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is true that Ibn Khaldun had no peers in the world of Islam, but it is not correct as has become fashionable to assert that he had neither predecessors nor successors in what he set himself to do.

Muslim historians do, in their search for causes, go into fields that are not merely political and search out causes that are not discernible on the surface. The Muslim writers had tried to understand the working of economic laws and were conversant with the Greek works on the subject.84 The writers on revenue in particular brought in economics and sound finance within the scope of their work.85 Of these perhaps Quinamah bin Ja'far deserves special mention, who in one of his chapters presents a systematic discussion of political and social sciences.86 He enters into fundamental considerations regarding the social and economic needs of human beings and the steps taken to meet them. Observations on political, economic, and social factors are found scattered throughout the books of ethics, politics, and history. In the Indo-Pakistan sub-continent, Abu al-Fazl among others has brought in questions of economics and social organization while commenting upon administrative measures. The most outstanding example is Shah Wali Allah, who based his philosophy on economic and social foundations.87 Being confronted with the problem of the decline of the Muslim political power in the sub-continent of India and Pakistan, he analysed the forces at work to diagnose the disease from which the polity as well as the society suffered at that time and came out with his suggestions for curing their ills, in doing which he explored a wide range of economics, sociology, history, and politics. He examined the relations subsisting between the producers and consumers and laid down the dictum that in a balanced society everyone must contribute to its welfare. Then he pointed out how some sections of the society had become parasites and, thus, had upset the balance. This kind of analysis runs right through his discussions, whether he is discussing social conditions or examining political and economic ills. He has a historical mind because he brings in the examples of the great civilizations that had preceded Islam and draws relevant conclusions from their fate.

In conclusion one may say that history has been a favorite discipline with the Muslims. They brought the highest standards of objectivity into their writings; they showed great enthusiasm for the discovery of true facts; they produced a vast literature of considerable merit at a time when even among the civilized peoples there was not much flair for historiography; indeed, there were cultures of a highly developed nature that had no place

82 M. Flesmer, Der islamische Lebenswandel "Bayram" und sein Einfluss auf die islamische Wissenschaft, Heidelberg, 1929, Orient und Antike, Vol. V.
83 The various books on Khurasan and the A'in-i Achar of Abu al-Fazl are good examples.
84 Rosenblatt, op. cit., pp. 452–93, gives a table of contents.
85 Such material is found in several of his books, especially Ibnjat Allah al-Bilagh; an Urdu translation is available, Lahore, 1953.

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Chapter LXI

JURISPRUDENCE

In this chapter it is proposed to bring into relief the philosophical significance of certain salient points and aspects of Muslim Law, otherwise known as Fiqh. But before doing so, let us have a tolerably precise idea of what one understands by law, and in particular what the Muslim jurists have understood by it.

A

THE LAW

Law roughly means the rules of conduct. But not every rule of conduct forms a part of law. There are things people instinctively do under the dictates
of their normal impulses. These do not concern law, nor are the concern of law the modes of behaviour regarding things which persons do deliberately but which relate to their private lives, and have no repercussions on other members of the society or are of rare occurrence. Men differ enormously among themselves in their capacity for reasoning and the power of choosing an action out of the various possible alternatives. Even some matters of general occurrence and those affecting other persons besides the agent himself do not come under law.

Law does not take cognizance of the behaviour of individuals which is infinitely varied, for if it did, it would lead to chaos and conflicts rather than uniformity in behaviour.

The cases which fall under law are as follows:

(i) Sometimes certain individuals do things of their own accord and thus their private initiative sets precedents, customs, and usages if experience shows their utility, or in case historical reasons create a halo of prestige and awe around the names of their initiators.

(ii) Sometimes actions are done at the instance of others. For example, a child may do something or abstain from doing something because its mother, father, or some other superior directs it to do so. A young student may behave similarly at the instruction given by his teacher. A grown-up man may do something at the suggestion of his friends in whose sincerity and intelligence he has confidence, on the direction of his spiritual guide, or on the dictates of public opinion. Rules of conduct are also sometimes determined by the orders of a superior to whom we delegate powers out of our own free choice, such as an elected or accepted ruler with or without the power of revoking our decisions. On other occasions a rule of conduct may arise from a superior's order, obedience to which is a lesser evil than its disobedience. Such is the case with prisoners of war, slaves, and the like who must abide by the order of their master under pain of coercion and punishment.

(iii) A rule of conduct may also be considered to be of divine origin. Our forefathers in different parts of the world at various epochs have continuously believed certain individuals possessed of holy character to be messengers of God and later generations have inherited this belief. It goes without saying that of all the superiors' orders those that proceed from God must remain the most meritorious to obey. God's orders, according to religious beliefs are received through the agency of certain human beings chosen by Him and called by some prophets and incarnations of God by others. The commandments communicated by such persons are accepted by those who believe them to be the orders of God, the Creator and Master who will judge them all on the Day of Resurrection according to their deeds.

(iv) Lastly, there are deductions from and interpretations of basic laws, such as lead to new laws.

Muslim Law is a collection of all the four types of rules mentioned above, viz., rules of customs, orders of superiors, divinely revealed Laws, and the rules arising from the deliberations of jurists. There is the Qur'an, which is

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2. Al-Qur'an, iii, 104, 110, 114; vii, 157; ix, 67, 71, 112, etc.

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taken as the uncreated Word of God; there is the Hadith and Sunnah (sayings and doings of the Prophet of Islam) which include not only what the Prophet said or did himself, but also what he tolerated of the existing practices among his Companions, practices coming indeed from pre-Islamic habits and customs. Moreover, there are individual or unanimous opinions of experts and specialists (jurists), there are customs which do not go against express laws, and there are foreign laws acted upon on the basis of treaties, reciprocity, and so on and so forth.

Whether the legislators of Islam abolished some old customs and practices, retained and confirmed some others, enacted or in a modified form, or took the initiative of ordaining new rules of conduct—the sole principle that guided their legislative activity in all these cases was to "do what is good and abstain from doing what is evil." According to al-Qarâbi, this principle of good and evil (maṣla wa maṣla) was propounded by the Mu'tazilite jurists. Being more rationalist than their contemporary traditionalists, it was the Mu'tazilites who were perhaps the first to be struck by the curious and repeated stress which the Qur'an has laid on the rational side of life. To persuade men to abide by the precepts of Islam, the Qur'an again and again appeals to reason (infālakār, intāfakhārūs, tāf'iṣu, etc.), and repeatedly refers to ma'ruj and mumāsr as the bases of Muslim Law.

Now, ma'ruj means a good which is recognized as such on all hands, and a mumāsr is an evil disapproved as such by everybody. It cannot, therefore, be true that the rules of conduct laid down by the Qur'an and the Sunnah are arbitrary and merely for the purpose of testing the will to submit on the part of the Faithful. Evidently, not every man in the street will be able to understand the underlying principles of each and every Qur'anic order or injunction. That is the domain of the specialists of the philosophy of Law. An anecdote will explain the point. Abu Hanifah, one of the early jurists, had a penetrating mind, and was also endowed with a sense of humour. Not always being able to understand the reasons that led this great jurist to hold certain opinions, stupid people began to accuse him of heresy; according to them, he legislated by his personal opinion in disregard of the sayings or practice of the Holy Prophet. Once somebody had the audacity to tell him this to his face. Abu Hanifah replied: "I never promulgate rules on my personal opinion; on the other hand, I always deduce laws from the sacred texts of the Qur'an and the Hadith. Had I relied on my personal reasoning, I would have ordered that in the act of abductions, one should pass a wet hand not on the upper of a shoe (khibb) as is ordered by the Prophet—but on the sole, for that is the part which requires cleansing more than any other part of the footwear." In this humorous way, Abu Hanifah excelled in silencing and even calming the apprehensions of his well-meaning critics. The answer was humorous, because Abu Hanifah did not refer to the reasons for not washing
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the roles of one’s shoes for if the sole of the footwear is moistened and then one stands up for the service of worship, it is the more apt to get dirty if one prays on the ground, and to soil the carpet if one prays on one. In other words, a single issue may have several aspects, but it is the duty of the philosopher to give preference to the more important of such aspects.

