

Chapter XXXIV

ABU ḤANĪFAH AND ABU YŪSUF

A

ABU ḤANĪFAH

*Life.*—It was under the circumstances explained at the close of the preceding chapter that abu Ḥanīfah appeared on the scene and began his work. His original name was Nu'mān bin Thābit. Born at Kūfah, capital of Iraq, in 80/699 according to authentic reports, in the reign of 'Abd al-Malik bin Marwān, when Ḥajjāj bin Yūsuf ruled over Iraq, he lived the first fifty-two years of his life in the Umayyad regime, the later eighteen in the 'Abbāsīd. He was fifteen years old when Ḥajjāj left the stage; in the time of 'Umar bin 'Abd al-'Azīz he was a youth. The stormy days of the rule of Yazīd bin Muḥallab, Khālīd bin 'Abd Allah al-Qasri, and Naṣr bin Sayyār, over Iraq, passed before his eyes. He himself was a victim of the persecution of ibn Hubairah, the last Umayyad governor. He saw the rise of the 'Abbāsīd movement with its centre at Kūfah, his home town, which remained virtually the main stronghold of the new-born 'Abbāsīd State before the founding of Baghdād. His death occurred in 150/767 during the reign of Maṣṣūr, the second 'Abbāsīd Caliph.

Abu Ḥanīfah's ancestors belonged to Kabul. His grandfather Zūta (according to some the pronunciation is Zauta) came to Kūfah as a prisoner of war, accepted Islam, and settled there under the friendly protection of Banu Taim Allah. Zūta was a trader by profession and was known to 'Alī, the "Right-going" Caliph; in fact, he was close enough to him and sometimes entertained him with gifts.<sup>1</sup> Abu Ḥanīfah's father, Thābit, also owned some business at Kūfah. According to a report coming from abu Ḥanīfah, he owned a bakery there.<sup>2</sup>

Abu Ḥanīfah's own account of his education describes him as applying himself first to recitation (reading the Qur'ān properly), Ḥadīth (Tradition), grammar, poetry, literature, philosophy, and other subjects in vogue in those days.<sup>3</sup> Then he turned to specialize in dialectical theology, and mastered it to such a degree that people looked to him as an authority in that science. His pupil Zufar (bin al-Hudhail) reports that his master himself told him that at first he took such interest in theology that people lifted their fingers towards him.<sup>4</sup> In another report abu Ḥanīfah says that at one time he was a past

<sup>1</sup> Al-Kardari, *Manāqib al-Imām al-A'zam*, Dairatul-Maarif, Hyderabad, 1321/1903, Vol. I, pp. 65, 66.

<sup>2</sup> Al-Muwaffaq bin Aḥmad al-Makki, *Manāqib al-Imām al-A'zam Abi Ḥanīfah*, Dairatul-Maarif, Hyderabad, 1321/1903, Vol. I, p. 162.

<sup>3</sup> *Ibid.*, pp. 57-58.

<sup>4</sup> *Ibid.*, pp. 55, 59.

master in the art of controversy and spent most of his time in debates. As Baṣrah was the main venue of these contests, he had been there about twenty times, occasionally staying there for six months or so at a stretch, and remaining engaged in controversies with the different sects of the *Khārijites*, the *Ibāḍīyah*, the *Ṣufriyyah*, and the *Ḥashwīyah*.<sup>5</sup> It may be easily concluded from this that he was well versed in philosophy, logic, and theological divergences of the numerous sects without which a man cannot enter the field of controversy at all. The beautiful use that he later made of reason and common sense in the interpretation of Law and the resolving of abstruse legal problems which won him immortal fame owed a great deal to the intellectual training which he had received earlier from these exercises of logical argumentation.

After keeping himself busy in polemical controversies for a long time and growing sick of them, he turned to *Fiqh*, i.e., Islamic Law. Here, with the bent of mind that he possessed, he could not interest himself in the Traditionist school (*ahl al-ḥadīth*). He, therefore, joined the Iraqi school of reason with its centre at Kūfah. This school of law traced its origin to 'Alī and ibn Mas'ūd (d. 32/652), after whom their disciples *Shuraih* (d. 78/697), 'Alqamah (d. 62/681), and Masrūq (d. 63/682) became its accredited leaders, followed in their turn by Ibrāhīm *Nakh'i* (d. 95/714) and Hammād (d. 120/737). Abu Ḥanīfah took Hammād for his master and kept him company for eighteen years till the latter's death. Frequently he also consulted the other learned masters of Law and Tradition in the Hijāz on the occasions of pilgrimage, and acquainted himself also with the Traditionist school of thought. On Hammād's death he was chosen to succeed him. He occupied that place for thirty years, delivering lectures and discourses, issuing legal verdicts, and doing the work which formed the foundation of the Ḥanafī school of law named after him. In these thirty years he answered some sixty thousand (according to other estimates, eighty-three thousand) legal queries, all of which were later compiled under different heads in his own life-time.<sup>6</sup> Some seven to eight hundred of his pupils spread to different parts of the Islamic world and filled important seats of learning. They were entrusted with issuing legal opinions and guiding the education of the masses, and became objects of heartfelt veneration for the multitudes. About fifty of them were appointed judges after his death during the 'Abbāsid reign. The law as codified by him was adopted as the law of the great part of the Muslim world. The 'Abbāsids, the Saljūqs, the Ottomans, and the Mughuls espoused it, and millions of people follow it today.

Abu Ḥanīfah, like his forefathers, earned his living by trade. He dealt in a kind of cloth, called *khazz*, in Kūfah. Gradually, his business flourished till he had a factory where this cloth was manufactured.<sup>7</sup> The business was not

<sup>5</sup> *Ibid.*, p. 59.

<sup>6</sup> *Ibid.*, p. 96; Vol. II, pp. 132, 136.

<sup>7</sup> Al-Yāfi'i, *Mir'at al-Jinān wa 'Ibrat al-Yaqẓān*, Dairatul-Maarif, Hyderabad, 1337/1918, Vol. I, p. 310.

restricted to Kūfah; his goods had a good market in far-off places. The growing recognition of his integrity converted his firm into a bank where people deposited huge sums of money on trust. These deposits ran to fifty million *dirhams* at the time of his death.<sup>8</sup> Extensive experience of financial and commercial matters gave him a deep insight into various aspects of law such as seldom falls to the lot of a theoretical lawyer. Later on, when he set himself to the task of codifying the Law of Islam this personal experience proved of immense help to him. A further testimony to his deep understanding and proficient handling of practical affairs is provided by the fact that when in 145/762 Maṣṣūr undertook the task of constructing the new city of Baghdād, he appointed abu Ḥanīfah to supervise the work, and for four years it remained under his supervision.<sup>9</sup>

In private life he was most pious, a man of known integrity. Once he sent out his partner in business to sell some merchandise. A part of the goods to be sold was defective. He instructed his partner to let the buyer know the defect. The partner, however, forgot to do so, and returned after selling the whole lot without apprising the buyer of the defect. Abu Ḥanīfah did not keep that money. He gave away the whole of it (and it amounted to 35,000 *dirhams*) in charity.<sup>10</sup>

His chroniclers have recorded occasions when ignorant persons would come to his firm selling goods at lower rates than what they were worth. Abu Ḥanīfah would tell them that their wares were worth more than what they put them at, and bought them at their actual rates.<sup>11</sup> All his contemporaries speak highly of his honesty. The famous learned divine, 'Abd Allāh bin Mubārak, said, "I have yet to see a more pious man than abu Ḥanīfah. What will you say about the man to whom they offered the world and its wealth and he kicked it away, who was flogged and remained steadfast, and who never accepted those posts and honours which people hanker after."<sup>12</sup>

Justice ibn Shubrumah said, "The world followed him but he would have none of it. As for us, the world would have none of us and we run after it."<sup>13</sup> According to Ḥasan bin Ziyād, abu Ḥanīfah never accepted a gift or favour from the rich.<sup>14</sup>

He was also very generous, never sparing in spending, particularly on the learned and the scholarly. A part of his profits was earmarked for them and expended throughout the year; and whatever of it was left over was distributed among them. Extending them such help he would say: "Be pleased to spend

<sup>8</sup> Al-Makki, *op. cit.*, p. 220.

<sup>9</sup> Al-Ṭabari, Vol. VI, p. 238; ibn Kathīr, *al-Bidāyah w-al-Nihāyah*, Vol. X, p. 97.

<sup>10</sup> Al-Khaṭīb, Vol. XIII, p. 358; Mulla 'Alī Qāri, *Dhail al-Jawāhir al-Muḍī'ah*, Dairatul-Maarif, Hyderabad, 1332/1913, p. 488.

<sup>11</sup> For an instance of this see al-Makki, *op. cit.*, pp. 219-20.

<sup>12</sup> Al-Dhahabī, *Manāqib al-Imām Abu Ḥanīfah wa Ṣāhibaihi*, Dār al-Kutub al-'Arabī, Egypt, 1366/1946, p. 115.

<sup>13</sup> Al-Rāghib al-Aṣḥabānī, p. 206.

<sup>14</sup> Al-Dhahabī, *op. cit.*, p. 26.

it on your needs, and thank none but God for it. I don't give you anything of mine. It is God's bounty; He has given it to me for your sake."<sup>15</sup> A number of his pupils entirely depended on him, particularly abu Yūsuf. He met all the expenses of the latter's house since his parents were poor and wanted their son to give up studies and take to some work to earn a living.<sup>16</sup>

That was the man, who tackled in the first half of the second/eighth century the knotty problems arising from the awkward circumstances that followed the "Right-guided" Caliphate.

*Abu Ḥanīfah's Pronouncements and Opinions.*—First of all we shall take those problems about which his opinions as recorded by himself are available to us. He was no prolific writer. Therefore, in order to know his views we have generally to resort to other reliable sources. But on certain issues, mainly raised by the above-mentioned sects (the *Shi'*ites, the *Khārijites*, the *Murji'*ites, and the *Mu'tazilites*) he has written, against his wont, with his own pen, drawing up in brief but eloquent words the creed and doctrine of the *ahl al-sunnah w-al-jamā'ah* (lit., the followers of the Prophet and his Companions' tradition) who formed (as they still do) by far the largest section of the Muslim community. Naturally, in an estimate of his work the first place must be given to what flows from his own pen.

*Al-Fiqh al-Akbar.*—We have already stated in the preceding chapter how the differences that cropped up among the Muslims during 'Alī's reign and the first years of the Umayyad regime led to the birth of four big sects in the community, which not only expressed but also adopted as tenets of faith contradictory opinions on certain vital issues affecting the constitution of Muslim society, the Islamic State, the sources of Islamic Law, and the decisions adopted by common consent in the earlier period. The creed of the majority in regard to these matters was clear; it was embodied in the practice of the common man and not infrequently in the spoken word or behaviour of the great divines and men of learning. But nobody had drawn it up in clear-cut words and put it into the form of a treatise. Abu Ḥanīfah was the first person to put down perspicuously in his famous work, *al-Fiqh al-Akbar*,<sup>17</sup> the Sunni point of view regarding matters of divergence against the doctrines of other sects.

<sup>15</sup> *Al-Khaṭīb*, Vol. XIII, p. 360; *al-Makki*, Vol. I, p. 262.

<sup>16</sup> *Ibn Khallikān*, Vol. V, pp. 422–23; *al-Makki*, Vol. II, p. 212.

