Islamic Law

ITS SCOPE AND EQUITY

SAID RAMADAN

INDIAN INSTITUTE OF
ADVANCED STUDY
SIMLA

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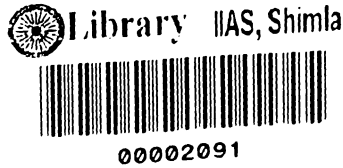

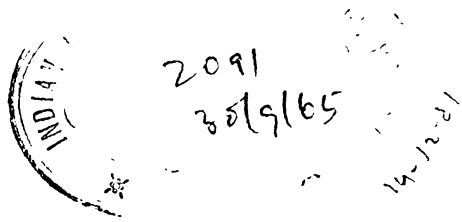

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PART THREE

SPHERE OF INFLUENCE

FOREWORD

BY PROFESSOR DR. GERHARD KEGEL
Prof. of International Law,
*University of Cologne, Germany**

Dr. Said Ramadan, a well-known active supporter of the Islamic Movement, tries to show in this book, what is to be understood by Islamic law and what are its merits in promoting justice. It is a formidable task, deserving the respect and sympathy of all unprejudiced men of good will, to adapt so efficiently an ancient law, shaped by strong religious ethics to the needs of the rapidly changing modern Islamic world, and to achieve this adaptation without giving away any of its great ethical values, and succeeding even in putting these values right into focus. This undertaking is especially welcome since Dr. Ramadan knows the Islamic law from the inside and may avoid some pitfalls hidden to the foreign student. His book is a remarkable contribution to our knowledge of the Islamic peoples and, perhaps, to peace between all peoples.

*It was at the Law College of this University that the author obtained his Doctor's degree with honours in Islamic Law.

PREFACE

ON the 7th of July, 1951, the Branch of Oriental Statutes concluded its "Week of Islamic Law" held on a prior resolution of the International Congress of Comparative Law. The "Week" was attended by outstanding professors of law from both East and West, and was presided over by Professor Milliot of the University of Paris. At the final meeting, the following resolution was passed unanimously:

"The Delegates,

Being interested in the problems brought about during the "Week of Islamic Law" and in the discussions which demonstrated the indisputable value of the principles of Islamic Law, and the fact that the variety of schools within this great juridical system implies a wealth of judicial elements and remarkable techniques, allowing this Law to respond to all the needs of adaptation required by modern life;

Hoping that the Week will proceed with its work next year, the bench is asked in view of the discussions that took place during the Week, to list all subjects that should be the object of study at the next session;

And it is recommended that a Committee be formed to make a Dictionary of Islamic Law in order to facilitate access to all related works and constitute a repertoire of Islamic judicial information according to modern methods."[1]

[1] *Travaux de la Semaine Internationale de Droit Musulman*, ed. Louis Milliot, Paris, Institut de Droit Comparé de l'Université de Paris, 1953. The original French text of the resolution reads as follows;

"Les congressistes,

Etant donné l'intérêt suscité par les problèmes évoqués au cours de la Semaine de Droit Musulman et par les discussions auxquelles ils ont donné lieu, dont il est résulté clairement que les principes du Droit Musulman ont une valeur indiscutable et que la variété des Écoles à l'Intérieur de ce grand système juridique implique une richesse de notions juridiques et de techniques remarquables, qui permet à ce droit de répondre à tous les besoins d'adaptation exigés par la vie moderne,

Emettent le voeu que la Semaine poursuive ses travaux l'année prochaine,

Chargent le Bureau de la Semaine d'établir la liste des sujets qui, à la suite des discussions ayant eu lieu au cours de la Semaine, devront faire é'objet d'un examen au cours de la session prochaine,

Souhaitent qu'un Comité soit formé pour établir un dictionnaire de Droit Musulman destiné à faciliter l'accès aux ouvrages de droit Musulman et constituant un répertoire des connaissances juridiques Musulmanes, exposées selon les méthodes modernes."

Such a resolution, adopted unanimously by a body of jurists of international status, following the discussions mentioned in the above text, can surely be considered an historic document that could positively contribute to inviting more attention to and stimulating more effort towards a full utilization of Islamic Law. What makes this resolution the more valuable is the fact that it comes at a time when such a scholarly outlook on the Law of Islam is most needed. It is admittedly true that any code of law is a mirror that reflects the actual state of affairs of its adherents in all walks of life. And this is even more emphatically the case when such a code involves the claim that it has been revealed by God and thus controls the thinking and behaviour of its adherents.