However, the principle of the Islamic Law is that its rules must be based on the good and prohibitions on the evil inherent in a given act. This was an original contribution of Muslims to the legal science; no other civilization had thought of it before, as has been admitted by Professor Ostrogors in his brilliant essay “Roots of Law,” contained in his book Angora Reform. In fact in expounding the Qur’anic statement, “Do what is mu‘ājaf (what is good in the eyes of God and man) and abstain from what is evil in the eyes of God and man,” the Muslim philosophers of Law developed an all-embracing system. A brief exposé is all that we can take up here in dealing with a subject which fills scores of pages in works on Uṣūl al-Fiqh (the Principles of Law).

In this world in which everything is infected with relativity, it is often impossible to obtain unmixed goods, and sometimes it is even possible to say that a given act contains neither good nor evil. Therefore, what seems to be unmixed good will be ordained as an obligatory rule (wājib); what is unmixed evil will be declared as an obligatory prohibition (haram); in complex cases, predominance will decide the preference: a matter of predominant good will be recommended (mustahkam), and one of predominant evil discouraged (mskrāk), without going so far as to declare them obligatory to perform or to abstain from. And in matters where good and evil are equal, or where one is unable to see either good or evil, Law will leave it to the discretion and choice of the individual to act or not to act.

This five-fold division of actions giving rise to five rules of law—order, prohibition, recommendation, discouragement, and indifference—resembles the cardinal directions of the compass, even as we can subdivide the directions and say North, NNE, NNW, and so on; we can also find out intermediary grades between good and evil. The absolute good will be divine order, obligatory on each person in a group (jāf’ā ‘ain) or obligatory on at least a few in the group (jāf’ā kiṣṭah); the good with less sure absoluteness will be legal order (wājib), and practice of it will be enjoined with insistence (sar)n (akhdak). The act with pronounced inclination towards the good will be recommended or preferred (manābūh or muta’dhah) and the one on the deadline will be supererogatory (ṣaf). Similarly, the evil may be prohibited (haram), ending to be prohibited (mskrāk ta’alrin), better to shun (mskrāh tanatil) and so on.

It is true that the application of these mathematically perfect rules of the legal geometry to concrete cases will be affected as everywhere else by play of the human element, more so in matters of intermediary grades with subtle points to judge. With regard to such matters the judges and jurists differ among themselves. Abu Ḥanifah would say that to eat prawns is forbidden, but al-Shafi‘i would declare it to be perfectly lawful. Certainly this respective relegation of the prawns as food to what is good or bad is only relatively so, and the forbidden character of their consumption has not the same degree of prohibition as, say, that of wine. Jurists call it deduced prohibition (harām istalbāk) as distinct from legal prohibition (harām gharā‘). Narrow minds may fail to see this point and enter into quarrels. Here a case may be cited which seems to be the model to follow in such cases: Abu Ḥanifah and al-Shafi‘i are doublet two of the leaders (imāms) of Muslim Law, completely independent of each other in legal judgment. According to al-Shafi‘i, the qanūn prayer at dawn (fajr) is obligatory, whereas Abu Ḥanifah supposes it completely. The story goes that once al-Shafi‘i went to Baghdad (where Abu Ḥanifah lies buried), and during his stay there he recognized his own view on the qanūn prayer. When questioned, he said: “I continue as firmly to cling to my opinion as before, yet in the presence of the great Abu Ḥanifah I feel ashamed to follow my own opinion.” Needless to say that the implication is that such learned differences do not concern the general public who should not only follow their leader (imām) but should also be tolerant of those who are followers of other leaders.

B

LAW AND ETHICS

Islam attaches very great importance to ethical values, yet it makes a distinction between Law and morals. In the books on Fiqh, one comes across such expressions: “that is the rule of Law (futun), though the rule of piety (taqwa) requires just the contrary.” The meaning is clear: the jurist wants to say that there is some difference between human justice and divine justice. Far from being impeccably perfect, what is human must fall short of the divine. The jurist and the judge decide cases on the basis of facts and evidence produced before them. If certain important facts, with bearings on the nature of the litigation, are concealed from the arbiter—no matter intentionally or otherwise—the decision may be correct de jure but not de facto, the latter being beyond human possibility, at least in some cases. For this very reason, the Holy Prophet once said: “Some of you are better pleaders, and I decide according to facts submitted to me. If I decide in favour of any of you what is not his due, let him know that I award him only a part of the hell-fire with which he will fill his belly,” if he profits by such a decision based on mistake or the only available material facts.

The law which claims to be based on the good is often hard to distinguish from ethics. Nevertheless, it may be said that there exists a measure for differentiating between them. For, the rules of Law in Islam have a double sanction, namely, the coercive power of the court of justice (a court may

2 Abu Dāwūd, Aphāgū, 6.
enforce its verdict to get the rightful owner his due, or, in case it is impossible, the court may punish the door of the injustice, and the divine punishment on the Day of Judgment; but the rules of piety, the ethical rules, as distinct from the legal injunctions, have only the other-worldly sanction apart from the more or less effective public opinion.

As Islam inculcates belief in Resurrection and the Day of Judgment, a true believer prefers a loss here to the divine wrath in the hereafter.

C
SANCTIONS

As we have just observed, the Muslim Law is more fortunate than its counterparts in some other civilizations, for it is endowed not only with the material sanctions enjoined by modern secular States but also with a spiritual sanction, and this in addition to persuasions both material and spiritual. The belief in Resurrection and the Day of Judgment, combined with the more coercive force of a country's court of justice, assures a greater observance of the law by its believing subjects.

It is common knowledge that the Qur'an repeates scores of times the formula, "Establish service of worship and pay the tax (zakāt)," pronouncing prayer and tax in the same breath. Even a beginner in the study of Muslim Law knows that zakāt has always been included in the section of liturgical rites ('ūbdāt) in the manuals of Fiqh. With a word of explanation of the meaning of the term zakāt, even the most uninstructed may realize the significance of this seemingly curious combination of prayer and tax.

Zakāt is not almsgiving or charity. Its proper place is in the books on law. In the time of the Holy Prophet and his successors, the Muslim subjects of the Islamic State—we exclude the non-Muslim subjects for the present—paid no tax to the government other than zakāt which covered the entire fiscal system. Zakāt al-farid was the land revenue; zakāt al-jāfirah was tax on commercial capital as well as on import customs; zakāt al-māghfīrath was imposed on herds of domesticated animals (ovine and bovine animals and camels) living on public pastures; zakāt al-ma'ādīs on the sub-soil products; zakāt al-mārth was imposed on savings of money, and so on and so forth. Every tax imposed by the government on Muslim subjects was included in the term zakāt, this may be corroborated from the sayings of the Prophet on the subject of zakāt (as also more or less the equivalent and synonymous term ṣadaqat).