<sup>17</sup> Before gaining currency as a term of the scholastics, the term *Fiqh* covered beliefs, general principles, law—in fact, everything under it. The differentiation was made by calling beliefs and general principles *Fiqh al-Akbar*, the fundamental or the main *Fiqh*, and abu Ḥanīfah gave that name to his compendium. Recently, some scholars have doubted the authenticity of some parts of this book; they believe them to have been included later. However, the authenticity of those parts which we discuss here is undoubted, as whatever other sources we tap to collect abu Ḥanīfah's opinions on these matters, we find these tallying with them. For instance, abu Ḥanīfah's *al-Waṣīyyah*, *al-Fiqh al-Absaṭ* reported by abu Muṭī' al-Balkhī, and *Aqīdah Ṭahāwīyyah* in which Ṭahāwī (c. 229–321/843–933) has described the doctrines reported from abu Ḥanīfah and his pupils, abu Yūsuf and Muḥammad bin Ḥasan al-Shaibānī.

The first question relevant to our discussion answered by him in the book is regarding the position of the "Right-guided" Caliphs. The dissenting sects had posed the question about some of them whether they were rightly raised to the office of the Caliphate. Some wanted to know who were superior to whom, and whether there was any among them who could not be called a Muslim at all. These questions were not merely queries regarding some personages of old history; in fact, they mooted another fundamental question, viz., whether the way these Caliphs were elected to their office was to be recognized as the constitutional way of electing the Head of the Islamic State or not. Moreover, if the title of anyone of them proved doubtful, the question would be raised whether the decisions taken by "consensus of opinion" in his regime would form part of the Islamic Law or not; whether his own decisions would continue to form precedents in law or cease to operate as such. Besides that, the questions whether they were entitled to the Caliphate, whether they were endowed with faith at all, and whether some of them were superior to others, naturally gave rise to another question of a very vital import, and that was, whether the Muslims of later times could repose any trust in either the members or the collective decisions of the early Islamic community brought up under the direct care and supervision of the Prophet of God, the people through whom the teachings of the Qur'ān, the Prophet's Tradition, and the Islamic Law came to be transmitted to later generations.

The second question related to the position of the Prophet's Companions. One of the sects, the *Shi'ah*, called the vast majority of these Companions sinners, gone astray, and even infidels, because they had selected the first three Caliphs to rule them; and a fair number was put outside the pale of faith or declared "transgressors" by the *Khārijites* and the *Mu'tazilites* for reasons of their own. This, too, was not a purely historical question, for it naturally led one to ask whether the laws and traditions transmitted by persons of doubtful *bona fides* to posterity would remain authentic sources of Islamic Law or not.

The third basic question dealt with in the book relates to "faith," its definition and distinction from unbelief, and the consequences of sin—issues of grave controversy and debate in those days among the *Khārijites*, the *Murji'ites*, and the *Mu'tazilites*. This again was not merely a theological question but one that was closely related to the constitution of Muslim society and its answer affected the civic rights and social relations of Muslims. A question that closely followed from it was whether in a Muslim State governed by the sinful and the wrong-doer it was possible to perform correctly such religious duties as the Friday and other prayers, or political functions like dispensing justice or participating in war.

Abu Ḥanīfah's answers to these questions embodying the Sunni creed are as follows:

1. "The best of men after the Prophet of God (on whom be peace) was abu Bakr. After him was 'Umar, after him 'Uthmān, and after him 'Alī. They were

all just men and abided by the right.”<sup>18</sup> *Aqīdah Ṭahāwīyyah* further explains it like this: “We believe abu Bakr (with whom God be pleased) to be the best of men after the Prophet of God (on whom be everlasting peace). We recognize his title of the Caliphate as prior to that of others, then ‘Umar’s, then ‘Uthmān’s, then ‘Alī’s—and they are the Right-guided Caliphs and the ‘Right-going leaders.’”<sup>19</sup>

It is a matter of interest to note that personally abu Ḥanīfah loved ‘Alī more than ‘Uthmān,<sup>20</sup> and believed that neither of them should be ranked above the other.<sup>21</sup> Formulating the creed, however, he accepted wholeheartedly the decision of the majority of his day in choosing ‘Uthmān as Caliph after ‘Umar, and agreed that in the ranking of the “Right-guided” Caliphs the order of their Caliphate was also the order of their superiority to one another.

2. “The Companions of the Prophet are not to be spoken of but respectfully.”<sup>22</sup> *Aqīdah Ṭahāwīyyah* elucidates it further: “We treat all the Companions of the Prophet respectfully. We do not love anyone of them beyond measure, nor censure anyone of them. We do not like one who bears them malice or mentions them with disrespect. We mention them in none but a good way.”<sup>23</sup>

Abu Ḥanīfah did not hesitate to express his opinion on the mutual war of the Companions, and said unambiguously that in the war between ‘Alī and his adversaries (and evidently the participants of the battles of the Camel and Ṣiffin are included among them) ‘Alī stood by right more than they,<sup>24</sup> yet he altogether refrained from inflicting reproach on the other side.

3. “Faith is synonymous with owning and believing. To have faith is to own and believe (in God and His Prophet).”<sup>25</sup> In *al-Waṣīyyah* it is explained in these words: “To have faith in something is to own it with the tongue and believe in it from the heart,” and further: “Faith is not owning alone, nor believing alone.” In another place we find: “Action is something different from faith, and faith different from action. Often a man is exempt from a certain action but he is not exempt from faith. For instance, it may be said

<sup>18</sup> Mulla ‘Alī Qārī, *Sharḥ al-Fiqh al-Akbar*, Delhi, 1348/1929, pp. 74–87; al-Maghnisāwī, *Sharḥ al-Fiqh al-Akbar*, Dairatul-Maarif, Hyderabad, 1321/1903, pp. 25, 26.

<sup>19</sup> Ibn abi al-‘Izz al-Ḥanafī, *Sharḥ al-Ṭahāwīyyah*, Dār al-Ma‘ārif, Egypt, 1373/1953, pp. 403–16.

<sup>20</sup> Al-Kardari, Vol. II, p. 72.

<sup>21</sup> Ibn ‘Abd al-Barr, *al-Intiqā’*, al-Maktabat al-Qudsi, Cairo, 1370/1950, p. 163; al-Sarakhsi, *Sharḥ al-Siyar al-Kabir*, Vol. I, Shirkah Musāhmah Miṣriyyah, Egypt, 1957. The same was Mālik’s and Yahya bin Sa‘īd al-Qaṭṭān’s opinion. Ibn ‘Abd al-Barr, *al-Istī‘āb*, Vol. II, p. 467.

<sup>22</sup> Mulla ‘Alī Qārī, p. 87; al-Maghnisāwī, p. 26.

<sup>23</sup> Ibn abi al-‘Izz, p. 398.

<sup>24</sup> Al-Makki, Vol. II, pp. 83, 84; al-Kardari, Vol. II, pp. 71, 72. This too was not the opinion of abu Ḥanīfah alone. All the *ahl al-sunnah* had agreed upon this. Ibn Hajar, *al-Iṣābah*, Maṭba‘ah Muṣṭafa Muḥammad, Egypt, 1939, Vol. II, p. 502.

<sup>25</sup> Mulla ‘Alī Qārī, p. 103; al-Maghnisāwī, p. 33.

that a poor man is exempt from the payment of *zakāt* (prescribed charity), but it cannot be said that he is exempt from bearing faith also.”<sup>26</sup> Thus abu Ḥanīfah refuted the *Khārijite* theory that action formed part of faith and hence sin was synonymous with disbelief, or, in other words, that a crime necessarily meant treason.

4. “We do not excommunicate a Muslim for any sin, however grave it may be, unless he affirms that it is ‘allowed.’ We do not divest him of belief. We call him a believer. A believer may be a transgressor, without being an infidel.”<sup>27</sup>

In *al-Waṣīyyah* he writes: “The sinners among the followers of Muḥammad (on whom be peace) are all believers, not infidels.”<sup>28</sup> *Aqīdah Ṭahāwīyyah* elucidates it further: “A man does not go out of the pale of faith except by denying the creed that had put him inside it.”<sup>29</sup> A discussion of the *Khārijites* with abu Ḥanīfah over this issue throws further light on this doctrine and its social consequences. A large party of them once came to him and said, “There are two biers at the gate of the Mosque. One is of a drunkard who died drinking, the other of a woman who got illicitly pregnant and took her own life in shame.”

“To which community did they belong? Jews, were they?” he asked.

“No,” they said.

“Christians, then, or Majūsīs?”

“No,” they answered again.

“Then, to which community did they belong?” asked he.

“To the community which bears witness to the creed of Islam,” they replied.

“Is that one-third of the faith, or one-fourth, or what?” asked he.

They said, “There is no one-third or one-fourth of faith.”

“After all, what part of faith is this bearing witness to the creed of Islam?” said he.

“The whole faith,” said they.

“When you yourself call them faithful, what is it you want of me?” asked he.

“We ask whether they would go to heaven or hell.”

He replied, “If you ask me that, I will say about them what the Prophet of God, Abraham, said about sinners worse than they, ‘O God, he who follows me is mine, and he who disobeys—Thou art the Forgiving, the Compassionate’; or what the Prophet of God, Jesus, said about sinners worse than they, ‘If You punish them they are Your creatures, and if You forgive them, Thou art All-Powerful and Wise’; or what the Prophet of God, Noah, said, ‘Their reckoning rests with God, would that you understood; and I do not wish to turn my back upon the believers.’”<sup>30</sup>

<sup>26</sup> Mulla Ḥusain, *al-Jauharat al-Munīfat fi Sharḥ Waṣīyyat al-Imām Abu Ḥanīfah*, Dairatul-Maarif, Hyderabad, 1321/1903, pp. 3, 6, 7.

<sup>27</sup> Mulla ‘Alī Qārī, pp. 86–89; al-Maghnisāwī, pp. 27–28.

<sup>28</sup> Mulla Ḥusain, p. 6.

<sup>29</sup> Ibn abi al-‘Izz, p. 265.

<sup>30</sup> Al-Qur’ān, xiv, 27; v, 118; xxvi, 113–14.

Hearing this the *Khārijites* felt outwitted and avowed their mistake.<sup>31</sup>

5. "Prayers can be offered behind any of the faithful, good or bad."<sup>32</sup> *ʿAqīdah Taḥāwīyyah* elucidates it further like this: "The pilgrimage and *jihād* (war) will continue to be performed to the Day of Judgment under the rulers of the faithful, whether they be good or bad. Nothing will make them unlawful or discontinue them."<sup>33</sup>

Al-Jaṣṣāṣ has more clearly explained abu Ḥanīfah's point of view in this matter. "Some people," writes he, "suppose that abu Ḥanīfah approves the Imāmate or Caliphate of the corrupt. If it has not been deliberately invented, the misunderstanding probably springs from this that abu Ḥanīfah (and not he alone, all the learned scholars of Iraq whose opinions are widely known are one with him in this) says that if a judge is himself just, his decisions will be accepted, no matter how corrupt a master has appointed him; and prayer may be lawfully offered behind corrupt masters despite their corruption. This attitude is absolutely correct in its own place, but it does not mean that abu Ḥanīfah finds no fault with the Caliphate of the corrupt."<sup>34</sup>

These elucidations make it clear that abu Ḥanīfah, unlike the *Khārijites* and *Mu'tazilites*, differentiated between Caliphs *de jure* and Caliphs *de facto*. A necessary corollary to the position taken by the above-mentioned sects was that in the absence of a just and pious ruler, i.e., a Caliph *de jure*, all functions of Muslim society and State would remain suspended. There would be no pilgrimage, and no Friday or other congregational prayer; the courts would stop, and there would be no other religious, social, or political work. Abu Ḥanīfah, on the other hand, contended that if at a time the Muslims were deprived of a Caliph *de jure*, the functions of their society would continue to be exercised lawfully under a Caliph *de facto*, though his right to Caliphate may be disputable. In the pages to come we shall point out what, according to him, were the essential prerequisites of a lawful Caliphate and what he thought of corrupt and unjust Caliphs.