We now live in an age branded by such much-repeated slogans as: "The world has become so small" and "Our age is one of science and knowledge". It is the foremost duty of those who claim to be responsive to humanity's needs and are genuinely interested in the future of human relations among all peoples to redouble their efforts in order to discern the intellectual and scientific elements of common interest and benefit within the different social structures and environments of these various peoples. The best qualified men for such a purpose are jurists who, through practicing law over long periods of time, have acquired an objective outlook and have arrived at precise criteria resulting from practical thinking.

The need to take an interest in Islamic Law is not motivated, however, by the supposed fact that it reflects the actual way of life of the Muslim peoples. On the contrary, it could be said that Islamic Law is not fully practised in any part of the Muslim world, and that the drive to implement it is the principal objective of a widespread movement which aims at totally changing the decadent status of almost all Muslim countries. There is nothing more expressive of the strong influence of this movement (a movement which demands the implementation of Islamic Law) than the undeniable fact that it was the major factor behind the creation of three states which are now members of the United

Nations: Pakistan, Saudi Arabia and Libya. The leading issue for the creation of Pakistan was, as its founder Muhammad Ali Jinnah repeatedly stated, "The Muslims of India seek to have a State of their own where they can live according to the basic Laws of Islam." Saudi Arabia and Libya were created by the Wahhabi and Sanussi movements respectively. They both meet on a common ground: the urge to implement the basic ordinances of Islamic Law in the Qur'an (the Revealed Book of Islam) and the Sunnah (the authentic Traditions of the Holy Prophet). That this urge was later overcome by other political trends is obvious, but this does not affect the validity of what I am trying to stress, i.e., the influence of the movement itself. It only means that the creation of these states has not fulfilled the objective of this movement, and that popular forces which could give birth to three states are still ready to respond to its appeal and move again towards achieving the original aims of the struggle.

I have before me, as I write this treatise, two reports, one from Indonesia and the other from the Sudan. They illustrate the fight for Islamic legislation in the Indonesian Constituent Assembly and the electoral campaign for the Sudanese Constituent Assembly.

In other words, what is known as the "Islamic Movement" throughout the Muslim world—now of great interest to international observers who are trying to analyze its intellectual structure and its translation into the practical form in which it would shape its society—is a movement that demands the actual implementation of Islamic Law.

Professor H. A. R. Gibb has referred to this concept of the Islamic Movement and considers it to be the main characteristic of the entire Islamic structure: "The kind of society that a community builds for itself depends fundamentally upon its belief as to the nature and purpose of the Universe and the place of the human soul within it. This is familiar enough doctrine and is reiterated from Christian pulpits week after week. But Islam possibly is the only religion which has constantly aimed

to build up a society on this principle. The prime instrument of this purpose was law."[1]

Says Prof. J. Schacht: "Islamic Law is the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself. For the majority of Muslims, the law has always been and still is of much greater practical importance than the dogma. Even today the law remains a decisive element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western ideas. It is impossible to understand the present legal development in the Islamic countries of the Middle East without a correct appreciation of the past history of legal theory, of positive law, and of legal practice in Islam."[2]

When, on the other hand, we take into consideration the fact that the Islamic Movement, with this juridical concept, is matched in the Muslim world only by the Communist movement, and that all others are mere national blocs that have no ideological background, it becomes clear that the intellectual gap between the two movements (the Communist and the Islamic) represents an ideological struggle which unavoidably will lead to the victory of one over the other. It also becomes clear that the importance of a resolution such as that cited above is not limited to its juridical value, but goes beyond it to the realm of international relations, upon which the future of mankind depends. The role that legal science might play in this field could be most instrumental towards clarifying many facts and avoiding many problems caused by mutual misunderstanding.

Geneva, December 12, 1958.

[1]H. A. R. Gibb, *Modern Trends in Islam*, p. 86-87.
[2]Joseph Schacht, *Pre-Islamic Background and Early Development of Jurisprudence*, treatise in *Law in the Middle East*, eds. Majid Khadduri and Herbert J. Liebesny, I, The Middle East Institute, Washington, 1955, p. 28.

INTRODUCTION

1. LAW AND RELIGION

THE very term "Islamic Law" reflects, in the first instance, an idea far from the common concept of the nature and function of law. Religion, as generally conceived, is a spiritual sphere of supra-human connotation that cannot be identified with "law", which is basically a secular concern. A vast background of legendary notions, sacerdotal build-up and political history has contributed to the estrangement of law and religion.

