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Pre-Islamic Law and Legal System

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**Issue**

There is much debacle among some historians regarding the life people lead in Arabia; whether it was influenced a great deal by the old Arab culture or whether it what is today is just a manifestation of a new epoch. The argument for the interrelationships of cultures i.e. the idea that old Arab world influenced the new Arabia posits that pre-Islamic law played a very important role when it comes to matters of bringing about law and order in the Arab law; be it when it comes to matters of religion i.e. Islam, social, politics, and economics. On the flip side, the argument against the importance of old Arab civilizations; pre-Islamic law included, affirms that cultures are dynamic and what is today would have been today despite any of the influences that defined the past. The opposite is basically a school of thought that goes against the capacity of the past to influence the present (Fluehr-Lobban, 2013).

**Historical Context of the formation of pre- Islamic law and custom**

World history shows that the Arab's social, economic, religious, and political conditions of life before the advent of Islam were not as organized as they are today. The Arab society was headed for the most part by the Sardar and the Bedouin; a very small number of individuals controlled the political system, and most of them lived in Medina and Macca. There was no single system of life all through the Arab country, nor there any central form of government that could control Arabia. They led a nomadic lifestyle. Taking a look at the nomadic way of life lived by the Arabs, what comes in mind is that strife must have defined the relationships people had. In the absence of centrally controlled society, a lot of misunderstandings must have defined everyday living. Many weak and poor people must have been tortured. All the same, in the midst of all barbarism and lawlessness it is still very astonishing as how the people of that time still managed to solve their problems. The slow but sure development of pre-Islamic law brought a little positive change but still, most of the decisions made by the arbitrators of the time were ignorant. The social lives of the Arabs were simple for the most part, and the challenges they had were of a simple nature. For example members of a similar tribe having a quarrel with each other; strife among several different tribes; and some problematic issues and their decisions. This paper is going to give invaluable insights regarding what constituted pre-Islamic laws and how they; being an important part of Arab culture; apply to today’s Arab world (Johansen, 2016).

**Analysis of the Issue**

The Pre-Islamic law had its origins in the Arabian tradition that defined Arabia. This society and its law showed both great and profane features. The law can be deemed as insightful in so far as the rules of evidence and investigation were defined by sacral modus operandi; like oath, curse, and divination; and it was sacrilegious in so far as the even correctional law was limited to questions of payment and compensation. There are no pointers that a sacred law was present in the society of the pagan Arabs; this was much later a novelty of Islam. The impressive element left only faint traces, but Islamic law conserved the profane character of a reasonable part of the law. It also made a preservation of the essential features of the law regarding individual status, inheritance, and family as it existed, no doubt with reasonable variations when it comes to detail, within the towns and among the Bedouin tribe of Saudi Arabia during that time. All the subjects as mentioned earlier were under the influence of the ancient Arabian clannish system, put together by a patriarchal organization of the family. Under this type of system, the individual was devoid of any manner of protection outside the confines of his tribe, the ideology of criminal justice was absent, and offenses were brought down to torts, and all the tribal groups were expected to take responsibility for the actions of all their members. This often culminated into blood feuds; these were never part and parcel of past Arabic tribal legislation, they had a positioning out of the law and were brought under the purview of the law only if they were solved by the payment of blood-money, and at such instances the profane nature of Arab law made an assertion of itself once more. The pre-Islamic law that defined the communities in Saudi Arabia and the rest of the Arab realm was characterized by slight differences but most of the laws revolved around rewards, punishments, and the search for justice (Johansen, 2016).

**Punchayat, the Tehkeme, and the Kahanct**

The problem-solving methods comprised the Punchayat, the Tehkeme, and the Kahanct. The above-mentioned methods happened to be the oldest way of solving problems. The people often resorted to these systems when it came to matters of making decisions revolving around civil and criminal cases. The moment any manner of strife occurred in the tribe, basic cases were brought to the Punchayat for decision making. What's more, when matters became more complicated the people turned to the Tehkeme way of decision making. Finally, the last resort lay with the Kahanct way of decision making. In all the cases, the tribal heads used to make a point of pronouncing decisions along with other members. The heads of the tribes used to be very capable, sagacious and intelligent people that had the capacity to guide the arbitration process.