6. "We do not say that sin does not do a believer any harm. We neither say that a believer will never go to hell, nor that he will live eternally in hell if he is a transgressor."<sup>35</sup> "We also do not say, like the *Murji'ites*, that our good deeds will be certainly rewarded and our bad deeds undoubtedly forgiven."<sup>36</sup>

*ʿAqīdah Taḥāwīyyah* has a further addition to it: "We decide in respect of no believer that he is destined to go to heaven or to hell. We do not accuse any Muslim of infidelity, polytheism, or hypocrisy, unless we see him actually

engaged in them. As for intentions and motives we leave them to God to judge."<sup>37</sup>

Thus abu Ḥanīfah steered a middle course through the opinions held by the *Murji'ites*, the *Khārijites*, and the *Mu'tazilites*, and formulated a doctrine of balance which, on the one hand, preserves the Muslim society from disintegration through mutual hatred and violence, and, on the other, insures against its falling into moral indiscipline and getting emboldened to commit sins with impunity.

*Abu Ḥanīfah on State and Caliphate.*—The opinions mentioned above related to issues which had cropped up in consequence of the political turmoil of the day and vitally affected the legal system and the political and social orders of Muslim society. Now, let us examine abu Ḥanīfah's views concerning the State and Caliphate. Since there is no work of his own touching these matters, we have to resort to the following two kinds of sources for information: first, his opinions quoted in the traditions and books of the Ḥanafi school; and, secondly, the attitude he adopted towards his contemporary governments of the Umayyads and the 'Abbāsids. The latter also includes a number of spoken words coming from his mouth during the course of his struggle with these governments, and these throw further light on his points of view under discussion.

*The Problem of Sovereignty and Legislation.*—Abu Ḥanīfah's views on sovereignty were identical with the generally known basic view of Islam on this issue, namely, (1) that the true sovereign is God, (2) that the Prophet is to be obeyed as God's accredited vicegerent, and (3) that the *Sharī'ah*, i.e., the Law of God and His Prophet, is the supreme Law to which all must submit without demur or reservation. Abu Ḥanīfah, pre-eminently a jurist, has stated this doctrine rather in terms of law than of politics. He says: "When I find an order in the Book of God, I take it from there. When I do not find it there I take it from the accredited practice, word, or tradition of the Prophet, coming down to us through reliable sources. When I do not find it either in the Book of God or in the Prophet's Sunnah, I follow the (agreed) opinion of the Prophet's Companions. In case of difference of opinion among them I adopt the opinion I like and reject the one I do not like; but I do not reject them all to follow an opinion from outside. . . . As for others, I have as much right to sift and draw conclusions as they have."<sup>38</sup>

Ibn Ḥazm states: "All his pupils are agreed that abu Ḥanīfah's practice was that even a weak tradition was to be preferred to (one's own opinion formed by) analogical reasoning (*qiyās*) or private judgment (*rā'y*)."<sup>39</sup>

This leaves absolutely no doubt that abu Ḥanīfah regarded the Qur'ān and the Sunnah as the final authority. Legal sovereignty, according to him, rested with God and the Prophet; and reason and judgment (*qiyās* and *rā'y*) were

<sup>31</sup> Al-Makki, Vol. I, pp. 124-25.

<sup>32</sup> Mulla 'Ali Qāri, p. 91; al-Maghnisāwī, p. 28.

<sup>33</sup> Ibn abi al-'Izz, p. 322.

<sup>34</sup> *Aḥkām al-Qur'ān*, Vol. I, pp. 80-81; al-Sarakhsī has also explained this in his *al-Mabsūṭ*, Maṭba'at al-Sa'ādah, Egypt, 1324/1906, p. 130.

<sup>35</sup> Mulla 'Ali Qāri, p. 92; al-Maghnisāwī, pp. 28-29.

<sup>36</sup> Mulla 'Ali Qāri, p. 93; al-Maghnisāwī, p. 29.

<sup>37</sup> Ibn abi al-'Izz, pp. 312-13.

<sup>38</sup> Al-Khaṭīb, Vol. XIII, p. 368; al-Makki, Vol. I, p. 89; al-Dhahabi, p. 20.

<sup>39</sup> Al-Dhahabi, p. 21.

to be employed in the service of legislation only in matters where they had given no instruction. The precedence given by him even to an "isolated" opinion of the Companions was also based on the possibility of their being aware of some instruction from the Prophet (about the matter under reference) which may have been the basis of that opinion. That was also why, when he saw a difference among the Companions, he accepted the opinion of someone of them rather than differ with all of them—he would avoid the danger of going against the Sunnah even inadvertently. In any case, he employed to the utmost his power of reasoning and judgment to find out whose opinion seemed best to approximate to the Sunnah.

The charge that he preferred his own discretion to a clear ordinance (*naṣṣ*) was laid at his door even in his life-time but he refuted it saying, "God knows that he who stated that I preferred my own discretion to 'ordinance' told a lie and accused me unjustly. How can we dare use our discretion when we have an 'ordinance'?"<sup>40</sup> The Caliph Manṣūr once wrote to him saying that he had heard that he (abu Ḥanifah) gave precedence to deductions from analogy over the Prophet's tradition. In reply, he wrote: "O Commander of Believers, what you have heard is incorrect. I go first by the Book of God, then by the Sunnah of the Prophet, then the decisions of abu Bakr, 'Umar, 'Uthmān, and 'Ali, and then the decisions of other Companions; but when I find disagreement among them, I resort to discretion."<sup>41</sup>

*Establishment of the Caliphate.*—Regarding the Caliphate his views were most clear-cut and unambiguous. According to him, to seize power by force and later regularize it by exacting allegiance under duress was no lawful way of being chosen for it. A Caliph should be chosen after consultation and in conference with the wise who are entitled to give opinion (*ahl al-rā'y*). Abu Ḥanifah expressed this opinion in face of the peril of losing his life. Manṣūr's Chamberlain, Rabi' bin Yūnus, relates that the Caliph summoned Mālik ibn abi Dhi'b and abu Ḥanifah before himself and asked, "What do you say about this power that God has given me over the people—am I deserving of it?" Mālik answered, "Had you not been deserving, God would not have conferred it on you." Said ibn abi Dhi'b, "God grants the kingdom of the world to whom He pleases, but the kingdom of the hereafter is given to him who strives for it and is helped by God to make way to it. The help of God will attend you if you obey Him; in case you disobey, it will keep away from you. As for the Caliphate, the truth is that only a conference of the God-fearing can institute it, and one who seizes it by force has no righteousness in him. You and your associates are deprived of the help of God, and have turned aside from truth. Now, if you ask the Almighty to grant you peace and try to gain nearness to Him with deeds of piety, you may win His grace; otherwise you are only a self-seeker."

<sup>40</sup> Al-Sha'rāni, *Kitāb al-Mizān*, Maṭba'at al-Azhariyyah, Egypt, 3rd ed., 1925, Vol. I, p. 61.

<sup>41</sup> *Ibid.*, p. 62.

Abu Ḥanifah tells us that when ibn abi Dhi'b spoke those words, Mālik and he folded their clothes about them expecting his head to go off his shoulders that very moment and his blood to fall on these clothes. But Manṣūr turned to abu Ḥanifah and inquired, "What say you?" He replied, "The man who sincerely seeks the right path to guide himself eschews wrath. If you consult your conscience you will see that you have not invited us for the sake of God but to make us say, out of dread, something that suits you and that should reach the people. The truth is, you have become a Caliph without even a couple of men from amongst the *ahl al-fatwa* (those whose opinion is respected as authoritative) agreeing to it, whereas a Caliph should be chosen with the conference and concurrence of Muslims. You know, abu Bakr refrained from making decisions for six months until the (news of the) Yamanites' allegiance arrived." Then all the three rose and took their way. Manṣūr despatched Rabi' after them with a bag full of coins for each with the instruction that if Mālik accepted it, it should be made over to him, but if abu Ḥanifah or ibn abi Dhi'b accepted it, he should bring their heads to him. When the gift was offered to Mālik he took it, but when Rabi' offered it to ibn abi Dhi'b he said that he did not consider it lawful for Manṣūr himself, how it could be lawful for him. And abu Ḥanifah said, "I won't touch it, not even if you cut off my head." When Manṣūr heard of it, he said, "Their contentment has saved their lives."<sup>42</sup>

*A Caliph's Qualifications.*—Till abu Ḥanifah's time the qualifications which entitled a man to Caliphate were not described at length as they were compiled later by scholars like Māwardi and ibn Khaldūn. They were for the most part self-evident, for instance, he should be a Muslim, a male, free, and well versed in religion, and sound in body and mind. Two things, however, were doubtful and needed clarification: first, whether a ruthless or corrupt person could become a Caliph or not; secondly, whether it was necessary for a Caliph to belong to the tribe of Quraish. Abu Ḥanifah's opinion with regard to the first was that a Caliph must be a just person. One who is cruel and corrupt cannot be a Caliph, a judge, a governor, a pronouncer of legal verdict (Mufti), or an arbiter. If such a person comes to office, his Caliphate is null and void and the public owe him no obedience. However, notwithstanding his usurpation of power, all the social dealings and obligations executed by Muslims under him in accordance with the *Shari'ah* will have legal sanction and the just decisions of the judges appointed by him will take effect. Abu Bakr al-Jaṣṣās, a well-known Ḥanafi jurist, has explained this point in greater detail. He observes: "It is not lawful that a cruel or corrupt person should be a prophet or his successor (*khaliṭ*) or a judge or hold any office by virtue of which he should be in a position to impose his will on the people in matters relating to religion: he cannot, for example, be a Mufti or a witness or a reporter of the Prophet's traditions. The Qur'ānic

<sup>42</sup> Al-Kardari, Vol. II, pp. 15–16.

verse: "My covenant does not extend to the wrong-doers"<sup>43</sup> shows that all those people who come to the helm of affairs in matters connected with religion must be just and virtuous. This verse categorically proves that the Caliphate of the corrupt is unlawful. No person of wicked reputation can be a Caliph. If any of that character should install himself in that office, the people are under no obligation to follow or obey him. The same was meant by the Prophet of God (on whom be peace) when he said that none among the created was entitled to command obedience in defiance of the Creator. The verse is also conclusive that no corrupt person can become a judge, a governor, or a magistrate; and if he becomes one, his orders will not be valid. Nor can his evidence be acceptable, nor his transmission of a report from the Prophet of God, nor the verdict (*fatwa*) of which he is the pronouncer.<sup>44</sup>

Al-Jaṣṣāṣ further affirms that this was abu Ḥanīfah's opinion. He regrets how unjust it is to accuse him of allowing the Caliphate of the corrupt. We have already alluded to that controversy and need not repeat it here.

Al-Dhahabī also affirms this to be abu Ḥanīfah's view. According to him, abu Ḥanīfah held that the Caliph who misused public money (*jay'*) or gave unjust orders was not entitled to remain Caliph and his orders were not valid.<sup>45</sup>

About the second question abu Ḥanīfah's opinion was that the Caliph should belong to the tribe of Quraish.<sup>46</sup> Not this alone; it was the agreed view of all the Sunnites.<sup>47</sup> However, they held this view not because the Caliphate was constitutionally the exclusive right of one tribe, but because in the particular circumstances of those days only a Quraishite Caliph could hold all Muslims together. In other words, this opinion was based on political expediency of the time and not on any legal or constitutional right of the Quraish. Ibn Khaldūn explains in detail that in those days the Arabs were the mainstay of the State and there were far more chances of the Arabs agreeing on a Quraishite Caliph than on anyone from some other tribe. The chances of strife and rift that lay in the choice of a non-Quraishite Caliph were so many that none could afford to put the Caliphate in that peril.<sup>48</sup> That incidentally unfolds the wisdom and implications of the Prophet's timely instruction that the Imāms should be chosen from the Quraish.<sup>49</sup> Had the Caliph's office been for ever forbidden to the non-Quraishites, 'Umar would not have said at the hour of his death, "If Ḥudhaifah's freed slave Sālim, were alive, I would have proposed him my

successor."<sup>50</sup> The Prophet, while instructing that the Caliphate should go to the Quraish, had made it clear that this office would be held by the Quraish as long as they retained certain merits.<sup>51</sup> This clearly implied that when the Quraish became bereft of those merits, the Caliphate should devolve on the non-Quraish. This was the essential difference between the view of the Sunnites including abu Ḥanīfah on one side and that of the Khārijites and Mu'tazilites on the other. The latter allowed Caliphate for the non-Quraishites irrespective of all conditions. Not only that; they went a step further and said that the non-Quraishites had a better title to it. Their main anxiety seemed to be democracy, even though it might lead to confusion and disintegration. With the Sunnites, democracy and the stability of the State were equally important considerations.