We may, however, summarize the elements underlying the alleged discord between law and religion in three main points. They are:

(1) THE SOURCE. The source of any legislation, in any society is, firstly, the comprehension by its members of their social need for some binding legal system. Then comes the society's inter-agreement on the form of representation from which would emerge an authority with competence to meet such a need, to discuss public affairs and to legislate the required laws. Religion, in its general connotation, is very different. It is a divine ordinance imposed upon people without their having the freedom to choose or to discuss. This divine ordinance is then concentrated in the hands of an ecclesiastical class that supervises, or rather, monopolizes, its interpretation, implementation and development. Even this function is a mystery to which human reason is subordinated.

(2) EVOLUTION. The relationship between law and a people's actual state of affairs is a permanent and living one. Law, therefore, is apt to develop with the development of these affairs and to change in response to the ever-changing requirements of social life. It is not the nature of law to solidify when life, which

it controls, is always on the move. Religion is commonly understood to be just the opposite. Its adherents believe that it has been revealed by God and is therefore unchangeable by man.

(3) SPHERE OF INFLUENCE. The legal system of any state is presumed to be equally applicable to all its subjects, irrespective of creed, whereas religion is the concern of its followers alone. Discrimination on the grounds of religion has engraved only bitterness on the memories of almost all nations, and it was the secular legal systems that broke the yoke of religious subjugation and introduced civic equality in its stead. And it is from this latter point rather than from the two foregoing ones that the old conflict has been deriving its strongest impulse, thereby operating widely both in theory and in practice. It is here, moreover, that we can perceive the reciprocal impact between law and religion, each of which claims to be responsible for the welfare of the community. Indeed, it is in the sphere of practical influence that we can examine any claim to the possibility of achieving a harmonization between the functions of law and religion.

2. CHARACTERIZATION OF ISLAMIC LAW

How, then, can the laws of Islam be characterized if examined in the light of these specific points of "discord between law and religion"? To gain a fair answer to such a question one has to apply a twofold method of research: on the one hand, one must examine the ethical basis of these laws and, on the other, one must circumscribe their actual impact in terms of positive law. However, in an effort to provide such an answer, this treatise is basically concerned with the impact of religion only in so far as it bears on the status of Islamic Law. In other words, this treatise is not meant to provide a comprehensive evaluation of Islam in the context of the problem of "religion and law". Rather, it is a modest attempt by a Muslim student of law to suggest how and to what extent non-Muslims may accept its laws on a purely legal basis. It is an attempt to discuss the applicability of Islamic Law, taking into consideration the perspective of non-Muslims

and the way they are apt to react to it in terms of social co-existence and positive law. Whatever ethical principles we may have to consider in the course of our research will be considered as the valid background for both the interpretation and the application of the relevant legal texts.

3. COURSE OF RESEARCH

Accordingly, we shall divide our discussion of Islamic Law into three parts. They are as follows:

PART I: THE SOURCE, wherein we shall survey the sources of Islamic Law and circumscribe the role of Revelation and Prophethood in distinction from the spurious authority of other juristic traditions.

PART II: EVOLUTION, wherein we shall summarize the characteristics of legislation in these basic sources, and examine how it corresponds with human reason and psychology. We shall also discuss its capacity to meet the ever-changing requirements of worldly affairs.

PART III: SPHERE OF INFLUENCE, wherein—in the light of the preceding—we shall discuss the competence of Islamic Law as regards non-Muslim subjects, and the latter's status thereunder. Since this is not only the main aspect of our subject, but is furthermore the source of a variety of misconceptions that have influenced many Western writings on Islamic Law, we shall dedicate a large portion of this treatise to this part. Here, the whole course of our study will be based upon the internationally accepted criteria of civic equality of, as opposed to discrimination against, minorities.

4. DIFFICULTIES OF LANGUAGE

IN all comparative studies of law, the difficulty of language is generally recognized as a considerable barrier. "However," says Robert Jackson, "the barrier of language presents more than the usual difficulty of comparative law studies in the case of

Islamic Law."[1] The main reason is the fact that the Arabic language belongs to a linguistic family entirely different from all Western languages. The Qur'an, the Holy Book of the Muslims and the basic source of Islamic Law, is not merely an Arabic book but reaches a standard of language which is admittedly very difficult, in fact impossible, to translate. Says Prof. Gibb: "An English translation of the Koran must employ precise and often arbitrary terms for the many-faceted and jewel-like phrases of the Arabic; and the more literal it is, the grayer and more colourless it must be. In passages of plain narrative, legislative and the like, the loss may be less great, although not only the unevenness and the incohesion of the compilation but also the fine shades, the hammer strokes and the eloquent pauses (if they can be reproduced at all) may have a disconcerting or, as Carlyle said, a 'crude and incondite' effect."[2]

