Review Article

Studies in Qur'an and Hadith: The Formation of the Islamic Law of Inheritance

by David S. Powers; Berkeley: University of California Press, 1986, 263 pp. (Appendices, Glossary, Bibliography, Index and Tables).

David S. Powers' book, originally a doctoral dissertation submitted to Princeton University, is a welcome addition to the already growing corpus of studies revising Joseph Schacht's thesis that Islamic law did not exist during the lifetime of the Prophet. This is, however, not the central theme of the book. Powers contends that the Islamic law of inheritance is not identical to the system of inheritance revealed to Prophet Muhammad and that the Muslim community is not in possession of the original reading and understanding of several Qur'anic verses and Prophetic ḥadīth.

The thesis presented in this book can be summarized as follows:

Islamic law began to develop with Qur'anic legislation which was more clear and systematic on the subject of inheritance. In pre-Islamic Arabia the intergenerational transmission of property was by seniority rather than by direct descent. The Qur'an introduced a new system of inheritance which reflected a transition from tribalism to individualism, with more emphasis on the rights of women to property. The author sees two systems of the law of inheritance in Islam:

1) The proto-Islamic law of inheritance which existed only during the lifetime of the Prophet; and,
2) Islamic law of inheritance, which exists as *'ilm al-farā'id.*

Powers contends that the proto-Islamic system was mainly testatory and the property was distributed according to fixed shares only in the absence of a will. Husband and wife, not being blood relatives, inherited as testatory heirs.

The author divides his dissertation into two parts. In the first part he deals with the proto-Islamic, in the second with the Islamic system of inheritance. The first part proceeds by looking at the practice of bequest and testation in Makkah and Madinah in early Islam, giving special attention to the inheritance between husbands and wives, and the Qur'anic law of testation and intestacy.

The second part proceeds by looking at socio-economic developments in the early period and contends that people in power manipulated the Qur'anic

legislation and altered their understanding by offering a different reading and by developing the doctines of abrogation of the bequest verses and of *asbāb al-nuzūl* of verses relating inheritance.

Reading this book one is struck by the strongly worded conclusions that the author draws from inconclusive evidence. His conclusions are admittedly thought provoking but his methodology, on the whole, is disappointing. Very often the author seems to accept evidence without critically examining the sources. Sometimes he goes on to draw conclusions from probable "clues" in the absence of reliable sources. We shall refer to only a few instances in the following lines.

Regarding the tribal customary law of pre-Islamic Arabia for instance, the author complains that there are few, if any, reliable sources that might shed light on this subject. To fill this gap, he develops a method which he describes as "teasing" certain elements of customary law out of historical sources" (p. 210). With this method he finds that "the transgenerational transmission of property among the tribesmen of Ḥijāz is more likely to have been governed by the principle of seniority than by that of direct descent" (p. 210). The conclusion at this point is stated very carefully with several qualifications and the author terms it a "clue", but still he builds on this "clue" the whole edifice of his thesis. It becomes an important "key" for his understanding of the Qur'anic legislation, for the relationship between tribal law and this legislation, and for his distinction between proto-Islamic and Islamic law of inheritance.

He finds this clue in R. Brunschvig's remarks about *'aṣabah and wilā'.* Powers refers to Coulson, Marçais, G. H. Bousquet, Robertson Smith and other scholars. He argues that these scholars were wrong in proposing the theory that "The *'aṣaba* of Islamic Law are a carry over from the tribal customary law of pre-Islamic Arabia" (p. 88). He endorses R. Brunschvig's theory for a contrary view. Brunschvig argued on the basis of "historical" (Strabo describing practice in Yemen), linguistic (*'Ubah* sharing consonantal structure with *'aṣabah* and ethnographic evidence (Chelhod's reference to Bedouine practice) that it was the principle of seniority, not the principle of direct descent that governed the transmission of property in pre-Islamic Arabia (p. 91).

The rule of seniority to which Brunschvig refers is connected with *wilāyah;* which can still be found operative in the *fiqh* books as far as guardianship is concerned. Brunschvig's *suggestion* that it might also apply to the distribution of property should not be stretched too far. Recently Patricia Crone *(Roman, Provincial and Islamic Law, Cambridge, 1987)* has analyzed the term and the institution of *wilāyah* in detail and differs with Brunschvig's views on this point.