*The Exchequer and the Public's Right of Ownership.*—The most reprehensible of all indulgences of the Caliphs of his day in the eyes of abu Ḥanīfah were their reckless waste of public exchequer and their illegal seizure of people's properties. As we have already quoted al-Dhahabī, according to abu Ḥanīfah, oppression and illegitimate use of public money in a ruler rendered his title to Caliphate void. Not only that; he even did not allow the tokens of goodwill and presents received from foreign States to be made the personal property of the Caliph. These things also were to be deposited in the treasury, not with the Caliph or his family, for the obvious reason that had he not been the Head of the State and thereby become conspicuous in the international world, none would have sent him those presents.<sup>52</sup> He also objected to the Caliph's squandering of public money and his giving gifts out of it. This was one of the main reasons why he himself accepted no gifts from the Caliphs.

*Separation of the Judiciary from the Executive.*—His views on the position of the judiciary *vis-à-vis* the executive were unequivocal. If justice was to be ensured, he said, the judiciary must be independent of the executive. Not only that; the judge must also be able to enforce his decree against the Caliph if the latter encroached upon the rights of people. Towards the close of his life when he was sure that the Government would not let him live any more, he gathered his disciples and addressed himself to them. Among other important things, he gave them this instruction: "If the Caliph is guilty of encroachment upon the rights of the people, the judge next to him in rank (i.e., the Chief Justice) should make him submit to the rule of Law."<sup>53</sup>

The main thing which prevented him from accepting an official position, particularly that of a judge during the Umayyad and 'Abbāsīd rule was that he did not see the judiciary as independent. There was no chance of making the Caliph submit to the rule of Law; on the other hand, he feared that he would be made an instrument of injustice and asked to give wrong decisions,

<sup>43</sup> Al-Qur'ān, ii, 124.

<sup>44</sup> Al-Jaṣṣāṣ, Vol. I, p. 80.

<sup>45</sup> Al-Dhahabī, p. 17; al-Makki has also quoted this opinion of abu Ḥanīfah, Vol. II, p. 100.

<sup>46</sup> Al-Mas'ūdī, Vol. II, p. 192.

<sup>47</sup> Al-Shahrastānī, Vol. I, p. 106; 'Abd al-Qāhir Baghdādī, p. 340.

<sup>48</sup> Muqaddimah, pp. 195-96.

<sup>49</sup> Ibn Hajar, *Fath al-Bārī*, Vol. XIII, pp. 93, 96, 97; Aḥmad, *Musnad*, al-Maṭba'at al-Maimaniyyah, Egypt, 1306/1888, Vol. III, pp. 129, 183; Vol. IV, p. 421; abu Dāwūd al-Ṭayālīsī, *Musnad*, Dairatul-Maarif, Hyderabad, 1321/1903, Tr. No. 926, 2133.

<sup>50</sup> Al-Ṭabari, Vol. III, p. 192.

<sup>51</sup> Ibn Hajar, Vol. XIII, p. 95.

<sup>52</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabir*, Vol. I, p. 98.

<sup>53</sup> Al-Makki, Vol. II, p. 100.

and that not only the Caliph himself but also those attached to the palace would interfere with his work.

Yazīd bin 'Umar bin Hubairah was the first of the Umayyad governors of Iraq who pressed abu Ḥanifah to accept office. This was in 130/747 when the upsurges in Iraq against the Umayyad regime were rising with a speed that completely overthrew that Government within a couple of years. Ibn Hubairah wanted to enlist the support of influential men of learning and use them to the advantage of the Umayyad cause. He invited ibn abi Laila, Dāwūd bin abi al-Hind, ibn Shubrumah, and others and gave them lucrative appointments. Then summoning abu Ḥanifah, he said, "Here I give you my seal. No order will be enforced here till you put the seal on it, and no money will be drawn from the treasury without your sanction." But abu Ḥanifah declined to accept the responsibility. Yazīd put him in prison and threatened him with whipping. Then the other learned men came round abu Ḥanifah and requested him to take compassion on himself. "This service is as repugnant to us," said they, "as it is to you. But we have accepted it under duress; so should you." Abu Ḥanifah replied, "Ah! had he asked me to count the gates of the mosque of Wāsiṭ, I would not have done it for his sake. Then how can I agree that he should write the death warrant of an innocent person and I should put the seal on that order? By God, I will accept no share of his responsibility." Ibn Hubairah then made him other offers but found him cold. At last he decided to appoint him the Chief Judge of Kūfah and swore that if abu Ḥanifah declined the appointment he would have him flogged. Abu Ḥanifah swore in return saying that the flogging of this world was easier for him to endure than the flogging of the hereafter, reiterating that he would never accept it, even though that cost him his life. At last the tyrant gave him twenty, or (according to another report) thirty, blows of the stripe on the head. According to some accounts, he kept it up with ten stripes daily for about eleven days, but found his victim firm like a rock. Then someone informed him that he was likely to die. Ibn Hubairah replied, "Is there none to counsel this man to ask me for a reprieve?" When abu Ḥanifah heard of this he asked to be set free to consult his friends. Ibn Hubairah set him free, at which he left Kūfah for Makkah, not to return to it before the final wiping out of the Umayyad dynasty.<sup>54</sup>

In the 'Abbāsid period again Manṣūr insisted on his accepting the office of a judge. As we shall presently see, abu Ḥanifah having openly participated in a revolt launched against Manṣūr by al-Nafs al-Zakiyyah and his brother Ibrāhīm, Manṣūr cherished such malice against him, that in al-Dhahabī's words, he was all but consumed in the fire of wrath.<sup>55</sup> However, it was not easy to lay hands upon a person of abu Ḥanifah's eminence. Manṣūr knew how the murder of Ḥusain had provoked feelings of wrath against the

Umayyads and how easily had they been uprooted on that account. Therefore, instead of killing him, he would rather lure him into a cage of gold and use him to advance his ends. With this in view he offered him the post of a judge again and again, in the end asking him to become the Chief Justice of the whole of the 'Abbāsid Empire, but abu Ḥanifah always put him off under one pretext or another.<sup>56</sup>

Ultimately, seeing him persist too much he told him frankly the reason why he was unable to accept these offers. On one such occasion he excused himself politely saying, "None can be fit to become a judge unless he has strength enough to impose law on you, your princes, and your commanders. I have not that strength in me. I am so built that whenever you call me, I cannot breathe easily till I go out of your presence."<sup>57</sup> On another occasion the talk took a harsh turn. Addressing the Caliph he said, "Even if I accepted this office willingly and not reluctantly, sure enough I would not prove worthy of your trust. For if I decided a case against your desire and you wanted me to alter the decision on pain of being pushed into the Euphrates to drown, I would rather be drowned than alter my decision. Then there are your courtiers, not a few of whom desire a judge to defer to their wishes to remain in your good books."<sup>58</sup> When talks like these led Manṣūr to conclude that this man could not be caught in the cage of golden bars, he resorted to open persecution. He had him whipped and flogged, put him in jail where they subjected him to tortures of hunger and thirst. Later he was confined in a cell wherein he died, according to some, a natural death, according to others, of poisoning.<sup>59</sup>

*Freedom of Expression: A Right and a Duty.*—According to abu Ḥanifah, freedom of expression in a Muslim society and in an Islamic State is of as much importance as the independence of the judiciary. The Qur'ān terms this freedom as *amr bi al-mar'uf* and *nahī 'an al-munkar* (enjoining the right and forbidding the wrong). No doubt, an unqualified right of freedom of expression may sometimes assume an unbecoming, mischievous, immoral, or even offensive form which no law can tolerate. But the Qur'ān, by using the above-mentioned term for this freedom, clearly distinguishes it from all other kinds of freedom and, thus, circumscribing it within well-defined limits, declares it to be not only an inalienable right but also a duty of the public. Abu Ḥanifah was particularly conscious of this right and duty, because the political order of his day had rid the people of this right to such an extent that they actually doubted if it had anything of the nature of a duty about it. We have pointed out elsewhere that the Murjītes by preaching ultra-liberal doctrines were emboldening people towards sin. The Ḥashwīyah professed that "enjoining the right and forbidding the wrong" where the government was involved was

<sup>54</sup> Al-Makki, Vol. II, pp. 72, 173, 178.

<sup>55</sup> *Ibid.*, Vol. I, p. 215.

<sup>56</sup> *Ibid.*, Vol. II, p. 170; al-Khaṭīb, Vol. XIII, p. 328.

<sup>59</sup> Al-Makki, Vol. II, pp. 173, 174, 182; ibn Khallikān, Vol. V, p. 46; al-Yāfi'i, Vol. I, p. 310.

<sup>54</sup> *Ibid.*, pp. 21–24; ibn Khallikān, Vol. V, p. 41; ibn 'Abd al-Barr, *al-Intiqā'*, p. 171.

<sup>55</sup> *Manāqib al-Imām*, p. 30.



mischievous and the Umayyad and 'Abbāsīd governments crushed the spirit of the people to raise a voice against the corruption and high-handedness of the ruling cliques. Abu Ḥanīfah, with both speech and action, attempted to resurrect this spirit amongst the people and elucidated the extent to which it could be exploited. This is clear from abu Ḥanīfah's answer to a question from Ibrāhīm al-Ṣā'igh related by al-Jaṣṣās.<sup>59a</sup>

Abu Ḥanīfah asserted the right of freedom of expression against law-courts also in the same manner. If any court of law gave a wrong decision he would not hesitate to point out whatever flaws of law or procedure he found in it. With him the respect of the courts did not mean letting the courts give wrong decisions. He was forbidden to pronounce verdicts on this account for a long time.<sup>60</sup> He was so zealous in the matter of freedom of expression that he did not consider it lawful to imprison or otherwise punish a person who spoke ill even of a legitimate ruler or his just government, not even if he went to the extent of abusing the Caliph and expressing an intention to kill him, until there was a resolve on his part of an armed revolt or breach of peace. He argued this from an incident during the Caliphate of 'Alī. Five persons were arrested and brought before him on the charge of abusing him openly in the streets of Kūfah. One of them was also accused of saying that he would assassinate him. 'Alī ordered their release. It was said, "But they intended to kill you." He asked in reply: "But should I kill them only for expressing the intention to kill me?" It was added, "But they also abused you." He said, "If you like you may also abuse them."

*The Question of Rebellion against Tyrannical Rule.*—Another important question that baffled the people of those days was whether or not it was lawful for the Muslims to rise in revolt against a ruler who perpetrated tyranny or transgressed the limits of *Shari'ah*. The Sunnis themselves were divided on this. A large section of the Traditionists (*ahl al-hadiṭh*) allowed that they could raise voice against his tyranny and speak their mind before him but they could not rise in rebellion, even though he should seize upon their lawful rights and indulge in unjust bloodshed and open transgression.<sup>60a</sup> But abu Ḥanīfah's creed in this matter was that the Caliphate of an unjust incumbent was basically wrong and insupportable, and deserved to be overthrown; that people not only had the right, but it was their duty to rise in rebellion against it; that such a rebellion was not only allowed but obligatory, provided, however, that it promised to succeed in replacing the tyrant or transgressor by a just and virtuous ruler, and not fizzle out in mere loss of lives and power.