* Perhaps it will be useful to remind that Islam in the pre-Hijrah period had no temporal authority and the Prophet proceeded gradually from suggestion to recommendation before finnally ordering and precribing sanctions. In the Mecceen period there was neither a fixed amount, nor a fixed time of the year, nor even an organization to collect and disburse the taxes; all those measures were taken during the Medineen period. The sense of the terms with regard to taxes underwent

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Now, reverting to the main point, mention of the service of worship and payment of tax in the same breath and, consequently, inclusion of the taxes in the category of liturgical acts ('ūbdāt) should not astonish us. It is in fact deliberate. In Islam one must do everything for the sake of God. As al-Ghazalli has forcibly put it, if you pray or fast for ostentation, it will be a kind of polytheism, the adoration and worship of your own self; on the other hand, if you eat delicious food (with the sole intention of acquiring energy for the performance of acts pleasing to God), and if you cohabit with your wife thinking that it is the performance of a divinely ordained duty, then these mundane enjoyments constitute real acts of the worship of God ('ūbdāh). Authors of the works on Muslim jurisprudence (Fiqh) since very early times have affirmed that acts of worship of God can relate both to our body and soul and to our property: if true faith is our spiritual act of worship, and prayer, fasting, and pilgrimage are the physical expressions of the same faith, then zakāt is no less than our monetary mode of worshipping God.

A true believer doth his spiritual and bodily duties with respect to God, without being forced to them by an organization (such as the government); he also pays his taxes to whomever they are due, even when the rightful person ignores his right or finds himself incapable of having it enforced. Which finance minister of the world would resent that the subjects of the State should believe that paying the government taxes is one of his religious duties, such as would bring eternal salvation in the life to come?

D
LAW AND RELIGIOUS AFFAIRS

We have already made passing remarks, in the foregoing paragraphs, that the subject-matter of Law consists of the practical affairs of men. It deals with affairs from birth to death, and, to a certain extent, even with those after death (such as the questions of funeral, payment to the creditors, execution of the will, distribution of heritage, remarriage of the widow, etc.).

It will be observed that the Fiqh excludes questions of non-practical nature, such as beliefs and dogmas and, as already pointed out, those of piety and charity, which are questions of conscience rather than those relating to practical affairs properly considered.

All practical affairs of public nature fall within the purview of Islamic Law because it prescribes for each of them the degree of obligation (fard, 'uṣūl, mu'tahā, snanah, muḥbī, etc.). Many a question of politics and administration too falls under the subject-matter of the legal science, although some latitude obtains in such matters.

A profound change when "charity" became a State duty; the Qur'an and the Hadith retained the old terms, with the advantage that the people were persuaded to believe that to pay tax to the government was no less meritorious in the sight of God than charity and almsgiving, and that zakāt was the best kind of charity. The Caliphs retained the same terms.
in Islam the Qur’an is the basis of all rules of conduct, both for the lay authorities and for the religio-spiritual functionaries. As to the object of Muslim Law, its comprehensive nature admits of no doubt regarding the fact that it aspires the well-being both here and in the hereafter. The Qur’an has condemned those who neglect any of these two, and approves of those who aspire simultaneously after welfare in both.  

E

THE CHIEF SOURCES

The life and longevity of a legal system depends much on its sources; unless these sources are adaptable to changing circumstances, it may not survive for long. Let us see if the recognized sources of Muslim Law satisfy this requirement of longevity. The chief sources of Muslim Law may be classified as under:

Divine Revelation—This is of three kinds: (a) Recited (matnāwī); (b) non-recited (ghair matnāwī), i.e., not employed in the service of worship; and (c) a previous revelation. A few details may not be out of place:

(a) The recited revelation as preserved consists solely of the Qur’an, which the Muslims believe to be the Word of God, a collection of divine messages revealed from time to time to the Prophet Muhammad, and preserved from his very time by the double method of writing and learning by heart. If the written document has some error due to inadvertence of the scribe, or even due to an exterior evil such as effacement, damage to the copy, etc., memory comes to rescue. Similarly, if one who has learnt a passage by heart, but while reciting it cannot recall a word, reference can be made to the written document. From the time of the Prophet down to these days, this double method has everywhere in the Muslim world been employed to preserve the integrity and purity of the sacred text, which in this respect is unique in the world.

(b) The non-recited revelation consists of three distinct things: what the Prophet said (Hadīth), what he did himself (Sunnah), and what he approved of and tolerated among his Companions such as an ancient pre-Islamic custom consistent with Islamic norms. For lack of a comprehensive term, Hadīth and Sunnah have been used as co-extensive, interchangeable, and synonymous terms to cover all the three aspects of the non-recited revelation.

It was quite natural for the community receiving a messenger of God to treat every message given and every act done by him as being in conformity with the will and wish of the sender of that messenger, more so because the Qur’ān

1. Al-Qur’an, vi, 90.
2. Ibid., ii, 246ff.
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itself has enjoined that the practice of the Prophet should be treated as the best model to imitate and follow. The non-recited revelation was both explanatory of and complementary to the recited revelation. As such it helped to clarify the Law and also to interpret it. A number of the Companions of the Holy Prophet put their memoirs on the subjects of Hadith and Sunnah to writing in the very lifetime of the Prophet. One such compilation, the Ṣaḥīḥ al-Ṭabi’i of Ḥabīb ibn ‘Amr ibn al-‘Ā’ish, is reputed to contain one thousand reports. The case of Anas is much more interesting. In later times, when requested by his pupils, he would bring out a box and show them note-books (majālis) saying, ‘That is what I wrote from the sayings and doings of the Prophet, and also read to him from time to time, so that if there was any mistake he removed it himself.’ Many more Companions prepared their memoirs after the death of the Prophet, yet they were all supposed to have been based on first-hand knowledge. Later generations compiled the memoirs of these different authors, always scrupulously mentioning in each case its source. How careful and honest they were may be realized from the following fact.

Al-Bukhārī’s collection of the Hadith is considered to be one of the most authentic collections. He has cited for each tradition the chain of narrators, i.e., the sources and the sources of the sources up to the Prophet. Supposing he uses the clause: ‘From Ḥabīb ibn Ḥanbal, who from ‘Abd al-Razzaq, who from Ṭabarzī, who from Mī’ām, who from Ḥamzah, who from Ṣa’īd, who from Ṣa’d ibn Abi Waqqās, who from the Prophet heard . . . .’ It would be perfectly legitimate for an objective and impartial student to be sceptical and to start fresh investigation by assuming that al-Bukhārī has forged the chain of the sources and invented the narration. But we possess also his source, the Masnad of Ḥanbal, and find that this latter author also cites the same narration, on the basis of the same sources, and gives exactly the same wording of the contents of the narration. Al-Bukhārī is acquitted honourably, but perhaps his source (Ḥanbal) had forged. But no, we possess fortunately also the Manṣūḥ of ‘Abd al-Razzaq (now in press in Hyderabad-Deccan, having been edited by Dr. Yusuf al-Din), and there the remaining chain of sources is given and the Ṣaḥīḥ is recorded in the same words without the least difference. Now say, perhaps ‘Abd al-Razzaq was the forger. But no, his source, the Ṣaḥīḥ of Ḥamzah ibn Munabbih dictated by abu Hurairah to his pupil, is there to attest his perfect honesty. We also know that abu Hurairah possessed many books on

*Al-Qur‘ān, xxxiiii, 21; ibid, 7, etc.
*As to the references and details of this and the following statements of the paragraph, see Hamidullah, Sahih Hadith Ins Munabbih (both Arabic and Urdu editions), Introduction.

