

in their learning for historiography. At such a time the Muslims established standards which have not always been improved upon in the modern world. For instance, contemporary nations have to learn a good deal in standards of objectivity and in distinguishing between national glorification and history. The Muslims were able to expand the scope of history from mere recording of facts into a repository of political, administrative, and cultural experiences and made fruitful essays into the analytical field as well. They failed like the political thinkers of Islam in suggesting the evolution of institutions that would have enabled greater and more responsible participation of the people in the affairs of the State, but they did help in making the Islamic governments beneficent and benevolent at a time when other governments tended to be arbitrary and even tyrannical.

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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 at 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 lofty 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'ān, which is

taken as the uncreated Word of God; there is the *Ḥadīth* 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, intact 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-*Qhazālī*,¹ this principle of good and evil (*ḥusn wa qubh*) was propounded by the Mu'tazilite jurists. Being more rationalist than their contemporary traditionists, it was the Mu'tazilites who were perhaps the first to be struck by the curious and repeated stress which the Qur'ān has laid on the rational side of life. To persuade men to abide by the precepts of Islam, the Qur'ān again and again appeals to reason (*tadabbarūn, tatafakkarūn, ta'qilūn*, etc.), and repeatedly refers to *ma'rūf* and *munkar*² as the bases of Muslim Law.

Now, *ma'rūf* means a good which is recognized as such on all hands, and a *munkar* is an evil disapproved as such by everybody. It cannot, therefore, be true that the rules of conduct laid down by the Qur'ān 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'ānic order or injunction. That is the domain of the specialists of the philosophy of Law. An anecdote will explain the point. Abu Ḥanīfah, 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 this to his face. Abu Ḥanīfah replied: “I never promulgate rules on my personal opinion; on the other hand, I always deduce laws from the sacred texts of the Qur'ān and the *Ḥadīth*. Had I relied on my personal reasoning, I would have ordered that in the act of ablutions, one should pass a wet hand not on the uppers of a shoe (*khuff*)—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 Ḥanīfah succeeded in silencing and even calming the apprehensions of his well-meaning critic. The answer was humorous, because abu Ḥanīfah did not refer to the reasons for not washing

¹ *Al-Mustaṣfa*, I, 55–56 (ed. Būlāq, 1322 A.H.).

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

the soles 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 Ostrorog in his brilliant essay "Roots of Law," contained in his book *Angora Reform*. In fact in expounding the Qur'anic statement, "Do what is *ma'rūf* (what is good in the eyes of God and man) and abstain from what is *munkar* (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 infested 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 (*ḥarām*); in complex cases, predominance will decide the preference: a matter of predominant good will be recommended (*mustaḥab*), and one of predominant evil discouraged (*makrūh*), 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, NE, NNE, 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 (*farḍ 'ain*) or obligatory on at least a few in the group (*farḍ kifāyah*); the good with less sure absoluteness will be legal order (*wājib*), and practice of it will be enjoined with insistence (*ṣunnat mu'akkadah*). The act with pronounced inclination towards the good will be recommended or preferred (*mandūb* or *mustaḥab*) and the one on the deadline will be supererogatory (*nafl*). Similarly, the evil may be prohibited (*ḥarām*), tending to be prohibited (*makrūh taḥrīmī*), better to shun (*makrūh tanzīhī*) 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 subtler points to judge. With regard to such matters the judges and jurists differ among themselves. Abu Ḥanīfah would say that to eat prawns is

forbidden, but al-Shāfi'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 (*ḥarām istinbāfi*) as distinct from legal prohibition (*ḥarām shar'i*). 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 Ḥanīfah and al-Shāfi'i are doubtless two of the leaders (*imāms*) of Muslim Law, completely independent of each other in legal judgment. According to al-Shāfi'i, the *qunūt* prayer at dawn (*fajr*) is obligatory, whereas abu Ḥanīfah suppresses it completely. The story goes that once al-Shāfi'i went to Baghdād (where abu Ḥanīfah lies buried), and during his stay there he renounced his own view on the *qunūt* prayer. When questioned, he said: "I continue as firmly to cling to my opinion as before, yet in the presence of the great abu Ḥanīfah 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 (*fatwa*), 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 jurisconsult 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,"³ 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