Furthermore, the picture that the author draws of the development of the

law of inheritance in Arabia of three clear phases of pre-Islamic, proto-Islamic and Islamic is too simple to be historically substantiated. For a very significant period (622-623) the inheritance of property was restricted by the principles of *Mu'ākhāt* and *Hijrah*. The Qur'anic verse 8:72 refers to this relationship. The *hadīth, tafsīr* and *fiqh* literature explains that migrants from Makkah and the people in Madinah inherited from each other on the basis of *Mu'ākhāt* and even the Muslims having blood and tribal affinities did not qualify as heirs if they had not migrated or if they were not brothers under *mu'ākhāt*. This practice continued until the revelation of the Verse 33:6 which gave priority to *'ulū'l arḥām*.

Had the author consulted these sources for "historical elements" he could have determined the chronology of these verses. He talks about abrogation and *asbāb al-nuzūl* stories and dismisses them as attempts to suppress the original meanings of the verses, but one fails to understand why he does not attempt to fix dates of these verses.

The examples of bequests and wills to which Powers refers on pp. 129, ff. are not sufficiently conclusive because the author has not placed the verses of these illustrations chronologically. Powers refers to nine instances (pp. 128, ff.) during the period of revelation to prove that it was common to leave a last will and testament and that the science of the shares was not practiced. Out of these instances 1, 3 and 7 have not been dated, 2 and 4 belong to the year 622, 5 to 624 and the rest fall between 625 and 631. As Ibn Sa'd noted, the verses relating to termination of inheritance on the basis of *mu'akhāt* were revealed in 624, and hence the instances of the earlier periods could not be judged on the basis of these verses. It is nevertheless significant to note that even the two instances (2 and 4) from 622 do not differ from the classical tradition, 2 speaks of the bequest of 1/3 of the property and 4 refers to guardianship. 6, 7 and 8 refer to the cases of the appointment of the executor of the will and that of passing of inheritance to the deceased's son. This is also not contrary to the classical legal position, the son inherits the whole estate in the absence of *dhawū'l furūḍ*. These instances, therefore, do not sufficiently establish his assumption. The ninth instance, referring to Mu'ādh b. Jabal, merits an additional comment.

The author says that Mu'ādh prepared a last will and testament in which he designated as heir a sister and daughter, who were each to receive half of his estate. (p. 131). We call it interesting because Mu'ādh b. Jabal died childless. Some of the sources even say that he never had a child. Others say that his son 'Abd al-Raḥmān died before Mu'ādh but he was still alive when Mu'ādh allegedly wrote his will. Secondly the author refers to two sources for this evidence: Abū Dā'ūd's *Sunan* and Ibn Hishām's *Sīrah*. Not all editions of *Sunan* include this story. One of the editions which includes it, glosses it as Mu'ādh's judgement in a case, not as his own will. Bukhārī's *Shaḥiḥ* also

mentions it as Mu'ādh's judgement. The second source, Ibn Hishām, does not refer to this will at all. Of course the word *awṣā* is mentioned on the referred page, but it alludes to the Prophet Muḥammad's instructions to Mu'ādh. Thirdly, Mu'ādh's judgement does not violate the rules of the science of the shares. In the absence of other heirs a daughter and sister each receives 1/2 of the estate according to Q. 4:11, and 76. Fourthly, as Ibn Sa'd, mentions, this story occurs in 9 H. when Mu'ādh was sent penniless to Yemen. There was nothing to prompt him to write his last will.

The mainstay of Powers' thesis is his suggested different reading of the Qur'anic verse 4:12, particularly a new meaning of the Qur'anic term *Kalālah,* that he has proposed.

He claims that the present reading of the verse differs from the originally revealed reading and that this alteration was manipulated by politically interested people soon after the Prophet Muḥammad's death. The author gives no substantial evidence for this manipulation. His contention is that the present reading leads to some syntactical difficulties which his suggested reading removes. Secondly, his suggested reading conforms with his view of the development of the law of inheritiance in Islam which places stress on individualism and the rights of women.