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Hadith. Even in the absence of these books other chains of transmission narrate the same hadith and attest to its truth and there remains no possibility of its having been falsely attributed to the Holy Prophet. There is no denying the fact that forgeries in the Ḥadith have crept in, due to unscrupulous or dishonest authors, yet the double method of riḍyāḥ (uninterrupted chain of transmission by reporters known for the integrity of their character) and ḍirāsah (scrutiny of the contents and internal evidence) has practically eliminated the chances of forgery in the more important collections, such as the “Ṣiḥṣa Canonic Collections” (Ṣiḥṣa Sunnah). If, however, a certain report seems to us to be incompatible with the dignity of the Prophet as envisaged by our modern conception, that alone would not justify our declaring it to be a forgery or a falsification. Many a time the context explains what an isolated phrase does not. A subjective approach must be replaced by an objective one, and everyone should try to understand things with reference to their context—not in isolation—and in the light of the whole system of Islamic Law.

The Hadith comprises also the taqṣīr or confirmation of some of the customs and practices of the pre-Islamic days. It shows on the one hand that Islam is a reform of the past and not a complete break with it, nor an entirely new implantation. It also gives an authoritative interpretation of the verses of the Qur’an according to which all that is not expressly forbidden is lawful. The same notion is stressed in two interesting sayings of the Prophet, namely:

(i) “The virtues of the days of ignorance (fiṣkīḥiyah) will be acted upon in Islam” (Ibn Ḥanbal, III, 425).

(ii) “A wise counsel is the lost property of the Faithful (maṭamīn); wherever he discovers it, he takes hold of it’ (al-Tirmidhī, chapter ‘Iṣl.,’ 19; ibn Mājah, chapter ‘Zahih,’ 15).

What is virtuous or vicious in pagan customs is easy to decide by reference to the injunctions and prohibitions expressly given in the Qur’an and the Hadith.

(c) Previous Revelations.—With regard to the earlier prophets the Qur’an has said: “They are those who received God’s guidance; follow the guidance they received.” But, unfortunately, most of the ancient Scriptures have been lost to us, e.g., that of the Prophet Abraham, of which there is repeated mention in the Qur’an. Some prophets seem never to have transcribed the divine messages they received. The accusation made by the Qur’an of the corruption of the previous Scriptures22 considerably reduces the importance of this source.

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12 Al-Qur‘ān, iv, 34.
13 Ibid., vi, 90.
14 Ibid., ii, 75, 79; iv, 46; v, 13, 41.

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F

OTHER SOURCES

(a) Private Expert Opinion.—Law in Islam has a divine origin, yet the exercise of judgment on its interpretation, application, and implications is human. The Qur'an and the Hadith have approved this source, and even encouraged it. Individual opinions are termed qiyas, and the collective one ijma' (consensus). But the opinions of savants and researchers are insufiable; hence these same savants have approved that a qiyas by one could be rejected by another and a better one suggested. Similarly, an earlier collective opinion can be superseded by a later one.13

It goes without saying that a right given by the Qur'an and the Hadith cannot be taken away by any worldly authority. These private opinions are, however, valid only in so far as they are not against the revealed Law, the principal source. In this connection the Holy Prophet has left a principle for the savants to observe. This principle enjoins that they should aim at facility for the public and not at difficulty. Once he said: "The Islamic religion is easy. Whoever will render it hard, he will be defeated thereby."14 The same principle was repeated in the instructions given to governors: "Provide facility, don't create hardship, and do not frighten people away from Islam." Hence public weal (tasikik) is an additional and valid source of Law.

(b) To the same category should be assigned the rules promulgated by the government—be they based on the ijihad of the ruler, or on expert opinion of the jurists consulted by him—and enforced mostly for administrative purposes. In theory, this may remain in force during the reign of a ruler, until it is abrogated by him or his successor. This kind of legislation is sometimes called al-akhsam al-auliyya. The fundamental principle holds good, viz., that such official directions should not go against the revealed Law.

(c) An allied source is a Muslim ruler's confirmation and retention of pre-Islamic customs of a territory, mostly at the time of the accession of that territory to his State. A typical instance is reported by al-Ma'mid, who says that after the conquest of Iraq and Iran, the Caliph 'Umar retained the Sassanian law of land-revenue. He found it equitable and conforming to social justice. Not so was the case with the Byzantine laws in force in Syria and Egypt which countries were conquered at the same time. 'Umar thoroughly modified the Byzantine laws.15 The basic source of this attitude was the Qur'an and the Hadith. Such "good customs" of foreign origin may even touch private affairs, such as contractual relations in commerce, industry, etc.

(d) With a small difference, the same source is to be based on the principle of reciprocity. A classical example is the following: Once the governor of the

14 Irem, Sibib, Chap. "Indis," section 44.
15 Consult the very interesting book Pola Tax in Islam by Domini.

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frontier town Mansab (Hierapolis) asked the Caliph 'Umar what tariff should be imposed on traders coming from beyond the frontiers, and the Caliph replied, " Levy as much as their governments may on Muslim subjects going there for similar purposes."14

(c) Certain laws, particularly those concerning international relations, both in peace and war, are often regulated by bilateral or multilateral treaties which were regarded by the Holy Prophet as a valid source of Muslim Law. An example of such laws is the law of extradition based on the Treaty of al-Hudaybiyyah.13

(f) Even new customs may gradually take root and add to the body of Muslim Law. To express slight nuances they are called 'ayr, 'akhr, 'as'mal. They are practices and customs limited to localities or classes of people. Needless to say that society is a living organism, and the interaction of circumstances, inventions, and progress made in the material domain profoundly affect our conceptions and, indeed, our practices. The general principle remains valid: such practices should not go against the revealed Law.

(g) One sole exception to this general principle is admitted by the jurists, and they call it "prevalent custom" (umud al-adab), which may abrogate even an existing law. Apparently, the theory of the ijma' (consensus) plays its role therein. In practice this touches only minor points of legal rules, mostly the rules deduced by former jurists. It is unthinkable that such "prevalent customs" could abrogate a law enjoined by the Qur'an.

G

PARTICULAR SECTIONS OF THE LAW

Theologians normally discuss four topics: (i) beliefs (mut'ad), (ii) acts of worship (sibd), (iii) morals (akhlak), and (iv) social affairs (mas'udul). The jurists do not concern themselves with beliefs and morals and confine their views only to rules regarding acts of worship and laws regarding social affairs.

Before dealing with Muslim jurisprudence under these two heads, we would like to make it clear that in Islam acts of worship (sibd) do not mean acts indicating only the relation between the worshipper and God. In fact, beliefs, acts of worship, morals, and social affairs are all closely related to one another and, therefore, none of them can be considered in isolation. Acts of worship, apart from relating the worshipper to God, directly influence other human beings as well. For example, although zikr is an act of worship in relation to God, yet it is intimately connected with society. It is a State tax collected from and used for the welfare of its members. Similarly, social affairs are not merely matters of relations between man and man but have

15 See for reference and discussion on this point, Hamidullah, Muslim Conduct of State, Lahore, 1953, pp. 17-38.
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direct bearing on man's relation with God. In Islam there is no matter which can be considered to be isolated from spiritual values and divinely ordained laws. Every public affair is a means to the achievement of some spiritual value. Therefore, it can be safely said that there is no matter in Islam which is purely an act of worship or a public affair. Every act of worship is a public affair and every public affair is an act of worship. Jurists generally divide jurisprudence into the laws dealing with (i) acts of worship (ibadât), (ii) social affairs (ma'idâl), and (iii) crimes (zâdût). Under the head "acts of worship" fall prayer, fasting, pilgrimage, and zâdût (the State tax). Under "social affairs" come socio-political, economic, and financial matters, e.g., sale and purchase, contract, gift, trust, surety, partnership, and matrimonial affairs. Penal laws deal with such crimes as murder, theft, adultery, drinking, etc. It is not possible to deal with every rule within the space at our disposal, not even with every set of rules. Therefore, we content ourselves with discussing some select topics and these too very briefly.