³ Abu Dāwūd, *Aqḍīyyah*, 6.

enforce its verdict to get the rightful owner his due, or, in case it is impossible, the court may punish the doer 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 mere 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'ān repeats 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 (*'ibādāt*) in the manuals of *Fiqh*. With a word of explanation of the meaning of the term *zakāt*, even the most uninitiated 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-arḍ* was the land revenue; *zakāt al-tijārāh* was tax on commercial capital as well as on import customs; *zakāt al-māshīyyah* was imposed on herds of domesticated animals (ovine and bovine animals and camels) living on public pastures; *zakāt al-ma'ādīn* on the sub-soil products; *zakāt al-'ain* 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 *ṣadaqāt*).⁴

⁴ 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 finally ordering and prescribing sanctions. In the Meccan 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 these measures were taken during the Medinese period. The sense of the terms with regard to taxes underwent

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 (*'ibādāt*) should not astonish us. It is in fact deliberate. In Islam one must do everything for the sake of God. As al-Ghazālī has forcefully 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 (*'ibādah*). 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 does 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 whomsoever 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 so.

All practical affairs of public nature fall within the purview of Islamic Law because it prescribes for each of them the degree of obligation (*farḍ*, *wājib*, *mustahab*, *sunnah*, *mubāh*, 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'ān and the Ḥadīth 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.

It is perhaps useful to point out a certain resemblance that exists between the Roman *fas* and *jus* on the one hand, and that between the Islamic *Fiqh* and *Siyāṣah Shari'ah* on the other. In ancient Rome all laws were religious (and called *fas*) and as such depended on the decisions of the priests; later, the kings arrogated to themselves the right to decide in certain matters (rules of which were called *jus*) which the priests reluctantly conceded, but slowly more and more matters entered within the competence of *jus* or civil law of Rome, on which lay authorities could promulgate rules. The *Fiqh* is also a religious Law, inasmuch as its principal source is the divine revelation, yet the same Law left a number of points, including certain matters of penal law, to the discretion of the ruler and his delegates; this was termed *Siyāṣah Shari'ah*. But the nature of relation between *Fiqh* and *Siyāṣah Shari'ah* was such that the latter could not replace the former or encroach upon its privileges. For in Islam the "priestly class" does not exist, at least in the past it was not separate from the class of civil authorities, the Caliph himself being the head at all religious functions.

It is to be pointed out that in other civilizations, human affairs are divided into temporal and spiritual. In Islam the greater part of spiritual affairs is vested in the hands of the same authorities as have the charge of temporal affairs. It seems that the Muslims divide their religious affairs into external and internal. Declaration of faith, service of worship, fasting, and *hajj*, although closely related to spiritual matters, are yet matters concerning the State, and are, therefore, external affairs. Internal affairs, by which one understands one's relation with God, form the subject-matter of mysticism and are left in the hands of spiritual guides who are also considered successors of the Holy Prophet and, therefore, Caliphs in the spiritual sphere. In this realm, there are no rivalries. Several Caliphs could and did simultaneously exist in the Muslim community. On the death of the Prophet, abu Bakr and 'Ali could not co-exist as Caliphs for external affairs, yet both were at the same time regarded as Caliphs of the Prophet in internal or spiritual affairs. As a result of this natural division of functions, Islam has been able to avoid the possibility of a tug of war, and the consequent bloodshed, between a king and the chief spiritual authorities.

It must further be pointed out that the division of spiritual and temporal powers is perfectly lawful in Islam, and does not upset its religio-legal system. The Qur'ān⁵ lays down that the practice of former prophets remains valid in Islam, unless expressly abrogated; and it relates, as a precedent, how in the presence of the Prophet Samuel and with his approval the Israelites could accept the famous Tālūt as king.⁶ The presence of a king and a prophet in the same community necessarily implies the division of powers, temporal affairs falling within the competence of the king. It goes without saying that

⁵ Al-Qur'ān, vi, 90.