The present reading of the verse is as follows:

• وَإِن كَانَ رَجُلٌ يُورَثُ كَلَٰلَةً أَوِ ٱمْرَأَةٌ وَلَهُۥٓ أَخٌ
أَوْ أُخْتٌ فَلِكُلِّ وَٰحِدٍ مِّنْهُمَا ٱلسُّدُسُ ۚ فَإِن كَانُوٓا۟ أَكْثَرَ
مِن ذَٰلِكَ فَهُمْ شُرَكَآءُ فِى ٱلثُّلُثِ ۚ مِنۢ بَعْدِ وَصِيَّةٍ يُوصَىٰ
بِهَآ أَوْ دَيْنٍ غَيْرَ مُضَآرٍّ ۚ وَصِيَّةً مِّنَ ٱللَّهِ ۗ وَٱللَّهُ عَلِيمٌ حَلِيمٌ

سورة النساء (٤:١٢)

Translation (Pickthall)

> And if a man or a woman have a distant heir (having left neither parent nor child), and he (or she) have a brother or a sister (only on the mother's side) then to each of them twin (the brother and sister) the sixth, and if they be more than two, then they shall be shares in the third, after any legacy that may have been bequeathed or debt (contracted) not injuring (the heirs by willing away more than a third of the heritage) hath been paid. A Commandment from Allah. Allah is Knower, Indulgent. *Sūrah Al Nisā' (4:12)*

The author suggests *Yūrithu,* in place of *Yūrathu, imra'atun,* and *yūṣī* instead of *yūṣā.* With these alterations he translates the verse as follows:

> "If a man designates a daughter-in-law or wife as heir, and he has a brother or sister, each one of them is entitled to one sixth. If they are more than that, they are partners with respect to one-third, after any legacy he bequeaths or debt, without injury. A Commandment from God. God is knowing, for-bearing". (p. 43).

The author notes cogent objections raised to this reading by his colleagues from the view point of Arabic language (p. 42 n. 37). Language apart, contextually also the suggested reading only adds to the confusion. Several questions arise.

If there is no restriction on bequest and the whole bulk of one's property can be bequeathed in favour of one person as the author maintains throughout his book, how is the designation of wife or daughter-in-law, or the division of property into 1/6 or 1/3 among the sisters and brothers possible. Secondly, daughter-in-law and wife are not mutually exclusive. Thirdly *"imra'atun/an"* does not mean "wife". Fourthly, in this reading there is no mention of children or parents; would they have no share in property while brothers and sisters of the deceased would? Fifthly if there is no restriction on bequest, how is the phrase "without injury" to be explained. With this reading it is possible that one designates his daughter-in-law instead of his wife. Sixthly, with this reading it is not clear whether a wife can designate her husband or her daughter-in-law. The traditional reading at least covers both cases of husband and wife.

This suggested reading is also unnecessary, if we look at the sequence of verses. The verse 4:6 declares a fixed share for both men and women in the property left by their parents and relatives. Verse 4:11 proceeds by explaining these fixed shares in the following order: children (shares in different situations e.g., if sons and daughters both exist, if more than two daughters, daughter alone inherits); parents (if both exist, if they exist along with the children of the deceased, or exist along with brothers and sisters of the deceased). Having dealt with the shares of children and parents in various situations, Verse 12 then proceeds to explain the shares of surviving spouse. First it deals with situations where spouse survives along with spouse's children, then where he or she survives alone. In logical order the next situation would be where the deceased has no parents or children because the cases of spouses, children and parents have already been covered. Hence the traditional reading and meaning seem more logical. The daughter-in-law does not fit into the sequence.

Powers suggests not only a different reading of the verse but also insists on a different meaning of the word *Kalālah.* Traditionally the word has been

understood to refer to the one who dies leaving no children and parents behind. Powers argues that it should be rendered as "daughter-in-law". His argument is threefold. Firstly he traces the origin of the word to Hebrew, Syriac and other Semitic languages where, according to him, it means "daughter-in-law" or "sister-in-law". Secondly, he argues that this meaning fits better with the Qur'anic legislative policy which stresses the rights of women. Thirdly, he maintains that the meanings as suggested by him were the original readings and were replaced by the first generation of Muslims for political reasons. To substantiate his claim the author refers to the uncertainty and the controversy over the meaning of the term that prevailed during the early period of Islamic history.