*Private Council and Codification of Islamic Law.*—Abu Ḥanīfah's greatest work which won him lasting eminence in the history of Islam was that he filled, on his own initiative, the vast gap caused in the Islamic legal system

by the discontinuance of the *shūrā* (the Consultative Council) after the "Right-guided" Caliphate. We have already alluded to the consequences that followed this ill-happening. The loss resulting from this state of affairs lasting over a century was a matter of grave concern to every thinking person. The State had extended its boundaries from Spain to Sind, taking in its fold scores of peoples with various cultures, customs, rites, and habits of their own. Facing it at home were problems relating to finance, commerce, agriculture, industry, marital relations, and the rest. There were civil and criminal cases to decide and ever-new constitutional, legal, and procedural problems to solve. Abroad, the relations of this large State with the other States of the world, and issues like war, peace, diplomatic relations, foreign trade, communications (by land and sea), customs, etc., demanded urgent attention. As the Muslims were a people with a distinct ideology, and claimed to guide themselves by principles and law of their own, it was necessary for them to solve their problems in the light of that ideology and those laws and principles. But the institution of *shūrā* having been discontinued there was no other properly established body or institution in which the trusted scholars, jurists, and lawyers of the community should meet to deliberate and devise such an authentic solution of every outstanding legal issue, as should be recognized as the accredited and uniform law of the land throughout the State. Thus, Islam was faced with a mighty challenge and there was no machinery to meet it.

The loss was being felt all round, from the Caliph to the governors and judges. It was not easy for every judge, lawyer, or head of a department to decide the innumerable problems that rose every day, there and then, on the strength of his own knowledge or by dint of his own understanding. Not only that; such individual decisions also conflicted with one another and created confusion. But a body whose verdict carried authority could be established only by the Government which, unluckily, lay in the hands of such people as knew for certain that they enjoyed no esteem or confidence with the public, nor were they prepared to face, nay even endure, the learned, who, they feared, would confront them with things they would not like. They also knew that laws enacted under their patronage could never be accepted as parts of the Law of Islam. Ibn al-Muqaffa' proposed to Maṣṣūr that in order to stop this gap he should convene a council of the learned lawyers of all schools of thought who should sit together and express their opinions on the various problems in hand. After hearing these opinions the Caliph himself should pronounce his decision in every case and that decision should be adopted as law. But Maṣṣūr knew his own position too well to make this mistake. His decisions could not equal decisions of abu Bakr and 'Umar. They could at best have lasted with his life. Even then he doubted whether he would find anyone in the whole realm who would respect and willingly follow a law enacted by him. He could make a secular law all right, but he could not make a law which would become incorporated in the Islamic juridical code.

In these circumstances it struck abu Ḥanīfah to try an entirely new path to

<sup>59a</sup> *Ahkām al-Qur'ān*, Vol. I, p. 81.

<sup>60</sup> Al-Kardari, Vol. I, pp. 160, 165, 166; ibn 'Abd al-Barr, *al-Intiqā'*, pp. 152, 153; al-Khaṭīb, Vol. XIII, p. 351.

<sup>60a</sup> Al-Ash'ari, Vol. II, p. 125.

redeem the loss, and this was to institute a private legislative body, on his own initiative, independent of the Government. Only a far-sighted person like him could think of such a plan. And only he could dare the adventure who trusted his own resources, character, and moral prestige well enough to be sure that the laws passed by a body raised under his auspices would enforce themselves by dint of their excellence in sufficiency, precision, adaptability, and the moral influence of their devisers, even without any political sanction behind them, and that they would be adopted by the people of their own accord, and recognized by the different governments of their own free-will. Abu Ḥanifah was no seer of the hidden future to perceive the results which his effort produced within half a century of his departure, but he knew himself and his colleagues well enough. He knew the collective temperament of his community and had an eye on the circumstances of the day. With the perfect eye of a man of sharp intelligence and foresight he gauged that he could fill the yawning gap with his private endeavour if he would, and that surely it would be filled satisfactorily.

Abu Ḥanifah's own pupils, trained under his care and guidance in his college of law for years in deliberating over legal questions, looking into them in the proper scientific spirit, and arriving at conclusions with arguments, formed the members of this council. Almost all of them had learnt the Qur'ān, literature, history, and *Sirah* (biography of the Prophet) not only from abu Ḥanifah but also from many other learned scholars of the day. Many of them had specialized in certain branches. Some had made a name in the field of "arguing conclusions by analogy," others for incomparable knowledge of the Prophet's traditions and precedents set by the Companions, judges, and Caliphs of old. Others yet had a reputation for interpreting the Qur'ān or for being skilled in a particular branch of Law or in grammar or *Sirah*. Abu Ḥanifah himself once described them saying: "These are thirty-six men of whom twenty-eight are fit to be judges, six to pronounce legal verdicts, and two good enough to teach judges and jurists."<sup>61</sup>

The procedure of work adopted in this council as reported by the authentic chroniclers of abu Ḥanifah should be described in their own words. Al-Muwaffaq bin Ahmad al-Makki (d. 568/1172) writes: "Abu Ḥanifah framed his legal system with the consultations of his learned pupils. His passion to do all that he could for the sake of his religion, and his love of God, the Prophet, and the believers did not allow him to undertake this work by himself to the disregard of his pupil colleagues. He put every problem before them, threw light on its various aspects, carefully heard all that each one of them had to say on it, and put forth his own point of view for their consideration. These deliberations and discussions were so exhaustive that some questions took a month or even more to decide. At last when unanimity was achieved abu Yūsuf recorded it in the fundamental compilations of Ḥanafi Law."<sup>62</sup>

Ibn al-Bazzāz al-Kardari (d. 827/1424), author of *Fatāwa Bazzāziyyah*, says in his *Manāqib al-Imām al-A'zam*: "His pupils debated each question to their heart's content and discussed it from every point of view. Abu Ḥanifah, the while, sat quietly listening to the discussion. When it was his turn to speak, there was such a hush in the house as if there was none other present."<sup>63</sup>

'Abd Allah bin Mubārak tells that once the discussion on an issue lasted three days. On the evening of the third day he heard cries of *Allah-u akbar* (God is most great) from within and understood that a solution had been achieved.<sup>64</sup> It is recorded by another pupil, abu 'Abd Allah, that when abu Ḥanifah got his views recorded on an issue, he had them afterwards read out to him to ensure their correctness. His own words are: "I read out the Imām's words to him. Abu Yūsuf (in recording the proceedings) used to record his own views, too, therein. Hence, I tried to read out the Imām's words only, leaving out those of abu Yūsuf. Once I made a slip and read the other view also. The Imām at once cut in, 'Whose view is this second?'"<sup>65</sup>

Another thing that we gather from al-Makki is that the work of classification of this council's decisions under different heads and chapters also was completed in the life-time of abu Ḥanifah. He says: "Abu Ḥanifah is the first man to gather the knowledge of the *Shari'ah* (Islamic Law). None before him had done this work—abu Ḥanifah compiled it in books, under different heads and chapters."<sup>66</sup>

This council recorded decisions on about 83,000 legal issues. These embraced not only those questions with which the public or the State was currently or had formerly been confronted but also others that might arise in future. Possibilities were conceived and discussed freely to ensure that if ever they turned into actualities there should be laws ready to meet them. They related to almost all branches of law, internal (covered under the term *al-siyar*),<sup>67</sup> constitutional, civil, criminal, of evidence, of procedure, laws governing different aspects of economic life, marriage, divorce, and inheritance, personal, and those dealing with worship. We can find all these subject-heads among the contents of books compiled by abu Yūsuf and later by Muḥammad bin Ḥasan al-Shaibāni from the material provided by the deliberations of this "legislative council."

<sup>63</sup> Al-Kardari, Vol. II, p. 108.

<sup>64</sup> Al-Makki, Vol. II, p. 54.

<sup>65</sup> Al-Kardari, Vol. II, p. 109.

<sup>66</sup> Al-Makki, Vol. II, p. 136.

<sup>67</sup> People of the present day labour under the wrong impression that International Law is a thing of the modern times and its founder is Grotius of Holland (991-1055/1583-1645). But whoever has seen *al-Siyar* of abu Ḥanifah's pupil Muḥammad bin Ḥasan al-Shaibāni (132-189/749-805) knows that the codification of this law was accomplished by abu Ḥanifah 900 years before Grotius, and that if, on the one hand, his discussions hardly leave any aspect of it untouched, on the other, they encompass the finest and the most vital issues. This has recently been acknowledged by a group of scholars and a Shaibāni Society of International Law has been founded in Germany.

<sup>61</sup> Al-Makki, Vol. II, p. 246.

<sup>62</sup> *Ibid.*, p. 133.

This regular codification of law soon deprived individuals of the confidence which they enjoyed in its absence in their efforts at law-making. The opinions and verdicts of scattered individuals, be they doctors or judges of repute, could not carry weight before the wholesomely judicious and precise decisions arrived at in a council of legists presided over and guided by a man of abu Ḥanīfah's foresight and calibre, after thorough sifting of the Qur'ānic injunctions and the Prophet's Tradition and keeping in view the precedents and the verdicts of the scholars of old, drawn as they were with thoughtful and steady labour, bearing in mind the principles of *ijtihād* (deducing conclusions with thorough discretion) in the light of the *Sharī'ah*, embracing all aspects of life, and able to meet all exigencies. Therefore, as soon as it came to light, the common people, the rulers, the judges, all felt forced to turn to it. It answered the demand of the day. As a matter of fact, it was the long-awaited help which everybody had been seeking. The famous legist Yaḥya bin Ādam (d. 203/818) tells us that the opinions of other jurists paled into insignificance before those of abu Ḥanīfah; his ideas spread everywhere; the judges, rulers, and officers of every place decided their cases in accordance with his law; in short, everything went according to it.<sup>68</sup> By the time of al-Māmūn (198-218/813-833) it had acquired such popularity that one day the Premier Faḍl bin Sahl was advised by a jurist who was hostile to abu Ḥanīfah, to issue orders to stop the use of abu Ḥanīfah's code. Faḍl invited the wise and prudent men to advise him on this. They told him not to take this step for it would not succeed. On the other hand, the whole country, they said, would turn against the Government, adding that the man who had given him that counsel was surely a fool. The Premier agreed with them, saying that he himself did not see any wisdom in that course, nor was the Caliph likely to agree to it.<sup>69</sup>

Thus came about this historical reality that a system of law devised by a private legislative council became the law of countries and empires on the strength of its merits and the moral prestige of those who framed it. It had also another important consequence in that it opened up for Muslim thinkers new lines for the codification of Islamic Law. The chief legal systems devised later may have differed from it in their methods of deduction and in their results, but they were all inspired by and based on this model.

## B

## ABU YŪSUF

In abu Ḥanīfah's life-time the relations between the Ḥanafi school of law and the 'Abbāsīd rulers were very much strained owing to his political creed and non-co-operation with the Government. The effect of this lasted for a long while even after his death. The leaders of this school stuck to their policy

of indifference towards authority. Thus, when after the death of abu Ḥanīfah his great pupil Zufar bin Ḥudhail (d. 158/775) was asked to accept the post of a judge, he flatly refused it and fled to find safety in concealment.<sup>70</sup> On the Government's side also the tendency from the days of Maṣṣūr to the early years of Hārūn's reign was to resist the influence of this school of thought. Maṣṣūr and his successors earnestly desired that the gap in the legal system of the State, detailed in our previous discussion, should be filled by some other system of codification. Both Maṣṣūr and Maḥdi in their respective reigns endeavoured to bring Mālik to the fore.<sup>71</sup> Hārūn also in 174/791, on the occasion of the pilgrimage, expressed his desire to make his book *al-Muwaffā'* the law of the land.<sup>72</sup> But at long last a man of great strength and character belonging to the Ḥanafi school of thought rose to bring this state of affairs to an end. With his great ability and personal influence he delivered the Empire from a continued state of legal chaos. The Ḥanafi code was made the law of the land which gave the whole Empire a uniform system of law. This man was abu Yūsuf, the ablest of the disciples of abu Ḥanīfah.

