AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW

Wael B. Hallaq is regarded as one of the leading scholars in the field of Islamic law. His latest book is about the function of authority in Islamic law, and how it is constructed, augmented, and utilized. In a comprehensive intellectual trawl through the intricacies of the law, the author demonstrates how that authority – at once religious and moral but essentially epistemic in nature – has always encompassed the power to motivate the processes of continuity and change. The role of the law schools in augmenting these processes cannot be doubted. However, as the author shows, it was the construction of the absolutist authority of the school founder, an image which he suggests was actually developed later in history, that maintained the foundations of school methodology and hermeneutics. The defense of that methodology, reasoned and highly calculated, in turn gave rise to an infinite variety of individual legal opinions, ultimately accommodating and legitimizing changes in the law. In this way, the author concludes that not only was Islamic law capable of change, but that the mechanisms of legal change were embedded in its very structure despite its essentially conservative nature. This book will be welcomed by specialists and scholars in Islamic law for its rigor and innovation.

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To my mother
Samīra ʿĀqleh-Ḥallāq

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PREFACE

To say that authority is the centerpiece of law is merely to state the obvious. Equally obvious therefore is the proposition that Islamic law – or any other law, for that matter – cannot be properly understood without an adequate awareness of the structure of authority that underlies it. It is this theme which constitutes the main preoccupation of the present work. In Islamic law, authority – which is at once religious and moral but mostly epistemic in nature[1] – has always encompassed the *power* to set in motion the inherent processes of continuity and change. Continuity here, in the form of *taqlīd*, is hardly seen as "blind" or mindless acquiescence to the opinions of others, but rather as the reasoned and highly calculated insistence on abiding by a particular authoritative legal doctrine. In this general sense, *taqlīd* can be said to characterize all the major legal traditions, which are regarded as inherently disposed to accommodating change even as they are deemed, by their very nature, to be conservative; it is in fact *taqlīd* that makes these seemingly contradictory states of affairs possible. For in law both continuity and change are two sides of the same coin, both involving the reasoned defense of a doctrine, with the difference that continuity requires the sustained defense of an established doctrine while change demands the defense of a new or, more often, a less authoritative one. Reasoned defense therefore is no more required in stimulating change than it is in preserving continuity.

In order to probe the substance and dimensions of these themes of continuity, change, and their relationship to authority, I have chosen to

[1] On these types of authority, see E. D. Watt, *Authority* (London and Canberra: Croom Helm, 1982), 45–54, 55–63; Richard T. De George, *The Nature and Limits of Authority* (Lawrence, Kans.: University of Kansas Press, 1985), 26–61, 191–209; Stanley I. Benn, "Authority," *Encyclopedia of Philosophy*, 8 vols. (New York: Macmillan Publishing Co., 1967), I, 215–18; Robert Peabody, "Authority," *International Encyclopedia of the Social Sciences*, ed. D. L. Sills, 17 vols. (New York: Macmillan and Free Press, 1968), I, 473–77.

examine the relatively compendious discursive construct called juristic typology which ranks legists according to the various levels of hermeneutical activity in which they are deemed competent to engage. This genre has the virtue of serving a double purpose, one of which is the inherent feature of self-representation. In speaking of the juristic structure of authority, of the various levels of its functioning, and of the limits of legal hermeneutics, it is instructive to listen to the voices emanating from within the tradition itself, for at a certain analytical level, self-perception is part and parcel of the objective reality which we have chosen to study. The other purpose, in contrast, is the harnessing of this typological genre for a critique that only outside observers of the tradition can proffer, since no participant in the tradition can advance such a critique and still remain part of that tradition. Subjecting the traditional account to a critical approach of this kind amounts to no less than deconstructing the historical imagination and inventions that were necessary to construct the authoritative edifice of the legal system and doctrine in the first place. No one, for instance, can at once question the almost mythological status of the eponyms of the four schools and still accept the fundamental assumptions of these typologies as anything more than linguistic structures needing to be decoded in a historiographical exercise. It is in virtue of such purposes that juristic typologies will serve to guide us as a framework for inquiry throughout this study.