⁶ *Ibid.*, ii, 246 ff.

in Islam the Qur'ān 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'ān has condemned those who neglect any of these two, and approves of those who aspire simultaneously after welfare in both.⁷

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 (*mathūww*); (b) non-recited (*ghair mathūww*), 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'ān, 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 (*Ḥadīth*), 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, *Ḥadīth* 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

⁷ "And there are some men who say: Our Lord, give us a good in this world and also a good in the next world, and deliver us from the torment of the fire. Such shall have a portion of that which they have gained" (al-Qur'ān, ii, 201-02). "Seek the abode of the hereafter in that which God hath given thee and neglect not thy portion of this world . . ." (*ibid.*, xxviii, 77).

itself has enjoined that the practice of the Prophet should be treated as the best model to imitate and follow.⁸

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 *Ḥadīth* and *Sunnah* to writing in the very lifetime of the Prophet. One such compilation, the *Ṣaḥīfah Ṣādiqah* of 'Abd Allah ibn 'Amr ibn al-'Āṣ, is reputed to contain one thousand reports.⁹ 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 (*majallāt*) 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 *Ḥadīth* 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 ibn Ḥanbal, who from 'Abd al-Razzāq, who from Ma'mar, who from Hammām, who from abu Hurairah, 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 *Musnad* of ibn 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 ibn Ḥanbal had forged. But no, we possess fortunately also the *Muṣannaf* of 'Abd al-Razzāq (now in press in Hyderabad-Deccan, having been edited by Dr. Yūsuf al-Dīn), and there the remaining chain of sources is given and the *ḥadīth* is recorded in the same words without the least difference. Now say, perhaps 'Abd al-Razzāq was the falsificator. But we possess his source also, for in the *Jāmi'* of Ma'mar now being edited by Dr. Fu'ād Sezgin of the University of Istanbul, the same *ḥadīth* is found, with a shorter chain, but with no difference in the wording of its contents. Perhaps Ma'mar was the forger. But no, his source, the *Ṣaḥīfah* of Hammām 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

Ḥadīth. Even in the absence of these books other chains of transmission narrate the same *ḥadīth* 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 *Ḥadīth* have crept in, due to unscrupulous or dishonest authors, yet the double method of *riwāyah* (uninterrupted chain of transmission by reporters known for the integrity of their character) and of *dirāyah* (scrutiny of the contents and internal evidence) has practically eliminated the chances of forgery in the more important collections, such as the "Six Canonical Collections" (*Ṣiḥāḥ Sittah*). 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 *Ḥadīth* comprises also the *taqrīr* 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'ān according to which all that is not expressly forbidden is lawful.¹⁰ The same notion is stressed in two interesting sayings of the Prophet, namely:

- (i) "The virtues of the days of ignorance (*jāhiliyyah*) will be acted upon in Islam" (Ibn Ḥanbal, III, 425).
- (ii) "A wise counsel is the lost property of the Faithful (*mū'min*); wherever he discovers it, he takes hold of it" (al-Tirmidhī, chapter "Ilm," 19; ibn Mājah, chapter "Zuhd," 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'ān and the *Ḥadīth*.

(c) *Previous Revelations*.—With regard to the earlier prophets the Qur'ān has said: "They are those who received God's guidance; follow the guidance they received."¹¹ 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'ān. Some prophets seem never to have transcribed the divine messages they received. The accusation made by the Qur'ān of the corruption of the previous Scriptures¹² considerably reduces the importance of this source.

⁸ Al-Qur'ān, xxxiii, 21; lix, 7, etc.

⁹ As to the references and details of this and the following statements of the paragraph, see Hamidullah, *Ṣaḥīfah Hammām Ibn Munabbih* (both Arabic and Urdu editions), Introduction.

¹⁰ Al-Qur'ān, iv, 24.

¹¹ *Ibid.*, vi, 90.

¹² *Ibid.*, ii, 75, 79; iv, 46; v, 13, 41.

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'ān and the Ḥadīth have approved this source, and even encouraged it. Individual opinions are termed *qiyās*, and the collective ones *ijmā'* (consensus). But the opinions of savants and researchers are not infallible; hence these same savants have approved that a *qiyās* 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'ān and the Ḥadīth 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 (*istiṣlāḥ*) 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 *ijtihād* 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-aḥkām al-sultāniyyah*. 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-Mas'ūdī, who says that after the conquest of Iraq and Iran, the Caliph 'Umar retained the Sassānian 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'ān and the Ḥadīth. 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

frontier town Manbij (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 levy on Muslim subjects going there for similar purposes."¹⁶

(e) 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-Ḥudaibiyyah.¹⁷

(f) Even new customs may gradually take root and add to the body of Muslim Law. To express slight nuances they are called '*urf*', '*ādah*', '*ta'āmul*'. 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" ('*umūm al-balwa*'), which may abrogate even an existing law. Apparently, the theory of the *ijmā'* (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'ān.