The leaders of the time in the Arab world were not only responsible for making decisions but were also expected to keep rapport with other tribes as well. Any problems forwarded to the Punchayat, Tehkeme, and the Kahanct to make decisions on used to be brought on anvils and discussed in a thorough manner. All the members had the right to bear witnesses of the pros and cons of matters out and out. After detailed discussions only then they could arrive at the conclusion and make a decision on matters at hand, and then the leaders (the head arbitrators) having the full consensus made the right decisions. Every decision made by the Punchayat, the Tehkeme, or the Kahanct were final, and no form of appeal would be launched against the decisions arrived at, nor the case once decided upon, could be heard ever again (Marglin, 2013).

There were no planned out political authorities in pre-Islamic Arab society, and also no organized system of judiciary. All the same, if arguments came about on nonserious matters, decisions were usually arrived at by self-help but; if negotiation within the parties turned out to be unsuccessful, recourse through an arbitrator was sought. Since one of the important qualities of a judge was that he possesses supernatural powers, arbitrators were time and again selected from soothsayers (Park, 2016). The decisions made by any one given arbitrator were obviously never a judgment that could be deemed enforceable, but a statement that was in line with the stipulations of customary Arab Law. The arbitrators i.e. Punchayat, Tehkeme, and the Kahanctof the time had many different roles such as lawmaking and legal expounding of the normative legal customs. Transposed into several Islamic concepts, the ideology of legal customs revolved around becoming one of the most relevant Islamic agents, if not the most revered, in the making of Arab traditional/customary law, and the ‘ulama', the legal interpreters of Arabic law, became not theoretically but in essence the lawmakers of Islam.

**Pre-Islamic Law and It’s Transition Into The Early Islamic Law .**

Islamic law as we are aware of it today cannot be said to have been in existence in the time of Muhammad; it came slowly into life in the first century of Islam. It was during this time that nascent Islamic society created its custom made legal institutions. The old Arabic arbitration system and traditional Arab law at large continued under the rule of Muhammad's successors that made up the caliphate of Medina. In their duty as superior administrators and rulers, the caliphs of old acted to a large extent as the makers of the law in the Islamic community; in the course of the first century of Islam, the lawmaking and administrative functions of the Islamic government can never be separated. But the aim of such administrative legislation was never to make modifications of the traditional Arab laws of the time far from what the religious law had achieved; it was to bring into organization the newly conquered territories for the gain of people in Arabia, and to make sure there is a success of the largely developed Arab world. The first ever group of caliphs never, for example, be uncertain when it came to matters of repressing manifestations of disloyalty, and even to punish with lashes of the whip the writers of satirical ballads and poems dedicated to rival tribes, a recognized manner of poetic expression which, all the same, might have brought a lot of threat to internal security of the Arab community (Hallaq, 2016). Decisions such as these never became a part of Islamic law, but other law formulations by the Medina caliphate came to realize official recognition, not as statutes made by the caliphs, but subject to the fact that they could be summarized under a single or the other official sources of the law that characterized pre-Islamic law that later on theory came to make a recognition of.

The start of the custom of throwing stones to an individual to the death as a punishment for various types of crimes is a single example of such an enactment. In the history that defines pre-Islamic law, its authority emanates from the Arab oral tradition and ways of the Arabs of old. Customs that in the course of history made a reporting of the alleged acts and sayings of the Arab tribesmen came into utilization as proof-texts in law not much earlier than the end of the 18th century, and the spurious highlights of the traditional law and custom makes representations of earlier efforts to make an establishment of the validity of several penal enactment. That the need of this manner of validation was felt at all, is a sign of how exceptional a phenomenon the laws of tradition had been in the eyes of all the present-day Arabia.

