CHAPTER 1

Further Development and Upheaval from the Thirteenth/Nineteenth Century Onwards

1 Introduction

During the thirteenth/nineteenth century many parts of the Islamic world began to experience more intensive contact and confrontation with European culture, some of their own accord such as in Muhammad Ali’s Egypt, others of necessity due to colonial subjugation. While the field of law did not remain unaffected, it would be wrong to see this as a simple rejection of previously valid concepts. We occasionally encounter the belief that Islamic law did not evolve at all from the fourth/tenth century onwards and was then mainly replaced by Western laws; this, however, does not do justice to reality. On the one hand it suggests that internal development – albeit inspired by communication with non-Islamic cultures – is impossible. On the other it overlooks the centuries-old dynamics, e.g. in the Ottoman Empire or under the Mughals in India, which was certainly not ‘guided from outside’. It is true that the thoughts of reformers such as Jamāl al-Dīn al-Afghānī or Muhammad ‘Abduh would not have been possible without communication with the West, but they evolved out of Islam itself.

From a non-Muslim point of view it is futile to argue whether all this is a continuing development of existing ideas or a rejection of these. The question is difficult to answer, not least because there is very little information overall on whether classical legal texts correspond to the practice of the time.

The later period is more accessible thanks to collections of fatwas and contemporary accounts. Besides the Ottoman qānūn-nāmehs, the sources of the law ‘urf and ‘āda seem to be playing a significant part. In the Ottoman Empire in particular we can observe a tendency to unify divergent doctrines, by means of e.g. attempts at standardisation and collection in literary canons, as well as establishing institution such as the chief mufti (şeyh ül-Islām) and other ‘official’ mufti positions in larger and smaller towns and settlements.¹

---

¹ Cf. Peters, What does it mean, 147 ff. with further references; Vikør, Between God and the Sultan, 212 ff.; in detail: Gerber, State, 79 ff.
With regard to the law relating to aliens, the gradual reversal of the political and military balance of power between East and West had an additional impact.

The need for modernisation within Islam has been expressed for a long time. Attempts at reform are based on the basic concept that Islam as it was practised during the Middle Ages, and frequently is even today, has moved away from its spiritual foundations and got entangled in rigid and superficial conventions.² The actual term 'reform' is, in fact, rejected by many, as it might be interpreted as a desire to replace God-given rules with man-made ones, or adopt unsuitable Western ideas. Instead, the support of an approach which has been employed since time immemorial is sought once more, namely that rules may and must be re-interpreted according to the circumstances prevailing in time and space. Terms such as 'renewal' (tajdīd), 'revival' (iḥyāʾ), or 'correction' (islāh) are also used in this context.³ The effect is essentially that which legislators term 'reform', i.e. changing a previously existing rule or its interpretation.

The key to new approaches lies in activating the ijtihād, independent reasoning while consulting and interpreting the respective relevant sources. One of the great reformist thinkers of the twentieth century, Muhammad Iqbal,⁴ wrote the following: 'The closing of the door to ijtihād is pure fiction, suggested partly by the crystallization of legal thought in Islām and partly by that intellectual laziness which, especially in the period of spiritual decay, turns great thinkers into idols. If some of the later doctors have upheld this fiction, modern Islām is not bound by this voluntary surrender of intellectual independence.'⁵

Under the series heading 'The Islam we want' the Kuwaiti author Ismāʿīl al-Shāṭī drafts the agenda in a high-circulation newspaper: 'We must lead Islam out of the straits of tradition.'⁶ Justification for his demand is provided by sura 21:25:⁷ The fact that many prophets were sent, one after the other, is evidence to him that God considered it necessary to protect the true revelation from the aberrations of tradition. Al-Shāṭī is also referring to the heyday of the Islamic world: due to the freedom of opinion and thought the Islamic community, he

---

² Cf. e.g. Husain, Interpreting the Tradition, 1, 2.
⁵ M. Iqbal, The Reconstruction, 168; cf. also Iqbal, Islamic Rationalism, esp. 325 ff.
⁷ 'And We sent never a Messenger before you and did not reveal to him, saying, 'There is no god but I; so serve Me.'