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Press release

"Revising the image of Islamic law"

Scholar of Islamic studies Norbert Oberauer explores the unknown legal genre of the "maxims" – Study sheds new light on the legal history of Islam: far more alterations from the Middle Ages to the modern age than expected – Formulas of the maxims systematised the law, an innovative step in history that had long been overlooked

Münster, 17 October 2017 (exc) With the study of "maxims" in Islamic law, a genre of legal formulas that has so far barely received any attention, scholars are shedding new light on Islamic legal history. "One can read often that the law has virtually not changed over the centuries", says scholar of Islamic studies Prof. Dr. Norbert Oberauer of the University of Münster's Cluster of Excellence "Religion and Politics", who is one of the first researchers to address the maxims. "However, our studies of these concise textual formulas show a surprising innovation in history: from the 10th century onward, scholars systematised the abundance of legal knowledge by means of the maxims to a far greater extent than before", according to the scholar. "Yet, research has so far rather denied scholars an urge to systematise – and indeed the ability to develop the law. We need to revise this image."

The Maxims, *qawa'id* in Arabic, pooled legal ideas that had previously coexisted, the researcher says. Scholars thus boiled the overarching principles down that unfolded in many individual regulations – often spanning a wide range of legal areas. An early maxim, for example, which is said to come from the Prophet's tradition, in its typically concise wording reads, "Proceeds go hand in hand with the assumption of risk" (*al-kharaj bid-daman*). "This can be illustrated by the sale of a sheep", says Oberauer. "According to this maxim, the buyer is entitled to the wool that the animal produces between the sale and the delivery because he also bears the risk of the accidental death of the sheep during this period." The sentence means that the accidental destruction of an object is always on the account of the one who draws profit from it. "This also shows how maxims were derived as an abstraction from individual rules."

According to the scholar, the maxims emerged in various schools of law and cover innumerable other topics such as the limits of attachment, issues of the law of obligations, or the question as to when a sexual act is to be taken as an implicit declaration of intent. "For example, if somebody sold a slave and had sexual intercourse with her afterwards – did he thus revoke the sale?" Many maxims express general rules or illustrate logical relations, says Oberauer; others are mere listings or formulas. "In this way, the wealth of legal knowledge became more manageable – an innovative step in the history of law that has long been overlooked."

"Difficult to decode"

Maxims condense highly complex facts into very concise formulas. "This often makes them difficult to decode", as Prof. Oberauer describes his research, in which he often needs to ponder over the few words of a single maxim for several days before its meaning and the reasoning of the medieval author become clear. From the 13th century onwards, the production of maxims became more vivid and the guiding principles were pooled in ever new compilations. A genre of its own emerged, in which all schools of law participated. "All in all, maxim literature remained very heterogeneous and limited in scope", according to Oberauer, "but many authors were famous scholars. This underlines the importance of the maxims."

The scholar sees a new quality in the maxims compilations of the 14th to 16th centuries. “The rational structure of certain maxims allowed them to be placed in a hierarchical relationship to each other – in superordinate and subordinate structures, which I call meta and sub maxims.” For example, “damage will be removed” (*ad-darar yuzalu*) was a basic principle expressing damage prevention. “On these grounds, a buyer has the right to return defective goods”, says Prof. Oberauer. An associated sub maxim states that “necessity makes forbidden things allowed” (*ad-darurat tubihu l-mahzurat*). Somebody who is about to die of thirst, for example, may also consume alcoholic beverages to save him, if need be. Concerns that this could be exploited too much resulted in yet another sub maxim, stating a restriction: “That which is permitted because of necessity is limited to the latter’s extent” (*ma yubihu bi-darura yuqaddaru bi-qadriha*), which the scholar explains: “The one who is about to die of thirst may not drink more alcohol than is necessary to save him.”

The scholars probably devised maxims in reaction to a deficit, as Prof. Oberauer explains. Legal knowledge remained highly fragmented in the traditional formats of legal literature. For example, despite its contractual character, the law of marriage was presented separately from the law of other contracts. “A general theory of contract law that links the two fields has not been developed in Islamic law”, says Oberauer. This is due to the “casuistic style of presentation” traditionally preferred by Islamic law: “Earlier sources typically discuss sequences of exemplary cases that differ from one another in legally relevant aspects.” This tends to obscure the logical structure of the law and its overarching principles. “The maxims, by contrast, highlight precisely those structural elements, thus promoting a better overview and a deeper understanding of the subject matter.”

Many research issues still unsolved

According to Prof. Oberauer, maxims research is still in its infancy, and he sees the door to a major research programme open. “We do not yet have satisfactory answers to many of our questions. For instance, legal scholars never discuss whether and how the maxims were actually applied in jurisdiction – which is quite astonishing”, says the scholar. “We will have to examine whether the maxims were merely an exercise in academic art, or whether they were used for practical purposes.”

It is also unclear what role the maxims play in the legal discussions of Islamic societies today and to what extent they are utilised, for example, by reformers. “Classical law does not address modern-age topics such as organ transplants, cosmetic surgery, surrogate motherhood, or reading the Koran on a smartphone. It would only be natural, in this case, to turn to maxims for guidance.” Even though the maxims have never been elevated to the status of an independent legal source, such as the Koran, the traditions of the Prophet (hadith), scholarly consensus and analogical deduction, Oberauer is convinced that the maxims had an important influence on the development of law. “We will continue to pursue this in our research.” The first basic research results are to be published in a volume from Mohr Siebeck publishers in early 2018. (dak/vvm)

Image caption: Prof. Dr. Norbert Oberauer (Photo: Cluster of Excellence “Religion and Politics“, Hanno Schiffer); A double page from the maxim collection of the scholar Ibn Nujaym, who died in 1563, undated manuscript (Photo: http://www.alukah.net/library/0/56982)

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The Cluster of Excellence “Religion and Politics” of WWU Münster

Some 200 academics from more than 20 disciplines of the humanities and social sciences and from 14 countries do research in the Cluster of Excellence “Religion and Politics” of the Westfälische Wilhelms-Universität Münster (WWU). They deal with the complex relationship of religion and politics across epochs and cultures: from the ancient pantheon and Judaism, Christianity and Islam in the Middle Ages and the early modern period to the current situation in Europe, America, Asia and Africa. It is nationally the largest research association of its kind and of the 43 clusters of excellence in Germany, it is the only one to deal with religions. The federal government and the state governments support the project in the second phase of the Excellence Initiative with 40.1 million euros from 2012 until 2018.