

OUTLINES OF MUHAMMADAN LAW, 3rd Ed. By Asaf A. A. Fyzee.
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European Colonial expansion resulted in, among other things, the spread of European legal systems and the displacement of the indigenous legal systems in those countries that were colonised. On occasion, however, the result of European expansion was not the destruction of the indigenous legal system but its retention in a symbiotic relationship with the European system brought by the colonisers. Islamic law showed great vitality here and has usually managed to survive European colonisation and to exist in symbiotic relationship with European systems resulting in the creation of what are virtually new systems of law such as the *Droit Musulman Algerien* of the Maghreb, and of Anglo-Muhammadan law of the Indo-Pakistan sub-continent.

It is this Anglo-Muhammadan law which forms the subject matter of Professor Fyzee's book. This it should perhaps be stressed is not some defunct system of law of interest only to the antiquarian or the orientalist. It is a living system of law that governs a large part of the lives of many millions of people in both India and Pakistan: it is as significant in the legal systems of India and Pakistan as the common law itself. Moreover its interest is not limited solely to India and Pakistan, for Anglo-Muhammadan law forms an important source of authorities in many former British colonial possessions in which Islamic law is retained as a personal legal system and applied alongside the imported common law. It is thus a system of primary importance for Malaysia, an importance which has been enhanced by the decision of the Judicial Committee in *Fatuma's* case and even more by the provisions of the Muslims Ordinance in Singapore s. 44 of which provides that this book is one of seven all but two of which treat of Anglo-Muhammadan law, statements in which the court shall be at liberty to accept as 'proof of the law of Islam'. To review this book, therefore, is to review a book to which has been assigned a statutory authority.

We may perhaps note in passing that there seems to have been a decline in interest in this rather unique system of law. Of the earlier standard works only that of Mulla seems to be currently in publication. The last of the early great works was that of Tyabji whose third edition was published in 1940, but a quarter of a century later its usefulness is now, of course, considerably impaired by its rapidly increasing age. Malaysian practitioners, therefore, have every reason to be grateful to Professor Fyzee for having provided them, in this edition, with a completely up to date account of the position in India.

Professor Fyzee's book, however, has never been merely a practitioner's repository of authorities. It was written as, and still remains, an introduction to the subject, and it is as such that it is perhaps best known. It remains incomparably the best introduction to both Islamic law and Anglo-Muhammadan Law for the English speaking reader.

Professor Fyzee writes in his preface to this edition that: 'It is my conviction that Islam cannot be understood without a study of its law'. He could well, of course, have added that Islamic law cannot be understood without a study of Islamic history, and indeed he devotes his first fifty pages to an historical introduction. He states, however, that the 'non-legal' parts of this have been rendered superfluous by the publication of Professor Lewis' *The Arabs in History*. With respect we would disagree, and would suggest that even some expansion of the historical introduction would be worthwhile. For the real beginner there is still much that is taken for granted, and much more that only becomes understandable in the light of additional knowledge. It is, of course, true that there are many admirable works on the history of the Arabs, but they are not written from the point of view of the student of Islamic law. We would submit that the publication of Professor Lewis' wholly admirable work on Arab history does not render superfluous any of Professor Fyzee's historical introduction which, we would claim, would benefit from some slight expansion, with doubtless references to Lewis' book.

Professor Fyzee, however, is not solely concerned with the classical Islamic law. He is primarily concerned with the system of Anglo-Muhammadan law and on the history of this system he tells the reader virtually nothing, and yet just as the 'classical law' cannot be understood without some knowledge of Arab history so, we would suggest, the Anglo-Muhammadan law cannot really be appreciated without some understanding of the history of the relations between Islamic law and the common law in India. We would suggest that, in the next edition, Professor Fyzee gives some thought to explaining to his readers just how the Anglo-Muhammadan system is related to the classical system and the place which it occupies within the Indian and Pakistan systems.

The most notable change in this edition is the treatment which Professor Fyzee accords to the work of Schacht and the modern school of *hadith* criticism. With the greatest respect we would suggest that he tends to place a false emphasis upon the findings of this school. He writes in his preface that: 'The Islamic science of *hadith* has not been and cannot be demolished by orientalist labouring under the handicaps of imperfect knowledge and lack of faith.' To be sure it cannot. Modern *historical* research on the basis of Islamic law and on the origin of *hadith* can merely show that the historical situation was not quite what the theory assumed it to be. The *sunna* remains, and must remain, what the faithful accept to be such. Whether the mere

fact that history proves to be more complex than was once thought is regarded as a ground for changing one's attitude towards the canonical collections is a matter for the faithful and not for the orientalists.

This, of course, is always a problem for historically orientated religions, for if a thing is only believed because it is thought to be historically true, and the historians come along and prove that it is not true then one has to decide between no longer believing it, or formulating a different reason for the belief. The problem which modern *hadith* criticism presents to the faithful of Islam is essentially no different from that which the 'higher criticism' presented to devout Christians, and just as Christianity survived the 'higher criticism' so doubtless will Islam survive *hadith* criticism.