G

PARTICULAR SECTIONS OF THE LAW

Theologians normally discuss four topics: (i) beliefs ('*aqā'id*'), (ii) acts of worship ('*ibādāt*'), (iii) morals ('*akhlāq*'), and (iv) social affairs ('*mu'āmalāt*'). 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 ('*ibādāt*') 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 *zakāt* 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

¹³ Al-Bukhārī, *Kashf al-Asrār 'ala Uṣūl al-Bazdawī*, III, 262.

¹⁴ *Idem*, *Ṣaḥīḥ*, Chap. "Imān," section 44.

¹⁵ Consult the very interesting book *Poll Tax in Islam* by Dorman.

¹⁶ Abu Yūsuf, *Kharāj* (Būlāq edition), p. 78.

¹⁷ See for references and discussion on this point, Ḥamidullah, *Muslim Conduct of State*, Lahore, 1953, pp. 17–38.

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 (*'ibādāt*), (ii) social affairs (*mū'āmalāt*), and (iii) crimes (*'uqūbāt*). Under the head "acts of worship" fall prayer, fasting, pilgrimage, and *zakāt* (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. 'Ibādāt

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'rāj*), i.e., a journeying unto the Almighty. In the words of Shāh Wali Allāh: "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 lowliness 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 wit, 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."¹⁸ At the end, kneeling before the Lord, in the "invocation of the Divine Presence" (*tashahhud*), the faithful use the very words of the dialogue between the Holy Prophet and God during the *mi'rāj*:

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 submissiveness and attests the formula of the faith, then expresses his thankfulness to God for having sent such

¹⁸ *Hujjat Allāh al-Bālighah*, Vol. I, Chap. "Asrār al-Ṣalāh," cited in *Introduction to Islam*, Centre Culturel Islamique, Paris.

messengers as Abraham and Muḥammad (both of blessed memory) to guide him. Thereafter, he asks for pardon and well-being in the two worlds. On his "return" from the visit of the threshold of God, he wishes peace to all believers, and with that he terminates his service.

2. Mu'āmalāt

(i) *Polity*.—Islam has not only united prayer and politics in a greater whole by assigning them both to the same Imām, but it has also dispensed with all prejudices of colour, language, race, birth-place, etc., declaring all men equal, basing superiority solely on piety, and taking practical steps to reunify the descendants of Adam and Eve. Allāh is not the God of this or that race, He is the Lord of the worlds, both known and unknown (*Rabb al-'Ālamīn*). Nationality as based on race, colour, or language is fatal in the long run. It is to be based on the identity of outlook on life (religion) accessible to any and every individual, irrespective of race, caste, or colour. The common code of Law (the Qur'ān and the Ḥadīth), the common focal point for prayer and *ḥajj* (Ka'bah), and the unity of the Faithful under a common Caliph are some of the means employed for the removal of all class and colour distinctions. In politics, sovereignty belongs to God, and man is the lieutenant and vicegerent of God. This notion works powerfully on man. Islam imposes no particular form of government; the Qur'ān never speaks of kingship in connection with Muslim polity. There is not a single reference to republic or oligarchy. Yet the first Muslim Government after the Prophet was a "life-long republic." The Head of the State did not come to power by inheritance, but was chosen for life. So the State was neither our modern republic, nor the hereditary despotic kingship. The oath of allegiance (*bai'ah*) was essential even for the recognition of the Prophet himself; and this automatically excluded hereditary monarchy, though the Shi'ites do not hold this view.

It is obligatory on a Muslim ruler to have consultations; right of veto seems to be a matter left to time and clime. His fundamental duties are four-fold: cultural (propagation of Islam), administrative-executive, judicial, and legislative. But legislation by government is the least important of its duties. In Islam, legislation has always remained a privilege of private savants, beyond the control of the rulers with their ever-changing whims and fancies and exigencies of the day-to-day politics. And as we have described above, legislation in Islam is only for secondary matters; the primary principles have already been laid down by the Qur'ān and the Ḥadīth.

