed off from full-fledged innovations, which took place under the banner of *ḥ ā* , local custom (ʿ), necessity (*ḍ ū*), and public interest (*ṣ ḥ*). It cannot be proven, nor do I claim, that it was al-Ramlī who introduced these innovations. It is sufficient that he acknowledged innovations by others, and that the channels of Islamic law, as reflected in his thought, remained open to change.[14]

Also prominent in the field is Baber Johansen, whose writings are (perhaps surprisingly) not referenced by Calder in these pages. Johansen had approached the issue of change in Islamic law as early as 1979 in his assertion that certain elements of Ḥ ī penal law were developed and changed in response to and under the influence of legal practice.[15] He developed his conceptions of the modalities of legal change in a series of articles, the most relevant here being his 'Legal literature and the problem of change: the case of the land rent'.[16] There Johansen distinguishes between the core texts of the *madhhab* (*mutūn*), in which authoritative doctrine was declared, and the commentaries and fatwas

[13] D. Powers, 'The Mālikī Family Endowment: Legal Norms and Social Practices', *International Journal of Middle East Studies* 25 (1993): 379–406.

[14] Haim Gerber, 'Rigidity Versus Openness in Late Classical Islamic Law: The Case of the Seventeenth-Century Palestinian Muftī Khayr al-Dīn al-Ramlī', *Islamic Law and Society*, 5; 2 (1998): 194–95.

[15] See B. Johansen, 'Eigentum, Familie und Obrigkeit im hanafitischen Strafrecht', *Die Welt des Islams*, 19 (1979): 1–73 (also in Johansen, *Contingency in a Sacred Law,* 349–420).

[16] See n. 5.

which drew on that doctrine, often tangentially. Johansen's example of land rent in the Ḥ ī school indicates that the law as practised was subject to (often) volte-face change, and these changes were often justified in religiolegal terms by muftis and jurists. However, the expression of the most radical challenges to the established *madhhab* doctrine were restricted to commentaries (*shurūḥ*) and fatwas. The sacred core of the *madhhab* was preserved in the *mutūn*, while legal change and development, in response to social need, were permitted elsewhere. The task of characterising the modalities of change in Islamic law requires, for Johansen, an awareness of where innovative opinions can be introduced and how the opinions move from being peripheral to less marginal in the authority structure:

> It is, therefore, relevant to be aware of the many layered structure of the genres of the legal literature that we study and the different functions assigned to them, if we are to avoid misleading simplifications concerning the content, the meaning and the historical development of Islamic law.[17]

Now Hallaq's account, in which social and legal reality influence legal doctrine (ū) through the institution of ā has undoubtedly received more attention than that of Johansen's distinction between the dynamics of change in different genres of legal literature. The most sustained critique of Johansen's views is that of Lutz Wiederhold, who argues that

> ū -manuals, commentaries (ūḥ) on the ū -manuals, ṣū -books, or *fatwā*-collections are all normative sources because they reflect what their authors considered to be a norm. Although normative sources may contain descriptive passages that include elements of contemporary social reality, we cannot regard their normative content as a description of social reality, in general, or of legal practice, in particular.[18]

However, it does not follow from the fact that normative works of the genres listed here cannot be used to construct social reality or legal practice that they are uneffected by the said reality/practice. It is merely that the effect, generally speaking, cannot always be identified (I doubt Wiederhold would mean to imply that it can never be identified). More specifically, Wiederhold argues against the simplistic notion (implied in Hallaq's line of reasoning) that *ijtihād* never ended, and this means that change in Islamic law was a continuous possibility (and, in innumerable instances, an actuality):

> The sources that I have consulted treat *ijtihād* neither as a method – in the sense of a set of tools – nor as a mechanism of legal change. Rather, the *uṣū* , ū (including ūḥ),

[17] Johansen, 'Legal Literature and the Problem of Change', 31, in *Contingency in a Sacred Law,* 464.