We are not competent to comment on the first argument, but we may invite the author's attention to verse 16:76 where another word *Kalla* (probably the same root as *Kalālah?)* has been used in the meaning of "burden", (good for nothing).

Regarding his other evidence, it must be admitted that Powers knows how to manipulate it in his favour. For instance, he repeatedly refers to 27 statements in Ṭabarī about the definition of *Kalālah*. In fact they are not 27 different definitions of the word. None of them questions the traditional meaning of the word, they differ only on the point whether the term *Kalālah* in the verse refers to the deceased or the surviving. Powers says "According to fourteen *Shawāhid,* the word signifies one who leaves neither parent nor child, so that it refers to the deceased. According to twelve *shawāhid,* the word signifies all those except the parent and child, so that it refers to the heirs. Finally, one statement indicates that both definitions are possible". (p. 3) On p. 30 he nevertheless refers to this explanation as follows:

> "Reference has already been made to the twenty seven *shawāhid* containing one or another definition of the word."

Later the author admits that "these anecdotes make little or no sense when viewed in the context of the Islamic law of inheritance, for what could have been so controversial or mysterious about a word that means either a man who dies leaving neither parent nor child or all those except the parent and child" (p. 108). Still he concludes that these anecdotes were put into circulation by those who objected to the traditional interpretation and "these people did manage, however, to circulate a series of carefully coded anecdotes that allude, between the lines, to the original significance of Q. 4:12" (p. 108).

The author suggests that these anecdotes were actually circulated to limit the scope of the meaning of the word to either of these two senses in order to eliminate the original meaning of "daughter-in-law" which he believes prevailed in pre-Islamic Arabia. To substantiate his claim he refers to two early Arabic

texts. Along with them he mentions the story of Qays b. Dharīḥ which the author quotes from *Kitāb al-Aghānī*, a text of 4th century Hijrah, with the following introduction:

> "I have recently come across a text that uses the word *Kalālah* in a manner that can only signify a "daughter-in-law". (p. 41 n 36.).

The story tells us that Qays, a poet of the Ummayad period, married Lubnā against the wishes of his parents. Lubnā was barren. Qays's mother complained to her husband that Qays was childless and that her husband's property would pass to a *Kalālah*. She insisted that Qays should marry another woman so that he might have children. The author contends that in this context *Kalālah* refers only to Lubnā, Dharīḥ's daughter-in-law. It cannot refer to Qays.

This argument illustrates the author's obsession with his own opinion. This is why he is forced to change the text and context in favour of his own meanings. He adds a qualifying sentence "(if Qays dies)", otherwise his meaning would not fit into the context. He is so taken up by his own "discovery" that he could not accept the unaltered text where Qays's mother is complaining that Dharīḥ's property would pass to Qays who had no children. She pleaded that Qays should marry another woman in order that he might have children and might not die *Kalālah*, having no parents or children. Even if Powers' alteration and suggested meaning are accepted, his conclusion that Dharīḥ's property would pass to Lubnā is not tenable. The story belongs to the later period of the first century and the text belongs to the 4th century, when according to the author the science of the shares prevailed and when according to Islamic law the maximum share that Lubnā was entitled to would be 1/4 and that too only if Qays had not died during the lifetime of his father and if Lubnā inherited from Qays. Had Qays died while his father lived, Lubnā could not inherit from Dharīḥ at all.

There is no doubt that David S. Powers has explored in this book a very complex phenomenon which is entangled with historical and linguistic controversies, and that he has amassed a vast amount of material, but his search for evidence only to prove his hypothesis has prevented him from critically examining his own arguments, sources and possible biases. It is not in vain that he describes his methodology in the following words: "After completing the dissertation, I set about looking for evidence in the historical sources that might support my hypothesis. . . . . .(p. xii)

Muhammad Khalid Mas'ud
Islamic Research Institute
Islamabad