*Brief Life-Sketch.*—Abu Yūsuf's (b.113/731) personal name was Ya'qūb. His father came of the Arab tribe of Bajilah, his 'mother of the Anṣārs of Madīnah with whom his father was also connected by ties of alliance; hence his family was known as Anṣār. He chose to specialize in law after completing his elementary education and took his lessons from 'Abd al-Raḥmān bin abi Laila. Then he joined the school of abu Ḥanīfah and became permanently attached to him. His parents were extremely poor and did not like their son to continue his education. When abu Ḥanīfah came to know of it, he undertook to defray all the expenses not of the boy alone but of the whole family. He himself said that abu Ḥanīfah never gave him occasion to express his want before him. On and off he would send so much money to his family as would relieve him of worry on that account.<sup>73</sup>

From the very beginning abu Ḥanīfah was very optimistic about his ward. When his father wanted to withdraw him from the school, the Imām told him not to do so, for, if it pleased God, the lad promised to turn out to be a great man.<sup>74</sup>

Apart from abu Ḥanīfah, abu Yūsuf learnt a good deal from other famous scholars of the day, and made himself well acquainted with Tradition, Qur'ānic commentary, biography of the Prophet, history, language, literature, and scholastic theology. Particularly well versed in traditions, he knew them by heart, and men like Yaḥya bin Mu'īn, Aḥmad bin Ḥanbal, and 'Alī bin

<sup>70</sup> Al-Kardari, Vol. II, p. 183; Tāsh Kubrazādah, *Miftāḥ al-Sa'ādah*, Vol. II, p. 114.

<sup>71</sup> Ibn 'Abd al-Barr, *al-Intiqā'*, pp. 40-41.

<sup>72</sup> Abu Nu'aim al-Aṣbahānī, *Hilyat al-Auliya'*, al-Maṭba'at al-Sa'ādah, Egypt, 1355/1936, Vol. VI, p. 332; Tāsh Kubrazādah, *op. cit.*, Vol. II, p. 87.

<sup>73</sup> Al-Makki, Vol. II, p. 212.

<sup>74</sup> *Ibid.*, p. 214.

<sup>68</sup> Al-Makki, Vol. II, p. 41.

<sup>69</sup> *Ibid.*, pp. 157-58; al-Kardari, Vol. II, pp. 106-07.

al-Madīnī declared him *ḥiqāh*<sup>75</sup> (dependable—a particular term used for a person of known veracity on whom reliance is placed in the transmission of traditions). His contemporaries were agreed that he was outstanding among the disciples of abu Ḥanīfah. Ṭalḥah bin Muḥammad says, he was the greatest jurist of his age, none excelled him.<sup>76</sup> Dāwūd bin Rashīd thinks that it would have been enough source of pride for abu Ḥanīfah if he had produced only this one disciple.<sup>77</sup> Abu Ḥanīfah himself had great respect for him. He used to say that of all his pupils the most acquisitive and adorned with learning was abu Yūsuf.<sup>78</sup> Once he was very ill, so that little hope was left of his life. Abu Ḥanīfah, when coming out of the house after inquiring after his health, deplored that if the youth died he (abu Ḥanīfah) would not leave behind him a scholar more learned than himself.<sup>79</sup>

For sixteen years after the death of abu Ḥanīfah, he, too, in keeping with the traditions of his school, remained indifferent to the Government. Nevertheless, he continued the intellectual and educative work of his master, adding to it the compilation of several books on almost all branches of law, and recording the decisions of abu Ḥanīfah's times supplemented with his own opinions.<sup>80</sup> When these books spread in the country, they not only influenced the intellectual circles, but also impressed the courts and high officials connected with various government departments in favour of the Ḥanafi school of thought, since there existed no other classified code of law to satisfy their wants as these books did. Mālik's *al-Muwatta'* had come into the field long before, but it was not sufficiently comprehensive and elaborately classified to meet the needs of a government.<sup>81</sup> Thus, abu Yūsuf's intellectual and literary work took hold of the minds of people before he came to power. It lacked only formal political sanction to enforce it as the law of the land.

Had abu Yūsuf's position been economically sound, he might have followed in the footsteps of his master and lived in continued indifference towards the Government. But he was a poor man and abu Ḥanīfah's death had robbed him of his generous supporter. Reduced by poverty to live a miserable existence, he was obliged one day to sell off a girder of his wife's house, for which he was reproached by his mother-in-law in a manner he could not endure, and this

forced him to look for employment. He made for Baghdād and reached there in 166/782, saw the Caliph al-Mahdī who appointed him judge of eastern Baghdād, which office he continued to hold till the end of al-Ḥādī's reign. When Hārūn al-Rashīd became Caliph, abu Yūsuf steadily gained such influence on him that he at last appointed him Chief Justice of the whole 'Abbasid Empire. This was the first occasion that such a post was created in the Muslim State. None before abu Yūsuf had held the post of Chief Justice of the State in either the "Right-guided" Caliphate or the Umayyad and 'Abbasid rule.<sup>82</sup> His position was not only that of the Head of the Supreme Court of the realm, as we may conceive from the practice of our modern institutions, it also invested him with the authority of the Minister of Law; that is to say, he did not merely have to judge cases and appoint judges for the lower courts, he had also to advise the Government on all legal matters, internal as well as external.

Abu Yūsuf's appointment to this office bore three far-reaching results. In the first place, instead of a college where he discoursed to students, or a study from which he issued books, a vast field of work now engaged his attention—a field in which he dealt practically with the affairs of the biggest empire of the day. This provided him with opportunities of applying the Ḥanafi law to the actual affairs of life, thus making it in fact a practical system of law. Secondly, as the appointment and removal of judges was now entrusted to his charge, scholars connected with the Ḥanafi school were appointed judges in most of the places, and through them the Ḥanafi law automatically became the law of the realm. Thirdly, with the help of his great moral and intellectual influence he converted the Muslim State, which had assumed an autocratic character since the time of the Umayyads and was going, in a way, without a constitution, into a State guided to a large extent by a constitution; nay, he actually wrote a book on constitution for it, which has luckily come down to us intact in the shape of *Kitāb al-Kharāj*.

But before we speak of this work on constitution it is necessary to remove a widespread misunderstanding. Abu Yūsuf's biographers have described such stories about him as often present him to the reader as one given to flattery and skilled in wresting the law to suit the desires of kings. But if we mark the events recorded in history relating to abu Yūsuf's attitude to the Caliphs and their ministers and generals, it becomes impossible for us to believe that a mere flatterer could dare have it. In Ḥādī's time when he was the judge of eastern Baghdād he decided a case against the Caliph himself.<sup>83</sup> In Hārūn's time an old Christian filed a suit for a garden against the Caliph. Abu Yūsuf not only heard the case, both confronting each other, but also asked the Caliph to deny on oath that he refused to accept the claimant's title to it. Even after this he was sorry all his life why he did not make the Caliph

<sup>75</sup> Ibn Khallikān, Vol. V, p. 422; ibn 'Abd al-Barr, *al-Intiqā'*, p. 172.

<sup>76</sup> Ibn Khallikān, Vol. V, p. 423.

<sup>77</sup> Al-Makki, Vol. II, p. 232.

<sup>78</sup> Al-Kardari, Vol. II, p. 126.

<sup>79</sup> Ibn Khallikān, Vol. V, p. 424; al-Kardari, Vol. II, p. 126.

<sup>80</sup> Ibn al-Nadīm, *al-Fihrist*, al-Maṭba'at al-Rahmāniyyah, Egypt, 1348/1929. Ibn Khallikān (Vol. V, p. 424) writes on the authority of Ṭalḥah bin Muḥammad that abu Yūsuf was the first man to compile books on all fundamental branches of Law in accordance with the Ḥanafi creed, and thus spread abu Ḥanīfah's knowledge to all corners of the world.

<sup>81</sup> It must be understood that the codification of Islamic Law according to the Mālikī principles enabling it to serve the needs of a government took place later on the model of Muḥammad bin Ḥasan al-Shaibānī's books.

<sup>82</sup> Al-Makki, Vol. II, pp. 211–39; ibn Khallikān, Vol. V, p. 421.

<sup>83</sup> Al-Kardari, Vol. II, p. 128.

stand side by side with the suitor.<sup>84</sup> He declared 'Alī bin 'Īsā, Prime Minister of Hārūn al-Rashīd, an unreliable witness because, he said, he had heard him call himself the Caliph's slave. "If he is a slave in fact," contended he, "his witness cannot be accepted. If he is not and calls himself so for flattery, he is a liar and cannot be trusted."<sup>85</sup> The same punishment he gave to a general of Hārūn's forces.<sup>86</sup> 'Abd Allah bin Mubārak states that he used to go to Hārūn's palace riding right up to the private enclosures (where even the Premier must go on foot) and the Caliph was always the first to greet him.<sup>87</sup> Hārūn was once asked why he had raised abu Yūsuf so high. He replied, "In whatever branch of knowledge I tried him I found him perfect. Besides, he is upright and a man of solid character. If there is another like him I'd be pleased to see him."<sup>88</sup> When he died (182/798) Hārūn himself accompanied the funeral procession on foot, led the funeral prayer, buried him in his own family graveyard and said it was a bereavement on which all the believers should condole with one another.<sup>89</sup> But nothing bears out all that has been said above so well as his work *Kitāb al-Kharāj*. A perusal of its introduction alone will tell that it is just beyond an adulator to say such things as he did while addressing a king.

*Kitāb al-Kharāj*.—In Hārūn al-Rashīd, abu Yūsuf found a king of the most conflicting disposition and humours, at once a fierce soldier, a luxurious monarch, and a God-fearing man. Abu al-Faraj Aṣbahānī describes him in a sentence: "He would most easily melt into tears in response to an exhortation or admonition, but would be most unrelentingly cruel in response to something that kindled his wrath."<sup>90</sup>

Abu Yūsuf, prudently avoiding to touch upon the Caliph's failings, skillfully set to work on his religious sentiment bringing to bear his great moral and intellectual influence to the task, and pursued this steadily till the Caliph's heart was won and he proposed for him the assignment of preparing a constitution for him according to which he should guide the affairs of the State. This was how the *Kitāb al-Kharāj* came to be written.

The name of this book misleads one into thinking that its scope is limited to matters of revenue only. As a matter of fact, it deals with almost all the affairs of the State. Leaving aside all other details, we shall here examine its contents only with a view to seeing its basic conception of the Islamic State and its constitutional character.

*Reversion to the "Right-guided" Caliphate*.—The first thing that strikes the reader who follows *Kitāb al-Kharāj* closely is that abu Yūsuf desires the Caliph

<sup>84</sup> Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. XVI, p. 61; al-Makki, Vol. II, pp. 243–44.

<sup>85</sup> Al-Makki, Vol. II, p. 226–27.

<sup>86</sup> *Ibid.*, p. 240.

<sup>87</sup> *Ibid.*; Mulla 'Alī Qāri, *Dhail al-Jawāhir al-Mudhiyyah*, p. 526.

<sup>88</sup> Al-Makki, Vol. II, p. 232.

<sup>89</sup> Al-Kardari, Vol. II, p. 120.