[18] Lutz Wiederhold, 'Legal Doctrines in Conflict', *Islamic Law and Society* 3;2 (1997): 249.

adab ādī , *adab al-muftī*, and *fatwā* literatures raise questions as to whether a legal scholar may activate the mechanisms of legal change and, if he may, what qualifications are required to utilize the methods that are expounded in legal theory in solving a legal question.[19]

The theoretical question of whether (and which) scholars are qualified to exercise *ijtihād* is, for both Wiederhold and Johansen, distinct from the notion of legal change, and though there may be a link between *ijtihād* and change, it is difficult to prove (or, as Wiederhold points out, to disprove). Wiederhold develops Johansen's argument by pointing out that choice between competing solutions to a problem (one of the mechanisms for legal change identified by Johansen) was itself an element in *ijtihād* for many scholars. This, for Wiederhold, increases the likelihood of a direct linkage between the theoretical discussions concerning *ijtihād* and legal change. Notwithstanding this conclusion, both scholars argue that any account of change must concentrate on the 'evolution of new legal ordinances'.[20] As we shall see, for Calder, the evolution of new legal ordinances (which should be distinguished from a jurist's choice to emphasise an ordinance that has already been proposed but considered marginal) is unusual in the central *ū* texts of a *madhhab*. When change does occur, it is best described as an extension of existing opinions to new cases, brought on by casuistic reasoning during scholastic exchange. For Calder, the influence of social or legal practice here is minimal.

These citations, and the views expressed therein, represent the contours of the scholarly debate over the possibility of change in Islamic law when Calder composed these four chapters. His notes do not take into account all the views developed here (only Hallaq and Powers are explicitly cited), and it is possible that Calder hoped to make further citation and adjustment to future versions of these chapters. In any case, one may speculate on what Calder's initial comments might be on the general direction of the discussion within these works. He would probably wish to apply his comment on a citation from Libson more generally within the field. When Libson states that Islamic law, or the 'Islamic legal system', influences and is influenced by social circumstance (i.e., is subject to change), Calder comments:

> What, in an Islamic context, could be the referent of 'a legal system' or even 'law'? It does not seem possible to make that kind of assertion either of *ī* or *fiqh*; but nor can the writer [i.e., Libson] be assumed to be talking merely about the actual practice of this or that Muslim community at a particular place and time.[21]

[19] Ibid., 267.
[20] Ibid., 268.
[21] See Chapter 1, p. 72.

The citation from Libson ('chosen more or less at random') exemplifies what for Calder is the most problematic element in the then current debate over the potential for change. What, exactly, is meant by the term 'Islamic law' when scholars say, for example, that 'Islamic law, after its formative period became increasingly rigid and set in its final mould'?[22] As is evident in the present volume, the imprecision of the formulation clearly frustrates Calder. 'The problem is that "the law" is radically ambiguous in an Islamic context, since it might refer to literature or to practice'.[23] Elsewhere, he had expressed his frustration with the widespread use of the term 'Islamic law' without any explanatory gloss or comment:

> The connotations of the phrase 'Islamic law' are in part a product of western perception 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 *ī* .[24]

We can begin with the presumption that what is meant by the term Islamic law' in the above analyses is actually the theoretical legal system described in works of *ū* *al-fiqh* (this Calder clearly suspects is the most likely intention). Such a presumption, however, immediately excludes other possible contenders for the referent of 'Islamic law'. A list could be made of the other possible contenders, including (1) divine law (which is known only to God, normally associated with the term *ī*); (2) the law of any state that claims to be 'Islamic' (the notion of an 'Islamic state', like *al-qānūn al-islāmī*, is, of course, an anachronism when applied to the pre-modern period); (3) the actual practice of a past Muslim governmental body (such as the law emerging from *ẓā* courts); (4) the law as it is described in court records (which are, after all, a professional representation of the procedure within the court); (5) the law as it was actually applied in a particular context by a governmental agency (which may not be identical with that found in court records); (6) the personal doctrines (in the form of norms and ordinances, found in fatwa-collections) of academic jurists or indeed jurists drafted in as legal functionaries (under Hallaq's analysis at least, these are not in themselves 'Islamic law' but are attempting to become so by influencing the *fiqh*) and (7) the law, as it is practised by a Muslim community (that is, its 'custom'), which it believes to be religiously grounded, but in fact has no textual or juristic support. The list of potential referents could be extended, but

[22] Hallaq, 'From *Fatwā*s to *ū* ', 1.
[23] See Chapter 3, p. 162.
[24] N. Calder, 'Law', in *History of Islamic Philosophy,* eds. S.H. Nasr and O. Leaman (London: Routledge, 1996), 2, 988.