One of the themes to be challenged, or at least questioned, in these typologies is the absolutist notion of a school founder. In chapter 2 I shall attempt to show, among other things, that while the image of a founding father was unquestionably essential for the school in constructing for itself an axis of authority, the abundantly available historical data serve to demonstrate that this image was a later creation and that the presumed founders of the four schools were far from having played these roles in their own times. This finding will further clarify the processes involved in the creation and construction of authority which was needed for the evolution and functioning of the schools. For our specific purposes, therefore, we shall be content to answer the question of *how* – rather than *why* – the imams' authority was constructed. This latter question will be the focus of another study currently in progress.[2]

In chapter 3 we shall trace the process by which the early multiple juristic voices of absolute *ijtihād* were progressively reduced to a relatively limited set of doctrines on which a special kind of authority was bestowed. The construction of the founder's authority, the reduction and

[2] See next note.

narrowing down of the early independent *ijtihādic* possibilities, and the final rise of *taqlīd* as an expression of loyalty to the schools are phenomena that share a single common denominator, namely, the augmentation of school authority without which the legal system could not have continued to exist, much less evolved or even thrived. The school as a doctrinal structure will therefore be shown to have constituted the very embodiment of this authority.

The inner dynamics of *taqlīd*, which represent the functional dominance of school authority, will constitute the main focus of chapter 4. A close examination of the activity of *taqlīd* and of the several types of discourse and reasoned arguments involved in this activity will make clear the many forms that school authority acquired. Within the confines of this activity, school authority could mean, at one end of the spectrum, the simple reproduction or mechanical application of authoritative doctrine, while at the other, it could involve the reenactment of a given authoritative opinion in the school, complete with all the ammunition of reasoned arguments and rhetorical discourse that the jurist could muster. But whether it was the former or the latter, nearly *ijtihādic*, type of *taqlīd* that was being advocated, or for that matter any degree of argument that lay between these two extremes, the defense of the school continued to be a central, if not the most important, goal of that activity.

In the final analysis, the defense of the school did not consist in a preoccupation with doctrinal trivia or with the mere collection and rehearsal of opinions. Rather, on a quite substantive level, it was a defense of methodology and hermeneutics, for the school itself was essentially founded upon a set of identifiable theoretical and positive principles, which in turn gave rise to an infinite variety of individual legal opinions and cases. These principles continued to serve as the foundation of the school as a substantive and authoritative legal entity, although the individual opinions and cases which constituted the practical and positivistic applications of these principles were subject to constant permutations. Cases and the opinions that governed them were regularly replaced by others, while the often undeclared principles from which they derived remained fairly constant.

The school was also defined by its substantive boundaries, represented by a massive bulk of particular cases and opinions that were articulated by the vast number of jurists who proclaimed loyalty to it in each generation, beginning with the presumed founders and their immediate followers, and ending with the jurists of later centuries. This arsenal of legal opinion represented, on the one hand, an imposing mass of doctrinal accretions, and on the other, a staggering plurality in the school's *corpus juris*. Now,

this multiplicity of doctrinal narrative resulted in the development of a technical vocabulary designed to distinguish an authoritative hierarchy of legal opinion. In chapter 5, therefore, I explore what I call operative terminology whose function it was to determine which of the opinions governing a case carried the highest level of authority. For it was this terminology that designated the process by which a particular legal opinion was elevated from near obscurity or marginality to the highest, or one of the highest levels, of authoritative doctrine.

The inner dynamics of legal doctrine functioning under the rubric of operative terminology permitted the adaptation, *mutatis mutandis*, of legal opinions according to the requirements of time and place. And it is within the boundaries of this hermeneutical activity that much of the dynamic of legal change lay. In chapter 6 I shall argue that legal change was not incidental to Islamic law but that it was channeled through processes that were embedded in the very structures of the law. The chief agents mediating change through legitimization and formalization were the jurisconsult (*muftī*) and the author–jurist (*muṣannif*). The former created the link between social practices and the law, thereby articulating in piecemeal fashion the changing requirements of legal doctrine. No less important, however, was the function of the author–jurist who, together with the *muftī*, had the authority to create and fashion the authoritative legal text. Legal works of this kind encompassed not only the discursive body of the school's doctrine but also, and more specifically, that portion of the *corpus juris* which was deemed authoritative, for it was an integral part of the author–jurist's function to determine, on his own authority as well as on the authority of his associates, the standard and thus authoritative doctrine in his school. It was this authority possessed by the author–jurist that allowed him to mediate legal change as reflected in the juridical practices prevalent in his own social and regional milieu. In chapter 6, but also throughout the book, one of our chief concerns will continue to be the delimitation of the scope of authority associated with the most prominent legal offices, namely, the judge, the jurisconsult, and the author–jurist.