1. 'Ibadât

Under this head we deal only with prayer. A prayer or service of worship in Islam is described by the Prophet as the "pillar of the faith" and "ascension" (mi'râj), i.e., a journeying unto the Almighty. In the words of Shâh Wali Allah: "Worship consists essentially of three elements: (i) humility of heart (spirit) consequent on a feeling of the majesty and grandeur of God, (ii) confession of the superiority of God and lowness of man by means of appropriate words, and (iii) adoption of bodily postures expressing reverence. As a man can reach the top of his spiritual evolution only gradually, it is evident that such an ascension must pass through all the three stages, and a perfect service of worship would have three postures, to sit, standing up, bowing down, and prostrating by laying the head on the ground in the presence of the Almighty—and all this for obtaining the necessary evolution of the spirit so as truly to feel the sublimity of God and the humility of man."14 At the end, kneeling before the Lord, in the "invocation of the Divine Presence" (tasbihâh), the faithful use the very words of the dialogue between the Holy Prophet and God during the mi'râj:

Prophet: "The blessed and purest of greetings to God!"

God: "Peace be with thee, O Prophet, and the mercy and blessings of God!"

Prophet: "Peace be with us and with all the pious servants of God!"

After this a Muslim affirms his submissionness and attests the formula of the faith, then expresses his thankfulness to God for having sent such

message

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hand in increasing the revenues, but in matters of expenditure it could not
deviate from the principles of a welfare State. The rates and items of the zakāh
are mentioned only in the Ḥadīth. That they are not of a static character, is
proved by the fact that in the time of the Prophet the imports of victuals,
effected by caravans of the Ṣaḥabah, coming from beyond the frontiers of
the Muslim State, were subjected to ten per cent of duties, but the Caliph
Umar reduced them only to five per cent. To Ibn Hashim the rates current in
the Holy Prophet’s time are, for all later generations, the necessary minimum
and can be increased only in the interest of the community. Other jurists
have resorted to more reverential attitudes. They upheld the rates of the time
of the Prophet as the norm, but allow under the name of mukāf’ (passing
exigencies) enhanced or new taxes.
The expenditure of zakāh is much more important. The Prophet of Islam
calculated that the income of zakāh is religiously forbidden (ḥarām) to him, to
his family, to his tribe, and to the sires of his tribe. If the Heed of the State
is so scrupulous and does not believe public confidence in money matters
entrusted to his care, subordinates would be the less tempted to corruption.
Further, the Qur’ān has ordered that taxes (ṭakāfah) should be spent under
eight main heads of expenditure. They are to be levied only for the poor,
the needy, the wayfarer, those who work for the State revenues, and those
whose hearts are to be won; also for freeing the necks, and the heavily indebted,
and for use in the path of God. According to such a high authority as the
Caliph Umar, fujud (the poor) are those who belong to the Muslim community,
and mawāli (the needy) are from the non-Muslims. It is to be noted that
the ṭakāfah do not come from the non-Muslims, yet the needy among them
are the beneficiaries of these taxes paid only by the Muslims. Those who work
are the collectors, accountants, controllers of expenditure, auditors, and others, embracing practically the entire administrative machinery
of the State.
Those whose hearts are to be won may be of many kinds. The great jurist
al-Shaybānī (al-Ṣallāḥ) observed: “Those whose hearts are to be won are of
four kinds: (i) those whose hearts are to be reconciled for coming to the fold
of the Muslims; (ii) those whose hearts are to be won in order that they abstain
from doing harm to the Muslims; (iii) those who are attracted towards Islam;
and (iv) those by whose means conversion to Islam of the members of their
tribes becomes possible. It is lawful to benefit each and everyone of those
whose hearts are to be won, be they Muslims or polytheists.”

By the term “freeing the neck,” jurists have always understood the emancipation
of slaves (which is a duty of the State) and ransoming the prisoners
of war, be they Muslim or non-Muslim subjects of the Muslim State.

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Aid to those who have heavy debts or great burdens may be given in different
ways. The Caliph ‘Umar organized even a service of interest-free loans.
Expenditure “in the path of God” includes every charitable act, and the
jurists from very early times have not hesitated to mention military equipment
for the defence of Islam as the first item, since Islam struggles solely for
the establishment of the kingdom of God on earth.

As for the wayfarers, one can help them not only by giving hospitality to
them, but also by ensuring them physical well-being and comfort, providing
means of communication, security of routes, and taking all other measures for
their well-being, be they countrymen or strangers, Muslims or non-Muslims.

These items are wide enough to embrace practically all the requirements
of a welfare State.

(iii) Contracts—Contracts are of many kinds: matrimonial, commercial,
agricultural, industrial, and so on. When differences arise as to the meaning
of the terms during the execution of a contract, third parties are referred to,
such as arbitrators, judges, and other State authorities. This entails questions
of evidence and proof and capacity of the contracting parties or the
minor, the insane, the absentee, etc. Again, contracts may be made of free
accord or under coercion.

In Islam, contracts require the consent of the parties, or “mutual free-will”
as the Qur’ān puts it. This great principle, common to all systems of law,
is a means to mitigating the rigour of another principle that men being equal
to one another, nobody owes anything to anybody else. Contracts include
among other things the give-and-take of labour. The give-and-take of labour
tails division of labour which has several advantages: saving wastage of
concurrent labour, specialization for the sake of better production, diminution
of preoccupations with the consequent leisure which is essential for all pro-
gress, intellectual as well as material. If everyone of us were to rely on his
individual resources to procure even the barest necessities of life—food, dress,
lodging, etc.—we should be worse off than most of the beasts.

Custom or usage has taught men the advantages of the exchange of com-
modities. Prices are a technique used to equalize two different kinds of items.
They are subject to variation according to the demand and supply of goods,
and also to the whims of the sellers. Ordinarily, this latter aspect is a man’s
private affair; the organization of which he is a member need not meddle
with it. But there is a limit even to this liberty. Once a merchant was selling
his goods in the market of Medina at a price lower than the one prevalent.
(We are not told whether it was a case of dumping or any other mis-
chief). The Caliph ‘Umar ordered him to leave the public market, or else fix
the price as charged by other merchants. Neither the inherent liberty of
each nor the mutual consent of the parties could deter ‘Umar from ordering
what he judged to be right in the interest of social well-being.

16 Al-Qur’ān, iv, 60.
17 Al-Ākhīd al-Sulṭānī, Chap. “Zakāh.” (The author was a contemporary
of al-Mawardi, and both composed their books with the same title.)
18 Al-Qur’ān, iv, 29.

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Contracts may comprise conditions. There is a huge monographic literature on the subject, and it is related that ahu Ḥānifah was the first to compile a special treatise on the conditions of contracts. Here too mutual consent is not the sole deciding factor, law steps in, and enjoins that no condition is to be tolerated which violates legal injunctions of all kinds. Loose of the two evils justifies to interfere and curtail the inherent liberty of the individual, since in the long run he too will suffer from the same liberty if left uncontrolled.