<sup>90</sup> *Kitāb al-Aghāni*, Vol. III, p. 178.

to give up the Byzantine and Iranian traditions followed by the Umayyad and 'Abbāsīd kings and revert faithfully to the traditions of the "Right-guided" Caliphs. Although he has not directly asked him to give up following his forefathers, yet he has never lapsed even into quoting the conduct or the decisions of the Caliph's forefathers as precedents worth following, much less those of his Umayyad predecessors. In every matter he bases his argument either directly on the Qur'ān or the Sunnah or else quotes precedents from abu Bakr, 'Umar, 'Uthmān, and 'Alī. If he has ever quoted a precedent from a later period it is not from Maṣṣūr's or Maḥdī's but from that of the Umayyad Caliph 'Umar bin 'Abd al-'Azīz. In preparing this book, he completely ignored the conventions and precedents of the whole one hundred and thirty-two years of Umayyad and 'Abbāsīd reigns, except those of the two and a half years of 'Umar II's reign. Abu Yūsuf's work may not have meant much, had it been done by some ingenious lawyer in his private capacity as a holy sermon for those who might like to follow it. But done as it was by the Chief Justice-cum-Law Minister of the State in his official capacity, at the express instance and request of the Caliph, it becomes something extraordinarily significant.

In the beginning of the book abu Yūsuf lays down the basic conception of the State before the Caliph in these words: "O, Commander of Believers, God, the sole deserver of praise, has placed on you a heavy responsibility which carries with it a great reward and a great punishment. He has committed to your charge the affairs of this community, so that yours is the duty to work for a large number of people day and night. He has appointed you a guard over them, given you their trust, and tried you by them, for you are to conduct their affairs for them. An edifice founded on anything except fear of God does not take long to crumble. God shakes it to the foundation and makes it fall on its builders, and on them that helped in its construction. . . . Kings will be called to account by God as a shepherd is called to account by the owner of the flock. . . . Take not the crooked path, lest your flock should follow in your footsteps. . . . Treat everybody alike in the Law of God, whether one is akin to you or not. . . . Go not into the presence of God as one who has been committing excesses, for the Ruler of the Day of Retribution will judge men by their actions, and not by ranks. Guard against wasting the flock entrusted to your care, lest the owner of the flock take you to task for every little sheep of it."<sup>91</sup>

After this he continues to press it on the Caliph everywhere in the book that he is not the owner of his kingdom but the Owner's Caliph (lit. deputy),<sup>92</sup> and that if he proved a just ruler he would see the best imaginable end; but if he proved unjust he would meet with the worst punishment.<sup>93</sup> At one place he puts before him the words of 'Umar wherein he says, "None who enjoys

<sup>91</sup> *Kitāb al-Kharāj*, pp. 3, 4, 5.

<sup>92</sup> *Ibid.*, p. 5.

<sup>93</sup> *Ibid.*, p. 8.

the right of commanding obedience has risen so high as to ask anyone to obey him in disobedience of God."<sup>94</sup>

*Spirit of Democracy.*—Abu Yūsuf conceives the Caliph to be answerable not only to God but also to the public, and has quoted at several places from the sayings of the Prophet and the Companions to prove that the Muslims have an unquestionable right to criticize their rulers, and that such criticism contributes to the good of the people and the State.<sup>95</sup> "Enjoining the right and forbidding the wrong is an inalienable right and a duty and its negligence in a community is equivalent to inviting the wrath of God upon its head."<sup>96</sup> It is the duty of rulers to have forbearance for truth being spoken before them, as nothing is more hurtful in a ruler than his being short-tempered and intolerant of criticism,<sup>97</sup> and the Muslims have a right to call him to account in respect of their lawful rights on him and of their properties that have been entrusted to his care.<sup>98</sup>

*Duties of the Caliph.*—The following duties of the Caliph have been specifically mentioned: to establish the rights of God and enforce the limits prescribed by Him; to determine correctly the rights of other right-holders and ensure their enjoyment of these rights; to revive the conventions of virtuous rulers (that have been discarded by the wicked rulers of late);<sup>99</sup> to check injustice and redress the grievances of people after proper scrutiny;<sup>100</sup> in pursuance of the orders of God, to command people to obey Him and stay away from the commission of sins; to apply the Law of God on himself and others alike, without regard to who suffers by it;<sup>101</sup> and to make only lawful exactions from people and expend them in lawful ways.<sup>102</sup>

*Duties of Muslim Citizens.*—As opposed to these, the duties of the Muslims toward their rulers, as described in this book, are the following. They have to obey them, not to commit acts of disobedience, nor lift arms against them, nor reproach them (unnecessarily), nor deceive them. They have to put up with their excesses, to be sincerely helpful to them, to try to check them from wrong things and to co-operate with them in all that is good.<sup>103</sup>

*The Exchequer.*—He calls the exchequer a trust of God and the people instead of its being the Caliph's property. Off and on he reminds the Caliph of the words of 'Umar wherein he compares the Caliph's position in relation to the exchequer to that of an orphan's guardian in relation to the orphan's property, and states that if he is well-to-do, he should not take anything from

<sup>94</sup> *Ibid.*, p. 117.

<sup>95</sup> *Ibid.*, p. 12.

<sup>96</sup> *Ibid.*, pp. 10–11.

<sup>97</sup> *Ibid.*, p. 12.

<sup>98</sup> *Ibid.*, p. 117.

<sup>99</sup> *Ibid.*, p. 5.

<sup>100</sup> *Ibid.*, p. 6.

<sup>101</sup> *Ibid.*, p. 13.

<sup>102</sup> *Ibid.*, p. 108.

<sup>103</sup> *Ibid.*, pp. 9, 12.

it, in deference to the advice of God, and manage it for Him without any consideration; and if he is needy, he may take from it an amount which everybody will recognize as just and proper.<sup>104</sup> He also draws his attention to 'Umar's example in spending from the exchequer more sparingly than one would from one's private purse. He illustrates his point by reference to another instance where 'Umar, appointing a judge, a governor, and a revenue officer for Kūfah, allowed them to take a goat every day for the expenses of their board, adding at the same time that a land from which the officers will pick up a goat every day would soon be impoverished.<sup>105</sup> The Caliph is also asked to forbid his officials to spend public money for their private needs.<sup>106</sup>

*Principles of Taxation.*—Abu Yūsuf prescribes the following principles of taxation: Only the surplus wealth of people should be taxed and the burden of taxes should fall upon the people with their consent. The tax should vary according to the capacity of the tax-payer. Nobody should be taxed more than he can pay. The tax should be collected from the wealthy and spent on the poor.<sup>107</sup> Rates of tax should not be fixed so as to suck the blood of the people, nor should the tax be realized by coercive methods.<sup>108</sup> Government should refrain from extorting taxes which are not warranted and also forbid its officers and landlords to make such exactions.<sup>109</sup> Non-Muslims who accept Islam should not be charged the poll-tax.<sup>110</sup> The practice of the "Right-guided" Caliphs is quoted as authority in this connection. He refers, for example, to the incident related to Ali that while in public he advised his officials to realize every penny of revenue from the payers and not to be at all lenient to them in this matter, but calling them apart he instructed them to be careful not to beat anybody or make them stand in the sun or press them so hard that they should be obliged to sell their cattle or clothes or utensils to pay the tax.<sup>111</sup> Or the fact that 'Umar used to examine thoroughly his revenue officers to satisfy himself that the farmers were not dealt with too harshly in the exaction of revenue, and when the collections actually came in, the representatives of the common people were summoned to bear witness that no Muslim or non-Muslim peasant was unjustly made to pay the tax.<sup>112</sup>

*Rights of non-Muslim Subjects.*—With regard to the rights of non-Muslim subjects in the Islamic State, three principles are quoted again and again on the authority of 'Umar:

1. Whatever agreement is made with them has to be faithfully observed.

<sup>104</sup> *Ibid.*, pp. 36, 117.

<sup>105</sup> *Ibid.*, p. 36.

<sup>106</sup> *Ibid.*, p. 186.

<sup>107</sup> *Ibid.*, p. 14.

<sup>108</sup> *Ibid.*, pp. 16, 37, 109, 114.

<sup>109</sup> *Ibid.*, pp. 109, 132.

<sup>110</sup> *Ibid.*, pp. 122, 131.

<sup>111</sup> *Ibid.*, pp. 15, 16.

<sup>112</sup> *Ibid.*, pp. 37, 114.

2. The responsibility for the defence of the State does not lie on them, but on the Muslims alone.

3. They should not be burdened with excessive poll-tax and land revenue.<sup>113</sup>

Then it is said that the poor, the blind, the old, the recluse, workers at the houses of worship, women, and children are exempt from polltax; that there is no *zakāt* (prescribed charity) chargeable on the wealth and cattle of the non-Muslims; that none is allowed to resort to beating or inflicting other physical tortures on them for exacting the capitation, as the maximum punishment for its non-payment is only simple imprisonment. To realize more than the fixed amount from them is unlawful, and the poor and the cripple among them are to be supported from the State exchequer.<sup>114</sup> Historical incidents are related to make the Caliph see that it is for the good of the State to be kind and generous to the non-Muslim subjects. It was, according to him, magnanimity of the Muslims that in the days of 'Umar won for them the hearts of the Syrian Christians to such a degree that they loved them more than their co-religionists, the Romans.<sup>115</sup>

*Land Settlement.*—Abu Yūsuf disallows the feudal system of settlement in which the government, in order to realize the revenue from the farmers appoints a person to overlord them, allowing him to exact from them whatever he likes and as he likes so long as he guarantees the payment of government dues. He condemns it as a most tyrannous system that is bound to lead to the ruin of the country and vehemently advocates that it must be shunned at all costs.<sup>116</sup> He also calls it unlawful for the government to appropriate somebody's land and bestow it upon another. He says: "The Caliph is not authorized to dispossess any person, Muslim or non-Muslim, of anything that belongs to him unless a proved or valid right stands against him in law. To snatch from one to make over to another is like committing robbery for the sake of distributing alms."<sup>117</sup> Gifts of land are allowed only if uncultivated, unowned, or uninherited pieces of land are distributed within reasonable measure for purposes of cultivation or as rewards for some real, useful social service. Such donations too are to be withdrawn if the donees fail to cultivate such land within three years.<sup>118</sup>

*Redress of Wrong.*—After this he tells Hārūn al-Rashid that it is not lawful for him to appoint tyrants and corrupt people to offices of State or to employ them as officers of departments or governors of districts. If he did so, he would surely share the retribution for the wrongs that they do.<sup>119</sup> He asks him again and again to employ honest, righteous, and God-fearing people

to State services. He emphasizes that in addition to their efficiency the government should also satisfy itself with regard to the moral character of its servants, and constantly keep a watch on them through its intelligence department, and if they tend to be corrupt or fall into cruel or cunning ways the Caliph should know of their conduct and call them to account.<sup>120</sup> He also tells Hārūn that the Caliph should listen regularly to the grievances of the people himself, and that the occurrence of injustice could be made to stop if he has open court even once a month, where every grieved person is allowed to put his grief before the Caliph and the officers are made to realize that what they do may one day reach the Caliph's ear.<sup>121</sup>

*The Judiciary.*—The judiciary, according to him, is meant to dispense justice, pure and undiluted. To punish one who is not guilty or to let one who is guilty go unpunished are alike unpardonable. But none should be punished on doubt. To go wrong in forgiveness is better than going wrong in awarding punishment. There should be no interference in the course of justice, nor should anybody's recommendation, position, or status count.<sup>122</sup>

*Personal Liberty.*—Abu Yūsuf also maintains that nobody can be incarcerated on a mere accusation. The accused person must be given a regular trial, and witnesses examined. If he proves guilty, he may be imprisoned; otherwise he should be set free. He advises the Caliph that the cases of those who lie in prisons should be examined and those that are found to have been put there without sufficient proof or witness should be released. For the future all the governors should be instructed not to imprison anybody on the basis of mere allegation or suspicion without giving him a fair trial.<sup>123</sup> He also holds that it is illegal to beat or flog an accused person. Every person's back is immune from punishment unless a court declares him worthy of the lash.<sup>124</sup>

*Jail Reforms.*—In the reforms that he has suggested for the improvement of prisons, he affirms that every prisoner has a right to receive his board and clothing from the Government Exchequer. He severely condemns the Umayyad and 'Abbāsīd practice of daily taking out the prisoners handcuffed and in chains to beg for their food and clothes. He requests the Caliph to put a stop to it and proposes that clothes suited to the season and sufficient food should be given to every prisoner by the Government. The practice of burying the deceased heirless prisoners without wash and coffin, or without the funeral prayer, is also condemned in vigorous terms. "It is a matter of great shame for the Muslims," says he. The proper wrapping and burial of these prisoners should be a Government charge. He has also recommended

<sup>113</sup> *Ibid.*, pp. 14, 37, 125.