(ii) *Fiscality*.—As already pointed out *zakāt* is not at all almsgiving or charity, but the State tax, covering practically the entire fiscal system imposed on Muslim subjects. It is significant that the Qur'ān prescribes no details as to the income, but gives very precise directions regarding the expenditure of the State. The implication seems to be that the government may have a free

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 *zakāt* 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 import of victuals, effected by caravans of the Nabataeans, 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 Ḥazm 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 uphold the rates of the time of the Prophet as the norm, but allow under the name of *nawā'ib* (passing exigencies) enhanced or new taxes.

The expenditure of *zakāt* is much more important. The Prophet of Islam ordained that the income of *zakāt* is religiously forbidden (*ḥarām*) to him, to his family, to his tribe, and to the allies of his tribe. If the Head of the State is so scrupulous and does not abuse 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 (*ṣadaqāt*) 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.¹⁹ According to such a high authority as the Caliph 'Umar, *fuqarā'* (the poor) are those who belong to the Muslim community, and *masākīn* (the needy) are from the non-Muslims. It is to be noted that the *ṣadaqāt* 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 abu Ya'la al-Farrā' observes: "Those whose hearts are to be won are of four kinds: (i) those whose hearts are to be reconciled for coming to the aid 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."²⁰

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.

¹⁹ Al-Qur'ān, ix, 60.

²⁰ *Al-Aḥkām al-Sulṭāniyyah*, Chap. "Zakāt." (The author was a contemporary of al-Māwardī, and both composed their books with the same title.)

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 including the minors, the insane, the absentees, 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.²¹ 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 entails 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 progress, 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 commodities. 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 mischief.) 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.

²¹ Al-Qur'ān, iv, 29.

Contracts may comprise conditions. There is a huge monographic literature on the subject, and it is related that abu Ḥanifah 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.²² Lesser of the two evils justifies to interfere in 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 (*maṣlaḥat 'ammah*) 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 incapacities.

(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 matrimony to the level of any other bilateral contract. In pre-Islamic days, people "sold" 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 progenitive father. For profound social reasons, and in view of the nature of the fair sex, the mutual benefit 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 Qur'ān, 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, Bucer, Melancthon, 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.²³ The reference here is not to the

²² Based on a saying of the Prophet: "Muslims abide by the conditions they have contracted, except the condition which permits a *ḥarām* (forbidden thing)"; cf. al-Tirmidhi, Chap. "Aḥkām," 17, etc.

²³ Edward Westermarck, *History of Human Marriage*, French tr. Genep, Paris, 1943, Vol. V, pp. 54–56; *Encyclopaedia Britannica*, "Polygamy."

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—*khul'*. 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 Kriegstag of Nuremberg (Germany), in view of the greatly reduced number of the male population due to war ravages, ordered that thenceforth every man should contract marriage with two women?²⁴

(v) *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;"²⁵ 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.²⁶ 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 fructify 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-ghunum ma' al-ghurum*). One should certainly take necessary precautions, even create reserve funds for lean years, 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 *zakāt*. The same could also be done on the basis of mutuality.

²⁴ *Ibid.*

²⁵ Al-Qur'ān, ii, 279.

²⁶ *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 *ma'āqil*, 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 reorganized the insurance units, and according to *al-Mabsūṭ* of al-Sarakhsī, 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. Inexpensive, prompt, and fool-proof—such is the ideal of justice in Islam. 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 judicial 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-

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'ān²⁷ made it obligatory to have written documents of contracts. During his audiences, 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 sacrosanct character once for all.

Let us refer to two verses of the Qur'ān regarding punishment:

- (a) "Whoever 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 ailment of criminality has not been found.

The penal law of Islam has certain peculiarities. First, it makes a distinction between crimes of fixed penalties (*ḥudūd*), and those which allow a certain latitude to the judges. The crimes of *ḥudūd* refer to person, property, and honour. According to the classical jurists, 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.

²⁷ *Ibid.*, ii, 282.

(a) *Apostasy*.—In all old and most new legal systems treason is awarded capital punishment. We have seen that Islam has rejected colour, language, land, 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,²⁸ 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, 8:3ff.). 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.²⁹

(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

²⁸ *Ibid.*, ii, 256.