The same principle of public well-being (rāṣṭra ‘dānaḥ) has led legislators to declare inadmissible the contracts made by minors or the insane. Guardians are appointed temporarily or permanently to look after the affairs of those suffering from legal insapacities.

(iv) Family Law.—Of all the contracts, those of matrimonial relations seem to be the oldest in human society. Here there is no question of exchange of commodities, but rather of usufruct. Muslim Law has relegated marriage to the level of any other bilateral contract. In such Islamic days, people called their daughters to their would-be husbands. In Islam, woman has an individuality of her own as independent and complete as that of man, and is not a chattel even of her procreative father. For profound social reasons, and in view of the nature of the fair sex, the mutual benefits accruing from married life has been thought to be less favourable to the wife, who is, therefore, considered entitled to a compensation in the form of a monetary gift settled upon her before marriage (mahr), dowry, and maintenance by the husband. The mahr, which is a sine qua non of Muslim marriage, is the exclusive property of the wife, giving no right of share to anybody else, not even to her father; and she has full legal powers to dispose of her property—mahr or anything else—the way she likes it (a thing unknown even today in other systems of law).

The question of polygamy may be briefly treated here. According to the generally accepted interpretation of the injunctions of the Qurʾān, it may be said that Islam permits polygamy, but which religion does not? Hindu, Jewish, and Parsi religions allow unlimited number of wives to a polygamous husband, and even Christianity is no exception! There is not a word against it in the Gospels and teachings of Jesus Christ; on the contrary, learned theologians (like Luther, Bossen, Melanchthon, and others) have deduced that Christ accepted polygamy as a matter of course as is evident from the way in which he speaks of the marriage of a man with ten virgins, mentioned in the Gospel according to St. Matthew 25:1-12. Further, it was practised in early Christianity, and as late as the time of Charlemagne (third/ninth century); even priests could be polygamous. The reference here is not to the

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Footnotes:

82 Based on a saying of the Prophet: "Muslims abide by the conditions they have contracted, except the condition which permits a ħudūl (forbidden thing)"; cf. al-Tirmidhi, Chap. "Aḥkām," 47, etc.


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Mundane rules among Christians and even Muslims to "abolish" polygamy, but to their religious doctrines only. Islam is the first and only religion which has put a limit to the maximum number of wives, and has also provided legal means of prohibiting the practice of polygamy between couples desiring monogamy. Marriage being one of the ordinary contracts, conditions can be stipulated therein. The lawful conditions are: (i) the husband would remain monogamous for the duration of the marriage with the stipulating wife, and (ii) the wife would have the right to divorce her husband at will. Christianity formally prohibited divorce, and so did the Dharma Śāstra. Islam, on the other hand, permits the right to divorce to the husband under certain conditions, and to the wife under contract, and even without a contract, by an appeal to a law-court—ṣafā. It also allows judicial separation under orders of the court. And if a woman herself does not demand these rights, it is not for the law to oblige her to do so, since there may be occasions when polygamy may even become necessary. Who does not know that after the Thirty Years' War, the Kirgsztat of Nuremburg (Germany), in view of the greatly reduced number of the male population due to war rages, ordered that thenceforth every man should contract marriage with two women? ⁸⁴

(5) Commercial Contracts.—The most important point in this connection is perhaps the prohibition of interest. Other religions also had done that before, but with little results. They did not attack the root question, which is: How to supply interest-free loans to the needy? Islam characterizes the taking of interest as "a declaration of war against God and His messenger;" ⁸⁵ in our own time Professor Keynes did not hesitate in his numerous writings to assert that interest more than anything else lies at the root of all social ills. Islam makes a clear distinction between commercial gain and interest on loans. ⁸⁶ The difference between them is that one shares in the former (in various kinds of joint-stock companies) both profits and risks, whereas in the latter the debtor has to pay a fixed profit even if circumstances have not allowed him sufficiently to frustrate the enterprise. The thesis of Islam is that one should undertake to participate in the eventual risks in order to participate in the profits (al-ḍawla wa al-dawla). One should certainly take necessary precautions, even create reserve funds for loan year, but the parties to the contract should be ready to divide losses as well as gains.

As to non-commercial and unproductive loans, it goes without saying that private capitalists cannot offer interest-free loans unless they are most generous and pious. Therefore, it is only a welfare government that can and must do so. As a practical religion, Islam noticed this human weakness and, therefore, made it the duty of the government to provide for interest-free loans to the public in the annual budgets of the State, as we have mentioned above while speaking of ṣafā. The same could also be done on the basis of mutuality.

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84 Ibid.
85 Al-Qurʾān, ii, 276.
86 Ibid., ii, 275.
In fact, interest-free co-operative lending societies have been a great success, for instance, in Pakistan and Hyderabad-Deccan (India) where they have existed for over a century. The members participate in the working expenditure, and the circulation of the money gradually paid by the share-holders satisfies the needs of the members of the society.

The question of co-operative activity for loans naturally leads to the problem of insurance which has existed in Islam from the time of the Prophet himself. It was further developed in later times. Under the term malīq, the constitution of the City-State of Medina, dating from the year 1/622, the Holy Prophet laid down that the individual shall not be required to shoulder two kinds of responsibilities alone: (1) payment of blood-money in case of homicide, and (2) payment of ransom for prisoners of war. It was the treasury of the tribe that was to bear these two obligations. Should the funds of the tribe, periodically contributed by its members, be not sufficient at a given moment, the parent tribe and in the last resort the Central Exchequer must come to aid. In the time of the Prophet insurance against fire had little importance. Incidents of fire occurred only in living quarters which were built by the inhabitants themselves at meagre expense. In later times, marine insurance was introduced among the Muslim merchant class. The Caliph `Umar is reputed to have recognized the insurance units, and according to al-Ma`arif of al-Sarakhsi, employees of the same governmental department, members of the same cantonment, etc., began to function as units. In still later times, we see insurance practised by guilds of the same profession in a given locality.

It may be pointed out that unused contributions to such units need not lie idle; they could be utilized for fruitful commerce to build up reserves, and eventually profits could be divided amongst the members of the units. There has been an attempt in recent times of this kind of insurance among the owners of automobiles of a big city, insuring against damages both to their cars and to their persons. Islam has not left this kind of self-help only to a group of capitalists but has proposed it for everyone as a measure against damages in addition to all that the government may do.

(vi) Administration of Justice.—As explained above, the administration of justice is a necessary concomitant of contractual relations in a society. In pre-Islamic days, there was declaration of rights by arbiters, but no provision for enforcement. The Holy Prophet gave Medina a constitution which made the execution of legal awards a central subject leaving it no longer to tribes, much less to the individuals winning their cases. Further, in pre-Islamic Arabia there was no law but only the common sense of the arbiters. There was also inequity in the administration of justice. Powerful tribes, for instance, paid half of the blood-money, and value of women was taken as half the value of men. The said constitution rectified these defects. Islam established equality not only among Muslims and Muslims, but also among Muslims and non-

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Muslims, and cases are recorded of the classical period, in which Muslims were executed for having murdered non-Muslims. Evidence was also demanded from the parties concerned. In the very first year of the Hijrah, the Qur’an made it obligatory to have written documents of contracts. During his audience, the Prophet would inquire about the character of the witnesses before admitting their evidence. In later times, every locality established archives of the entire population, constantly revising remarks on personal character. Whenever a man presented himself as a witness, the archives were consulted to admit or reject his evidence. Further, near relatives were declared unfit to give evidence in favour of their kinsmen. In almost all cases, no less than two witnesses were required.