The Pre-Islamic law refers to the guiding principles utilized, for the most part, in Arabia before the rise of Islam in the 630s. Today Islamic law is a representation of the world's greatest legal systems. In the same way as Judaic law, which influenced a great deal, of legal systems in the Western World, Islamic Law came out as a relevant part of the religion. Before the beginning of Islam, the nomadic peoples that lived in the Arabian Peninsula took part in idol worship. Besides, the above-mentioned tribes fought with each other all the time; with every tribe having its well laid out traditions governing revenge, hospitality, and marriage. Crimes against people were responded to with personal vengeance or were in some instances solved by an intermediary. Pre-Islamic law was meant to bring about a new law and order to organize the Arab world. Islam made an affirmation of there being only one true God. What’s more, the religion made demands that there is a need for all believers of Islam to obey the will and laws of God.

Sometimes what the pre-Islamic law that governed the Arabs did is that it highlighted the basic standards of human behavior, but does not offer a detailed code of law. Only a few chapters of this religious book deal with matters of jurisprudence. For the better part of, Pre-Islamic law made a clarification of later Islamic legal matters through the interpretation of the holy book's provisions and assuming the position of a judge in several legal cases. Therefore, Pre-Islamic law, which resonated with the Sharia, later became a very fundamental part of Islam as a religion. They played the role of political and religious leaders and were referred to as Caliphs. Through their decisions and pronouncements, Caliphs managed to develop religious law. It is also worth mentioning that the caliphs also managed to conquer territories out of Arabia such as Persia, Egypt, Syria, Palestine, and Iraq. As a result, some basic tenets of Greek, Jewish, Roman, Christian Church, and Persian law also helped influence the growth and development of the Sharia law (Fluehr-Lobban, 2013).

The law of pre-Islamic grew together with the Arab world that was coming to be very influential and The Umayyad house tribal representations of authority, that took over the reins of the empire in the year 661 A.D., extended the Arab religious laws to Northwest Africa, India, and Spain. The Umayyads made an appointment of Islamic judges called kadis, to make a decision on cases in all areas of the law. Following a timeline of civil war and revolts, the Umayyads were removed from power in 750 and replaced by the Abbasid dynasty. In the course of the 500-year reign of the Abbasids, the Sharia law realized its full development. Under their absolute government, the Abbasids transferred substantial sections of criminal law from the kadis courts to the government. The kadis went on to handle cases involving family, religious, commercial, and property law.

The Abbasids encouraged legal scholars to talk about matters of sharia law in a vigorous way. A competing group, all the same, made arguments that the Sharia should also include the reasoned arguments of the experienced legal scholar. Differentiated legal systems started to develop in some provinces.In a bid to bring together the rival groups, a very bright legal attorney and scholar called Shafii systemized and brought into development what is called the "roots of the law." Shafii made an argument that in finding solutions to legal questions, the government judges or the kadid ought to initially consult religious pre-Islamic law.

If the answer were not very clear in such cases, the judge in question ought to make reference to the authentic decisions and sayings of Muhammad. If the answers continued to be elusive, even on the judge, then what should follow is for him to look into the consensus of Muslim Legal scholars on the issue. Still not able to find an answer to a challenge, the judge or Kadi could come up with his answer through analogies from "the precedent closest in resemblance and most relevant" to the case involved.

Shafii’s ideas brought about a lot of controversy because he was in constant criticism of what he termed as “people of reason” and "people of tradition." While making a speech in Egypt in 820, he was attacked by enraged rivals and died some days later. All the same, Shafii's school of thought was later adopted far and wide all the way through the Arab community. Right after the year 900, the classic Sharia law had taken shape and Muslim specialists I the law brought together handbooks for judges to make use of when making decisions in the court's rooms. The classical Sharia law was never a code law, but a body of legal and religious scholarships that went on to be developed over the next 1000 years. Some basic sections of the pre-Islamic law as they were traditionally applied since the beginning of time;

## The Period Of Pre-Islamic and Early Islamic Family Law.

During the pre-Islamic times, all the cases that involved violations of myriad religious commitments, legal matters that had to do with business and property disagreements, and feuds between members of the same family all came at the courts of the kadis. Most of these cases would be deemed as matters of civil law in Western courts to this very day. Family law always made up a relevant section of the pre-Islamic law. Some of the features of family law that made up the classical pre-Islamic Law which would guide the kadis in making decisions are the fact that normally, a person became a grown up at the puberty stage; the support towards an abandoned child was a responsibility of the public; the moment an owner of a female slave recognized her child as his own, the child dropped the position of being a slave. Besides, the mother of the child became free when the owner died. In inheritance, the brother took two times the amount taken by his sister (the brother also had financial responsibility for his sister).