The nature of our enquiry dictates the investigation of sources that cover both the early and middle periods of Islam, a fairly long stretch of time indeed. In fact, our sources span the period from the second/eighth century to the thirteenth/nineteenth, a fact which inevitably imposes a caveat: The main focus of the book is the post-formative period which begins with the time when the schools had already reached maturity around the middle of the fourth/tenth century. The themes which will be raised here and which belong to the time-frame before the final

consolidation of the schools are intended to highlight the processes by which authority was constructed in preparation for, and during, the post-formative period. It goes without saying that in the present work these themes are studied, not for their own sake, but in order to ascertain their respective roles in the construction of school authority. Similarly, the much later sources from the tenth/sixteenth century and afterwards are here utilized to illustrate the processes by which doctrinal authority was made to persist and respond to challenge, to ensure continuity as well as effect change. Thus, the issues raised in this book ultimately belong to the centuries that roughly fall between the fourth/tenth and the ninth/fifteenth.[3]

Still, the fact that this study encompasses over five centuries' worth of developments does raise the issue of generalization. Social and other historians of the Middle East have often attributed general characteristics to the subjects of their enquiry on the basis of a few case studies. In like manner, by failing to unravel the connections between these subjects and the society and culture in which they operated and out of which they emerged, the works of a number of historians appear to lapse into essentialism. Despite the fairly wide coverage of the present study, however, it avoids, by sheer necessity, these pitfalls. Insofar as the structure of legal authority is the focus of our enquiry, no jurist can be said to have articulated – or operated within – a concept of authority that was at variance with that of his peers and contemporaries. For jurists, by the nature of their function, were neither philosophers nor theologians who were largely free to innovate within their own intellectual traditions. Unlike the latter, jurists were bound by their legal culture, its demands, restrictions, and, above all, by the infrastructural social and cultural reality on the ground, a reality whose demands were neither binding nor restrictive in the case of theological, philosophical, or other types of intellectual discourse. In chapter 6 I will attempt to show that juristic doctrinal discourse succeeded in appropriating social reality by means of forging structural mechanisms that involved the functions of the jurisconsult and the author–jurist. The input of these latter functions, coupled with the findings – in chapter 5 – that the authoritative status of legal opinions was negotiated through considerations of social and mundane exigencies, demonstrate an organic connection between social practice and juristic

[3] Answering the question why authority was constructed will involve us here in enquiries that are largely irrelevant to the issues under discussion. This question will form part of a study in progress that addresses the early formation of Islamic law, spanning the period extending from the first/seventh century to the middle of the fourth/tenth.

production of doctrine. At the end of the day, the latter emerges as a type of what has been called discursive practice.[4]

Be that as it may, the structure of authority does undergo diachronic change, a fact clearly attested by the transformations that took place during and after the consolidation of the legal schools. But the process of change in the structure of authority was certainly slow and was often rather subtle and seemingly imperceptible, a phenomenon that places certain constraints on the historian. For to diagnose and unravel the processes of change that were embedded in structures of juristic authority, a fairly long period of time must be subjected to scrutiny, and a wide variety of sources examined for this particular purpose. This is why an examination of juristic production covering several centuries is required, and, to make the processes of change clearer, sources from earlier and later periods are needed as well.

In my source coverage, there is admittedly a mild imbalance. I have attempted to draw evenly on works from the four schools. While this was largely possible, the Ḥanbalite legal literature was not always adequate for the task in hand. It will be immediately noted, for instance, that this school is absent from the list of juristic typologies, since no complete Ḥanbalite typology had been developed, at least insofar as I know. While in other parts of this study the Ḥanbalite presence is felt more, it almost never matches that of the other three schools. (The relative meagerness of Ḥanbalite sources is not only a function of the small size of the school in terms of the number of followers, but a historical phenomenon that has more serious dimensions still awaiting study.)

Finally, a word of thanks. In researching the subject of this book I have incurred a debt to my students who, as usual, have presented me with the challenge of having to answer their profound questions and to address their perspicacious comments. Adam Gacek, Salwa Ferahian, and Wayne St. Thomas of the Library of the Institute of Islamic Studies have been unfailingly helpful and supportive. Üner A. Turgay has been an ideal colleague and an extraordinarily supportive chair. My chief debt goes to Steve Millier whose library and editorial skills have been invaluable. To all these students and colleagues, I record my deepest gratitude.

[4] Here, a distinction is to be drawn between the demands – in terms of the nature of sources – that are imposed on legal and social historians. For the latter, the connection between such sources and the realia of social practice are, admittedly, at best tenuous. But for the former, especially where structures of authority are concerned, they manifest these connections in no ambiguous manner.