One more peculiarity of administration of justice was the autonomy conceded to non-Muslim inhabitants, the principle being, for instance, Jewish parties, Jewish Law, Jewish courts, and Jewish judges. In case parties belonged to different communities, a Jew versus a Christian or a Muslim, the conflict of laws necessitated special arrangements; in most cases parties agreed to go to the Muslim courts.

3. Penal Laws

The administration of justice described above applies mutatis mutandis to penal cases. It appears that ordinarily capital punishment was not enforced unless reference was made to the Caliph (Central Government).

In his celebrated farewell address during the last pilgrimage, the Prophet chartered human rights under a triple division: person-property-honour, and affirmed their sacred character once for all.

Let us refer to two verses of the Qur’an regarding punishment:

(a) “Whoevery transgresses against you, so transgress against him with the like of his transgression against you...” (ii. 194).

(b) “The compensation of an evil is an evil like thereof...” ( xl. 40).

The wording of these verses implies that punishment is also regarded as transgression and evil. Although many verses exhort the victim to pardon the transgressor, yet retaliation, a time-honoured institution in human society, is allowed as a necessary evil, though never beyond the measure of the original crime and this too perhaps only so long as a suitable cure for the ailments of criminality has not been found.

The penal law of Islam has certain peculiarities. First, it makes a distinction between crimes of fixed penalties (hadd), and those which allow a certain latitude to the judges. The crimes of hadd refer to person, property, and honour. According to the classical jurisprudence, they are eight in number: (a) apostasy, (b) homicide, (c) illicit sexual intercourse, (d) false accusation against the chastity of a woman, (e) alcoholic drinks, (f) highway robbery and theft, (g) war, and (h) infliction of injuries.

Ibid., ii. 282.
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(a) Apostasy.—In all old and most new legal systems treason is awarded capital punishment. We have seen that Islam has rejected colour, language, and similar other accidents and hazards of nature as the bases of "nationality," and adopted instead the "identity of outlook on life" as the foundation to build a world-wide community. Even with its zeal for religious propagation, Islam admits no compulsion in religion but intends to create a rigorous discipline among those who voluntarily enter its fold. Such seems to be the explanation of considering apostasy as a crime. At times one feels that Islam has needlessly provided for that, since apostasy among Muslims is practically non-existent.

(b) Homicide and Corporal Damages.—In such cases lex talionis is not the only alternative: injured persons and the representatives of the murdered person have been given the right to blood-money and appropriate monetary compensation. The blood-money imposed by the Holy Prophet approximately amounts to the maintenance of a man for thirty years (expected life of the victim if he were not murdered!). One hundred camels is the traditional blood-money. During the battle of Badr, when the Prophet heard that the enemy slaughtered one day nine and the next day ten camels for consumption, he concluded that they numbered between nine hundred and one thousand combatants. If one camel suffices for one hundred days, one hundred camels can do so for about thirty years.

(c) and (d) Sexual Transgression and False Accusations Affecting the Honour of Women.—Consent of the parties of adults in sexual relations, even though unmarried, gives them no immunity from the operation of the Islamic penal code. This strictness in Islamic Law at least deters men from behaving like dogs and asses. Despite this rigour the Prophet of Islam has been more indulgent than Jesus Christ (as described by the Gospel according to St. John, 8:34f.). The Qur'ān requires four eye-witnesses for a sexual crime (as against the normal two), or confession on the part of the culprit. Islam also intends to purify society of scandalous talk; if anybody talks of the sexual immorality of a woman, he has to produce at least four eye-witnesses, otherwise he is himself to be given eighty stripes and he permanently forfeits his right to give evidence before a tribunal.

(e) Alcoholic Drinks.—Though the Qur'ān has strictly prohibited the use of intoxicants, it has prescribed no definite punishment. The Holy Prophet, however, used to administer forty strokes with his sandals to the intoxicated persons. The Caliph 'Umar seeing the expansion of the evil in Muslim society said, "Since intoxication leads to obscene talk and false accusations against the honour of women, I shall henceforth give eighty strokes" (This is the Qur'ānic punishment for speaking against the honour of women) Non-Muslims including the non-Muslim wives of Muslims are, however, exempt from this penalty. But if the representatives of the non-Muslims in a parliament agree on total prohibition, it is to be enforced on them as well.

(f) Robbery and Theft.—Crimes against property have been provided with severe penalties. As to the results, it may suffice to refer to a case from contemporary history. Who does not know the pillaging of the pilgrims, during the time of Sharīf Husain? When Ibn Sa'ūd got power in the Hijāz, he reinstated the Islamic sanctions against theft, with the result that people began to feel that they were given the security of the times of abū Bakr and 'Umar. In 1930/1939, part of the baggage of a lady pilgrim was found missing at an intermediary station between Mecca and Medina. The police were alerted. Even after two weeks of investigation, the police were unable to trace the thief, but the Sa'ūdian Government ordered payment of the value of the stolen goods to the victim and the amount was immediately paid. The much maligned punishment of cutting the hands of a thief is waived in the case of theft committed by the needy and according to many jurists also in the case of children and the mentally diseased.

(g) War.—As everybody knows, international law means the rules that govern relations of States in times of war, peace, and neutrality. If suppression of theft and robbery requires partial mobilization of the forces of order and security, foreign invasion requires the same measures on a large scale. Hence the inclusion of international law by Muslim jurists in the section on penal laws, and its treatment immediately after the section on highway robbery. Apart from its logic, the important point to note is that international law forms an integral part of the Islamic Law and is not left to discretion. In the international law the accused has the same rights of defending his conduct before a tribunal as, say, a robber who is captured and tried. An old author aptly says: "Among the happenings of a certain time a war is like sickness in contrast to peace and security which resemble health. It is necessary to take steps against warlike activities to preserve peace as it is necessary to fight against disease."20

(h) Infection of Injurious (Muḥallib).—Under this category fall the crimes other than those determined by the hudud. Judges are given wide latitude for inflicting appropriate punishment according to the circumstances of each case. Nevertheless, the rule has to prescribe certain rules defining the discretionary powers of the judges.

H

MUSLIM CONTRIBUTION TO LAW

1. However unbelievable it may look at first sight, it is a fact that the science of law, in its theoretical sense, did not exist in the world before Islam.

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Law did indeed exist in Rome, Greece, China, India, Mesopotamia, Egypt, pre-Columbian America, and elsewhere, yet it was Imam Ṣāḥīḥ (b. 150/767) who first thought of the science of law or jurisprudence as science. His book al-Risālah fī Ṣulūq al-Fiqh speaks of the origins and sources of Law, as also of the methods of legislation, interpretation and application of law and many allied topics. Al-Ṣāḥīḥ gave this science the expressive name Ṣulūq al-Fiqh (the roots of Law) in contradistinction to the general laws of a land, which were named as “branchings” (furūʾ) shooting out from these roots. Some generations afterwards, the Muslim jurists created a new science, called Ḥādiṭhīyyah, i.e., “comparative Law,” restricted to the study of the different schools of Muslim Law and dealing with the grounds and consequences of differences amongst the various jurists.

2. The principle of intention, in spite of much research, has not been found in earlier laws. This was first introduced by the celebrated sayings of the Holy Prophet: “Actions are (to be judged) by intentions (inna ma al-aʾmād bi al-nigyāt),” quoted by al-Balāghārī, Muslim, and all the other authorities, the echo of which we hear in the celebrated address of the Prophet given during his last pilgrimage.