**The Period of Pre-Islamic and Early Islamic Criminal Law.**

The Classical pre-Islamic law made an identification of the most serious atrocities; they were considered sins against the gods and came with binding sets of punishments. Some of the crimes include, murder, highway robbery, theft. They all have different penalties, highway robbers were executed or crucified. Murder, if someone killed a person from different tribe, then the (dyah) to his kin is to sacrifice two people for the other tribe in order to avoid fights. The officials of the law or the leader are the ones that carried out penalties for all the above-mentioned crimes.

Crimes against the individual were characterized by murder or injury to the body. In such instances, the male next of kin or the victim had what was known as the "right of retaliation" where this was a possibility. This was to mean, for instance, that the male next of kin of a

homicide victim could be given the mandate to execute the murderer after he was tried by designated legal authorities (normally by cutting off his head using a sword). In the event that an individual lost the sight of an eye in the course of an attack, he or she could make a retaliation by placing a red-hot needle into the same eye (be it left or right) of the attacker that had been found to be guilty; this was in line with the rule of exactitude. All the same, the rule of exactitude needed that all retaliators ought to accord the same amount of damage received. If even by means of an accident, a person injured another very much, laws would be deemed to have been broken, and lawbreakers would be subjected to punishment. All the same, it is worth mentioning that the unwritten rule behind exactitude discouraged individuals from retaliation. What usually happened is that injured individuals and their kin would usually agree to accept money or something of value, i.e., "blood money" as opposed to retaliating. If offenses were less serious such as bribery or gambling, the judges involved usually used a lot of discretion when making a decision on a penalty. Punishments would many a time require the criminals involved to make payments in the name of reparation to the victim, get some strokes of the cane, or be imprisoned in jail .

## The Period of Pre-Islamic and Early Islamic Criminal Procedure.

The victim of a criminal injustice or his kinsman ("the avenger of the blood") was individually liable for putting forward a claim against the accused wrongdoers before the courts. The case then continued to go on in the same way as a private lawsuit. No designated prosecutors took part even though some prosecutors brought some cases to be heard in the courts.Pre-Islamic law, just like present day Sharia law, provided for the due process of law. This was part and parcel of claims made by the injured individuals, the right to be reserved, and a conjecture of blamelessness in a just and open trial in front of an impartial legal official. At this point of Arabic laws and Arab Sharia, there were no juries. Both the plaintiff and the defendant had the right to have a lawyer present, although the individual is bringing the claims the plaintiffs and the accused usually made a presentation of their cases.

In the event o a trial, the judges questioned all the defendants concerning the claims made against them; if the defendants openly denied the claims, the arbitrator then made a point of asking the plaintiff, who usually was charged with the burden of proof, to make a presentation of all the available evidence. Evidence almost always assumed the form of the direct testimony of two male witnesses that have never had a criminal record and sometimes four. Circumstantial documents and evidence were never admissible; what's more, female witnesses were never allowed in courtrooms save for instances where they were bearers of special knowledge, like cases that involved childbirth. In such instances, two female witnesses were required for every single male witness. The moment an accuser finished with all the witnesses in his support, the accused could make a presentation of his own(Glenn, 2014).

In cases where the plaintiff could not come up with witnesses, he or she could make a demand that the defendants swear that he or she was innocent. Evidence or oath was very much important. In the event that the defendant swore that he was innocent, the arbitrator made a dismissal of the case in question. When a defendant completely refused to take an oath, the accuser usually won the case; besides, defendants could also confess to crimes, but this could only be done by word of mouth in open courts. In all types of criminal cases, the evidence had to be deemed as “conclusive” prior to the arrival of a guilty verdict by any arbitrator in hearings. Appellate systems usually allowed individuals to make appeals of verdicts to higher officials in the land and to all the rulers and great merchants of the time.

**Conclusion**

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