²⁹ *Ibid.*, xxiv, 4.

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 Sharif Husain? When ibn Sa'ūd got power in the Hijāz, he reinstituted the Islamic sanctions against theft, with the result that people began to feel that they were given the security of the times of abu Bakr and 'Umar. In 1359/1939, 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 larger 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."³⁰

(h) *Infliction of Injuries (Maḏālim)*.—Under this category fall the crimes other than those determined by the *ḥudūd*. Judges are given wide latitude for inflicting appropriate punishment according to the circumstances of each case. Nevertheless, the ruler 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.

³⁰ Hasan ibn 'Abd Allah, *Āthār al-Uwal fi Tartīb al-Duwal*, compiled in 708 H., p. 167.

Law did indeed exist in Rome, Greece, China, India, Mesopotamia, Egypt, pre-Columbian America, and elsewhere, yet it was Imām Shāfi'i (b. 150/767) who first thought of the science of law or jurisprudence as case-law. His book *al-Risālah fi Uṣūl 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-Shāfi'i gave this science the expressive name *uṣūl al-Fiqh* (the roots of Law) in contradistinction to the general laws of a land, which were named as "branches" (*furū'*) shooting out from these roots. Some generations afterwards, the Muslim jurists created a new science, called *khilāfiyyāt*, 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.³¹

2. The principle of intention, in spite of much research, has not been found in earlier laws. This was first introduced by the celebrated saying of the Holy Prophet: "Actions are (to be judged) by intentions (*inna-ma al-a'māl bi al-niyyāt*)," quoted by al-Bukhārī, 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 Qur'ān.

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 *Siyar*. Further, before Islam, the subject was treated in books of politics and manuals of statecraft like the *Artha Śāstra* 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 Ḥanīfah. The works of the pupils of this master, abu Yūsuf and Muḥammad al-Shaibānī, have come down to us and have partly been printed.³²

5. The first *written* constitution of a State in the world, as 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 toto*, and comprises fifty-two articles, dealing with such questions

³¹ See Hamidullah, "Uṣul al-fiqh'm tarihi," in the *Islam Tetkikleri Enstiusü Dergisi*, of Istanbul University, II, 1956-57, pp. 1-18. Also the French tr., *Annales of the Faculty of Law* of the same University, 1959.

³² Extensive literature has been published in European languages during the last few decades, references to which can be found in the bibliography given in *Muslim Conduct of State* by Hamidullah, Lahore, 1953.

as independence *vis-à-vis* 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.³³

6. 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 Qur'ān 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 Sunnite, Shī'ite, and Khārijite 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 Osmania 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 Napoleon*, 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 chief determinant of the growth of Muslim Law, as it is sometimes claimed, Roman Law in its influence on Muslim Law has been of the least significance.³⁴ No early Muslim jurists, except al-Auzā'i

³³ 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 *Aḥd Nabawī ka Nizām-i Hukmrānī*. A more recent and detailed discussion and analysis is given in *Le Prophète de l'Islam, sa vie et son œuvre*, Paris, 1959. For the Arabic text, see *al-Waṭṭā'iq al-Siyāsiyyah*.

³⁴ 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. I); Bousquet, "Le Mystère de la formation et des origines du Fiqh," published in *Reveu Algerienne*, Alger, July-September 1947, Urdu translation in *Ma'ārif*, Azamgarh; see also Hamidullah,

hailed from an ex-Byzantine territory. All of them were either the Hijāzian Arabs or belonged to Persian families which had lived as Muslims for at least two generations. Even al-Auzā'i was not of Syrian origin for his father was among the captives brought from Sind.³⁵ 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 *Chirāgh-i Rāh*. 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'rūf*), interdicting the evil (*munkar*), and believing in God.³⁶

"Influence of Roman Law on Muslim Law," *Hyderabad Academy Journal*, Vol. VI, 1943, and *Imām Abu Ḥanīfah ki Tadwīn-i Qānūn-i Islāmi* (Urdu), Karachi.

³⁵ Al-Dhahabi, *Ṭabaqāt al-Ḥuffāz*, s.v. "Auzā'i."

³⁶ Al-Qur'ān, iii, 110.

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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,