In one sense the works of Goldziher or Hurgonje are irrelevant to the faith, for the acceptance of *hadith* rests upon the *ijma'a* of the faithful, and what the *ijma'a* of the faithful accepts is not dependent upon the findings of orientalists. Faith and history are quite distinct, though doubtless related, matters and it is essential that they be not confused. With respect we would suggest that on occasion Professor Fyzee is guilty of confusing them, for he dubs the findings of Schacht, the 'modern theory' of *fiqh* which he contrasts with the 'classical theory'. The so-called 'classical theory', however, is a legal theory (which is admittedly cast into historical terms) whereas Schacht's work is purely an historical theory. What modern historical research has shown is simply that the classical theory did not come into being in quite the way that was previously thought, but this can have no effect on the classical theory as such. The classical theory remains the theory on the basis of which the great corpus of the *shari'a* was built up. Schacht's theory is not an alternative to the classical theory, as Fyzee seems to suggest, but is purely an historical theory as to the way in which the classical theory was developed.

A further point upon which we would venture to disagree with Professor Fyzee concerns his treatment of *taqlid* and his attitude towards the so-called 'closure of the gate of interpretation'. He takes the view that the closure of the gate of interpretation has doomed the *shari'a* to fossilization. Whilst, of course, there is a deal of truth in this, it is surely not the whole truth, and is indeed difficult to reconcile with the recent burst of legislative activity in Islamic countries which Professor Anderson has chronicled in his many books and articles. The truth of the matter would appear to be simply that Islamic law is changing its nature as it moves from the theocratic Islamic commonwealth into the world of national states. Its position in the world of today appears to be not dissimilar from that of the common law. There are today numerous versions of the common law, and there are now developing numerous versions of Islamic law of which Anglo-Muhammadan law is but one. Just as English law is today a mosaic of common law, equity, ecclesiastical law, maritime law all of which have declined in creative power, so Islamic law is becoming one of the elements in the law of Muslim states in which it may have lost some of its power to function in its original form, but it is not totally deprived of significance on that account. The development of English law, as of Islamic law, is now in the hands of the legislator, the politician. This may be regrettable but it appears to be a fact. Legislation is now the major source of the common law as it is becoming the major source of Islamic law. The *Shari'a* will survive in the same way as the common law has survived, as an element within numerous legal systems: to ask for anything more is to cry for the moon; to accept anything less is to abandon all hope unnecessarily. Professor Fyzee's pessimism seems to stem from his concentration upon the 'classical' system of law. His sights, we would respectfully submit should, in this day and age, be firmly fixed upon the emerging national systems of Islamic law. Anglo-Muhammadan law is one such system, and if this retains its vitality one need not lament the passing of the older theocratic classical system; and we may add that Anglo-Muhammadan law is not likely to lose its vitality whilst it has institutional writers of the calibre of Professor Fyzee.

Reviewing the first edition of this book ((1951) 67 L.Q.R. 277) we wrote that it was incomparably the best textbook available for students, and nothing in this third edition in any way necessitates a revision of that opinion. It should be noted, however, that this book has grown in size as it has grown older: it is now 100 pages longer than the first edition, an increase over the first edition of 25%. This seems to be the inevitable fate of all books, a fate to which those which set out to be short introductions seem to be unusually prone. Of itself this is no bad thing, and it is still something of an achievement to have compressed such an adequate outline of

Anglo-Muhammadan law into 500 pages, but one point calls for special mention, namely the vast increase in the citation of cases. The first edition cited some 250 cases; in the second edition there was an increase of some 25, but in this edition there is a further increase of over 140, so that the volume now cites from some 400 cases. There is, it is submitted, little point in such an extensive citation of authorities in a book which is ostensibly an introductory work for students, particularly when so many of the new additions are merely footnote references which are not discussed in the text. If, in 1949, some 250 cases were adequate for the purpose in hand, it is difficult to believe that in a mere fifteen years there have been 140 decided cases that are so important that their inclusion in an introductory students' work is essential.

The problem has not yet become desperate, but it is hoped that in the fourth edition of this book some attention will be given to this problem. There are plenty of books which collect the authorities, and the work of collecting these is easy compared with that of writing a lucid and balanced introduction to a subject. Such introductions are rare, and Fyzee's book is far too valuable to become cluttered up with case citations. A collection of footnotes loosely held together by a text which enables the reader to find the footnote he requires is doubtless useful for the practitioner, but for the student it is of little help.

It is also to be hoped that in the next edition Professor Fyzee will find room for a discussion of the provisions of the Pakistan Muslim Family Laws Ordinance 1961. Professor Fyzee merely sets this Ordinance out in an appendix, but does not attempt any discussion of its provisions in his text. The Ordinance is surely too important to be dismissed quite as lightly as this.

This book remains what it became with the publication of its first edition in 1949, the only worth while introduction to Anglo-Muhammadan law for English speaking readers, and it continues to justify the statutory authority given to it by the Singapore Muslims Ordinance, section 44.