3. The idea of ethical value as the basis of legal injunctions is also unique in the legal history of the world. The credit of initiating it goes to the Qurʾān.

4. International law has existed in the world since times immemorial, yet in antiquity it was neither international nor law. For, ordinarily, it was reserved only for resolving disputes of a country with certain other countries and nations only; Islam extended its scope to the entire world, without making any geographical and political limitations. Again, in antiquity it was not considered to be law, but formed part of a country’s political discretion: Islam made it a part of Law. This is testified by the fact that all books of Fiqh from the very beginning have dealt with international law under the section named Sigar. Further, before Islam, the subject was treated in books of politics and manuals of statecraft like the Artha Sāstra of Kautilya, or the Politics of Aristotle. The Muslims made it an independent branch of Law, and devoted special monographs to it, the earliest of which is attributed to Abu Hamīfah. The works of the pupils of this master, Abu Yūsuf and Muhammad al-Shaibānī, have come down to us and have partly been printed.

5. The first written constitution of a State in the world, is promulgated by a sovereign, came from the Holy Prophet of Islam. The text constituting the City-State of Medina in the first year of the Hijrah (622) has been preserved in full, and comprises fifty-two articles, dealing with such questions

Jurisprudence as independence 64–64 the rest of the world, war and peace, administration of justice, legislation, religious tolerance with regard to non-Muslim subjects, social insurance, asylum, naturalization, etc. 65

Lastly, it is interesting to note that the Muslims as a people always kept legislation (and so also judiciary) separate from the executive. The development of Muslim Law as deduced from the Qurʾān and the Ḥadīth has always been the work of private savants and jurists. Tradition has insisted that the State should not interfere with this work, much less monopolize it. It is the freedom of juristic judgment which creates conflicting opinions and alternative solutions, and these provide the coming generations with raw material for sound judgment. These conflicting opinions have given rise to different schools of jurisprudence; yet in one’s comparative study of international law in Sunni, Shīʿite, and Ḥādiṭhīyya schools and their sub-schools one is agreeably surprised that, despite their water-tight divisions, there are practically no differences of vital significance.

I

INTERACTIONS

Ernest Nys (in his Les Origines du droit international, which has also an Urdu translation published by the Omsiana University) shows the great influence of Muslim international law, particularly on Spanish Christian writers, who first inaugurated the study of international law in modern Europe. Later on, the Dutch Hugo Grotius, who is considered to be the father of international law, also refers to Muslim practices. Many savants allude to the Muslim influence on the famous Code Napoléon, the basis of modern Western legislation. Many provisions of the Islamic law of inheritance, divorce, etc., are now being adopted by and necessary modifications made in Hindu Law by the modern Indian legislature.

Foreign elements in Muslim Law have already been shown in the section on "Sources." Far from being the executor of a law, as it is sometimes claimed, Roman Law in its influence on Muslim Law has been of the least significance. 66 No early Muslim jurists, except al-Azż̄iri

64 It goes to the credit of Wellhausen to have made this constitution known to the Western world for the first time, under the title Gemeindeordnung von Medina (published in Vol. IV of his book Skizzen und Vorarbeiten). For English tr., see Hamidullah, "The First Written Constitution of the World," Islamic Review, Woking, 1941. For Urdu tr., see his 'Abd Nabuwan ka Naqs-e i-Usbānī. A more recent and detailed discussion and analysis is given in Le Prophète de l'Islam, au vue et au murre, Paris, 1959, For the Arabic text, see al-Waṣṣāṣ fī al-Nuṣūḥīyyah.

65 There is now considerable literature in favour of this thesis. For instance, Nallino’s Italian article (English tr.) “Impossibility of the Influence of Roman Law on Muslim Law” in the Voice of Islam, Karachi, Vol. 1; Bouquet, "Le Mystère de la formation des origines du Fiqh," published in Revue Algérienne, Algier, July–September 1947, Urdu translation in Ma'ārif, Azarquah; see also Hamidullah,
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hauled from an ex-Byzantine territory. All of them were either the Hijazi Arab or belonged to Persian families which had lived as Muslims for at least two generations. Even al-Azizi was not of Syrian origin for his father was among the captives brought from Sind. And, therefore, he could not be suspected of having inherited any part of the Byzantine traditions.

J

FURTHER POSSIBILITIES

A modest yet practical procedure to adapt Muslim Law to present conditions has been suggested in the colloquium recently published by the "Law Number" of the Karachi monthly Chishti: i. Riz. Muslims should not remain content with their past, however glorious that past. The raison d'être of their existence is their constant struggle to become the very best community, a model for the whole of humanity—the community enjoining the good (ma'rifat), interdicting the evil (munkar) and believing in God.14


BIBLIOGRAPHY


Part 4. The Sciences

Chapter LXII

GEOGRAPHY

Philosophy in the past ages was not merely an academic subject studied by specialists; it was a living influence which guided men in their ideas about the universe and it included a variety of fields covering theology, law, society, and the sciences. To the Muslims during the Middle Ages philosophy and its various disciplines were all-embracing. Geographical ideas were inseparable from philosophical thinking as they were basic to a widening of horizons. Indeed, interest in geography is as old as recorded human history. This had its roots in ancient folklore, poetry, and travel. The geographical instinct in one form or another developed early among organized human communities, and the people of the ancient civilizations possessed a variety of geographical knowledge.

It is well known to historians that the culture of Greece was preceded by a continuous and composite culture in Western Asia and Egypt and that this culture in its turn was not the product of the genius of any one people, but was shaped by an ever-increasing human intercourse and was the fruitation of a long evolution. Thus, Greek geographical ideas too had a basis in the past and in the experience of other peoples. Philosophy and poetry formed the top-roots of the geographical knowledge of the Greeks. Similarly, in Arab times both Greek ideas and Islamic philosophy and literature were potent factors in the evolution of geographical concepts.

Early Greek contributions to geography were as varied as they were brilliant. Later on, Alexander's campaigns were of the nature of geographical exploration under arms. In the course of time the centre of scientific activity shifted to Alexandria. Science and geography continued to flourish in the Greco-Roman age, though under somewhat different cultural atmosphere. In fact, the Graeco-Roman culture was subjected to a terrible ordeal. It witnessed one of the greatest intellectual conflicts in history, the clash between Greek ideals and the various oriental religions, chiefly Judaism and Christianity.

But before Christianity could triumph, the great geographer Ptolemy (c. 150 A.D.) had accomplished his work of co-ordinating the sum total of geographical knowledge up to his time, though a little earlier Strabo (c. 19 A.D.) had contributed even more brilliantly in terms of geographic analysis. He had also indicated the extent of the knowledge of the Romans about the land and people of Arabia. Describing Gellius' expedition in 25 B.C. to Haora on the Red Sea coast to the borders of Saudi Arabia, Strabo says that the Emperor Augustus was also influenced by reports of the wealth of the Arabs and their trading activity in spices, aromatics, and precious stones, and that he desired either to befriend or subdue such opulent people.1

By the third century A.D. distinct changes had taken place in the political, cultural, and religious spheres. The Roman Empire came near to utter breakdown. The legions, never too many for the long frontiers and made increasingly heterogeneous by local recruiting, lost their sense of mutual cohesion and failed to check stronger outside attacks. Many emperors rose and fell like ninepins, unannounced, unsung. Rome was sacked by Goths in 410 A.D. By