<sup>114</sup> *Ibid.*, pp. 122–26.

<sup>115</sup> *Ibid.*, p. 139.

<sup>116</sup> *Ibid.*, p. 105.

<sup>117</sup> *Ibid.*, pp. 58, 60, 66.

<sup>118</sup> *Ibid.*, pp. 59–66.

<sup>119</sup> *Ibid.*, p. 111.

<sup>120</sup> *Ibid.*, pp. 106, 107, 111, 132, 186.

<sup>121</sup> *Ibid.*, pp. 111, 112.

<sup>122</sup> *Ibid.*, pp. 152–53.

<sup>123</sup> *Ibid.*, pp. 175–76.

<sup>124</sup> *Ibid.*, p. 151.

that no prisoner except those guilty of murder should be kept in fetters inside the prison.<sup>125</sup>

These are, in brief, the constitutional proposals which abu Yūsuf, as Law Minister and Chief Justice of the realm, placed before an autocrat twelve centuries ago. Placed beside the basic principles of an Islamic State and the traditions of the "Right-guided" Caliphate, or compared with the teachings of his own master abu Ḥanīfah, they look far short of them indeed. There is no trace in them of the ideal way of choosing a Caliph. There is no mention of the advisory body, called the *shūra*, guiding the administration of State affairs, nor of the idea that the wicked and the corrupt have no right to rule and if they come in, the public have a right to rise in revolt against them. Not only that; many other important things also are missing and, judged from these and other such considerations, these proposals fall short of the true conception of an Islamic order. But this should not lead us to infer that abu Yūsuf's conception of the Islamic State was restricted to the limits of these proposals of *Kitāb al-Kharāj* and that he did not want anything more than what he put down there. On the contrary, what we find here describes what he, as a practical thinker, conceived as the maximum that was possible and worthy of achievement in the particular circumstances of that period of the 'Abbāsid regime. In fact, the idea was not to present a theoretically perfect plan without regard to whether it was capable of being translated into practice or not. His intention was to draw up a constitutional plan which, in addition to satisfying the minimum conditions required for the making of an Islamic State, should promise to be workable in the circumstances.

## BIBLIOGRAPHY

1. *Qur'ān and Commentaries*.—Al-Qur'ān; ibn Kathīr, *Tafsīr al-Qur'ān al-ʿAzīm*, Maṭba'ah Muṣṭafa Muḥammad, Egypt, 1937; ʿĀḍi, *Rūḥ al-Ma'āni*, Idārah al-Tabā'at al-Muniriyyah, Egypt, 1345/1926; al-Jaṣṣaṣ al-Ḥanafī, *Aḥkām al-Qur'ān*, al-Maṭba'at al-Bahiyyah, Egypt, 1347/1928.
2. *Hadīth and Commentaries*.—Al-Bukhārī; abu Dāwūd; al-Nasā'ī; abu Dāwūd al-Tayālīsī, *al-Musnad*, Dairatul-Maarif, Hyderabad, 1321/1903; Muslim; ibn Mājah; al-Tirmidhī; Ahmad bin Ḥanbal, *al-Musnad*, Dār al-Ma'ārif, Egypt, 3rd ed., 1949; the same also published by al-Maṭba'at al-Maimaniyyah, Egypt, 1306/1888; ibn Ḥajar, *Fath al-Bārī*, al-Maṭba'at al-Khairiyyah, Cairo, 1325/1907; al-Baihaqī, *al-Sunan al-Kubra*, Dairatul-Maarif, Hyderabad, 1355/1936.
3. *Al-Fiqh*.—Abu Yūsuf, *Kitāb al-Kharāj*, al-Maṭba'at al-Salafiyyah, Egypt, 2nd ed., 1352/1933; al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Maṭba'ah Miṣr, Shirkah Musāhamah al-Miṣriyyah, 1957; *Kitāb al-Mabsūṭ*, Maṭba'at al-Sa'ādah, Egypt, 1324/1906; al-Sha'rānī, *Kitāb al-Mizān*, al-Maṭba'at al-Azhariyyah, Egypt, 3rd ed., 1925.
4. *Dialectic Theology*.—Al-Shahrastānī, *Kitāb al-Milāl w-al-Nihāl*, London; al-Ash'ari, *Maqālāt al-Islāmiyyīn*, Maktabat al-Nahḍat al-Miṣriyyah, Cairo; 'Abd

al-Qāhir al-Baghḍādī, *al-Farq bain al-Firaq*, Maṭba'at al-Adabiyyah, Egypt, 1317/1899; Mulla 'Alī Qāri, *Sharḥ al-Fiqh al-Akbar*, Delhi, 1348/1929; al-Maghnisāwī, *Sharḥ al-Fiqh al-Akbar*, Dairatul-Maarif, Hyderabad, 1321/1903; ibn abi al-'Izz al-Ḥanafī, *Sharḥ al-Tahāwīyyah*, Dā'irat al-Ma'ārif, Egypt, 1373/1953; Mulla Husain, *al-Jauharat al-Munīfat fī Sharḥ Waṣīyyat al-Imām Abi Ḥanīfah*, Dairatul-Maarif, Hyderabad, 1321/1903.

5. *Biographies*.—Ibn al-Qayyim, *Zād al-Ma'ād*, Maṭba'ah Muḥammad 'Alī Ṣabīh, Egypt, 1935; ibn Hishām, *al-Sirat al-Nabawiyyah*, Maṭba'ah Muṣṭafa al-Bābī, Egypt, 1936; ibn Khallikān, *Wafayāt al-A'yān*, Maktabat al-Nahḍat al-Miṣriyyah, Cairo, 1948; ibn 'Abd al-Barr, *al-Isti'āb*, Dairatul-Maarif, Hyderabad, 2nd ed.; *al-Intiqā' fī Fayā'il al-Thalāth al-A'immat al-Fuqahā'*, Cairo, 1370/1950; ibn al-Bazzāz al-Kardari, *Manāqib al-Imām al-A'zam*, Dairatul-Maarif, Hyderabad, 1st ed., 1321/1903; al-Muwaffaq bin Ahmad al-Makki, *Manāqib al-Imām al-A'zam Abi Ḥanīfah*, Dairatul-Maarif, Hyderabad, 1st ed., 1321/1903; Mulla 'Alī Qāri, *Dhail al-Jawāhir al-Muḍīyyah*, Dairatul-Maarif, Hyderabad, 1st ed., 1332/1913; al-Dhahabī, *Manāqib al-Imām Abi Ḥanīfah wa Ṣāhibaihi*, Dār al-Kutub al-Miṣri, Egypt, 1366/1946; ibn Ḥajar, *al-Isābah*, Maṭba'ah Muṣṭafa Muḥammad, Egypt, 1939; abu Nu'aim al-Aṣbahānī, *Hilyat al-Auliya'*, al-Maṭba'at al-Sa'ādah, Egypt, 1355/1936.

6. *History*.—Al-Tabari, *Tārīkh al-Umam w-al-Mulūk*, al-Maṭba'at al-Istiḳāmah, Cairo, 1939; ibn al-Athīr, *al-Kāmil fī al-Tārīkh*, Idārat al-Tabā'at al-Muniriyyah, Egypt, 1356/1937; ibn Qutaibah, *al-Imāmah w-al-Siyāsah*, Maṭba'at al-Futūḥ, Egypt, 1331/1912; *Uyūn al-Akhbār*, Maṭba'ah Dār al-Kutub, 1928, 1st ed.; ibn Kathīr, *al-Bidāyah w-al-Nihāyah*, Maṭba'at al-Sa'ādah, Egypt; al-Mas'ūdi, *Murūj al-Dhahab wa Ma'ādin al-Jawāhir*, al-Maṭba'at al-Bahiyyah, Egypt, 1346/1927; ibn Khaldūn, *al-Muqaddimah*, Maṭba'ah Muṣṭafa Muḥammad, Egypt; al-Suyūṭī, *Tārīkh al-Khulafā'*, Government Press, Lahore, 1870; *Husn al-Muḥāḍarah fī Akhbār Miṣr w-al-Qāhirah*, al-Maṭba'at al-Sharfiyyah, Egypt; al-Khaṭīb, *Tārīkh al-Baghḍād*, Maṭba'at al-Sa'ādah, Egypt, 1931; Ahmad Amin, *Ḍuḥā al-Islām*, Maṭba'ah Lajnah al-Talīf w-al-Tarjamah, Egypt, 4th ed., 1946; al-Maqrīzī, *Kitāb al-Sulūk li Ma'rīfat Duwal al-Mulūk*, Dār al-Kutub al-Miṣriyyah, 1934; al-Jahshiyārī, *Kitāb al-Wuzarā' w-al-Kuttāb*, ed. Vienna, 1926; al-Yāfi'i, *Mir'āt al-Jinān wa 'Ibrat al-Yaqẓān*, Dairatul-Maarif, Hyderabad, 1st ed., 1937.

7. *Literature*.—Al-Qalqashandī, *Subḥ al-A'sha fī Sanā'at al-Inshā'*, Dār al-Kutub al-Miṣriyyah, Cairo, 1910; ibn abi al-Ḥadīd, *Sharḥ Nahj al-Balaghah*, Dār al-Kutub al-'Arabiyyah, Egypt, 1329/1911; ibn 'Abd Rabbīhi, *al-Iqd al-Farīd*, Lajnah al-Talīf w-al-Tarjamah, Cairo, 1940; abu al-Faraj al-Aṣbahānī, *Kitāb al-Aghānī*, al-Maṭba'at al-Miṣriyyah, Bulāq, Egypt, 1285/1868; al-Rāghib al-Aṣbahānī, *Muḥāḍarat al-Udabā'*, Maṭba'at al-Hilāl, Egypt, 1902; al-Jāhiz, *Bayān w-al-Tabyīn*, Maṭba'at al-Futūḥ al-Adbiyyah, Egypt, 1336/1917; *Kitāb al-Hayawān*, al-Maṭba'at al-Taḡaddum, Egypt, 1906; *Thalāth Rasā'il*, al-Maṭba'at al-Salafiyyah, Cairo, 1344/1925; al-Murṭaḍā, *al-Amālī*, Maṭba'at al-Sa'ādah, Egypt, 1st ed., 1907; abu al-'Alā' al-Ma'arri, *Risālat al-Ḥuḍrān*, Dār al-Ma'ārif, Egypt, 1950.

8. *Miscellaneous*.—Tāsh Kubrazādah, *Miftāḥ al-Sa'ādah*, Dairatul-Maarif, Hyderabad, 1st ed., 1329/1911; ibn al-Nadīm, *al-Fihrist*, al-Maṭba'at al-Rahmāniyyah, Egypt, 1348/1929.

<sup>125</sup> *Ibid.*, pp. 149, 151.