Often we have to consult four or five different translations of the Qur'an in order to arrive at a satisfactory English equivalent of a particular Quranic text. On some occasions, as we shall see in the course of this treatise, all available translations fail to convey what the Arabic text expresses. Marmaduke Pickthall, an Englishman, introduced his own translation by saying, "The Qur'an cannot be translated. . . . The Book is here rendered almost literally and every effort has been made to choose befitting language. But the result is not the Glorious Qur'an. . . . It can never take the place of the Qur'an in Arabic, nor is it meant to do so."[3] He entitled his translation "The Meaning of the Glorious Qur'an". Muhammad Ali, whose translation has been highly praised by many orientalists, admitted in his preface to the second revised edition that the principle of greatest importance to which he had adhered in interpreting the Qur'an was "no word of the Holy Book should be interpreted in such a manner as to contradict the plainer teachings of the Holy Qur'an."[4] He also

[1] Robert Hoghwout Jackson, late Associate Justice, Supreme Court of the United States, in *Law in the Middle East*, p. v.
[2] Gibb, *Modern Trends in Islam*, p. 4.
[3] Marmaduke Pickthall, *The Meaning of the Glorious Qur'an*, text and explanatory translation, Hyderabad-Deccan (India), Government Central Press, 1938, I, p. 1.
[4] Muhammad Ali, *The Holy Qur'an*, Arabic text, translation and commentary, 4th revised ed., Lahore, Ahmadiyyah Anjuman Isha'at Islam, 1951.

stated that his vast studies of Islam between the two editions had given him a "deeper insight into the Qur'an that would help the revision". These statements by two translators, honest as they both are, illustrate the basic difficulty experienced by Western writers and readers in what a particular context meant to a particular translator as the authentic meaning of the Quranic passage in question. Arabic being our mother tongue, our difficulty was twofold: an inability to rival such translations in so far as the English language is concerned and, on the other hand, an inability to accept some of the translations as fairly representing the original, and sometimes even as correct. This, however, does not imply any ingratitude on our part for the invaluable works of Muhammad Ali and Pickthall; rather, we wish to differentiate between the Qur'an, on the one hand, and its various translations, on the other, as the translators themselves did. We have thus taken the liberty of combining their efforts when such a combination takes us closer to the meaning of the Arabic text. In cases in which we differed with their understanding of a particular text, we have recorded their translations as well as those of others, and have drawn the reader's attention to the literal and conjunctive implications of the Arabic text, thus allowing our opinion to be judged by the context of the Qur'an itself.

But the difficulty in translation is not merely linguistic. We may again quote Robert Jackson: "In course of time it is the custom that legal expressions come to carry a whole bundle of ideas to the initiate as do our phrases: 'due process of law', 'equity jurisprudence', 'trial by jury', or 'judicial review'. It appears to be true of many Islamic legal terms that they wrap volumes of meaning into a single word, which may be expounded to us, but we not having the same concept in our law, have no legal term to fit it."[1] This remark clearly illustrates the difficulty of terminology which has burdened the course of our research throughout.

[1]R. H. Jackson, in his Foreword to *Law in the Middle East*, p. viii.

On the other hand, in many of our English references we came across examples of translation that were far below the minimum standard of any truly scholarly work. To take advantage of the reader's ignorance of the Arabic language and to misquote expressions easily understandable to every Arabic-speaking person, or to apply a literal translation to an Arabic term which is generally recognized as a specific legal meaning, is a very shocking procedure. So much did this insidious method of translation shock us that we had to subdue our resentment with considerable effort. Some examples, however, had to be dealt with in the course of relevant controversy.

It happened that I was once invited to address a church congregation in the United States. The minister graciously introduced me as a "representative of Islam". "The Prophet of Islam," said he, "was Mohammed. When Mohammed came there were several gods worshipped by the Arabs. Mohammed selected one of them with the name 'Allah' and made him the one God to be worshipped." Indubitably, the minister was very honest and his introduction was friendly in spirit, but this demonstrates how he (and many others) have been misled by a difficulty of translation regarding the word "Allah". This word conveys to the Arabs, Muslims and non-Muslims alike, what the word "God" conveys to the English-speaking people. Since that occasion, I have been avoiding the use of the Arabic word "Allah" in English writings.

And let us end our sad complaint regarding language difficulties with the amusing remark of Dr. Hamidullah that "we must not disregard the difference between saying that 'all your relatives will die before you' and 'you will live longer than all your relatives' —a real difference, which as the story goes, caused one astrologer dishonour and brought to the other untold riches on the part of their royal master."[1]

[1]Muhammad Hamidullah, *Muslim Conduct of State*, 3rd revised ed., Lahore, M. Ashraf, 1953, p. 34.

PART ONE

THE SOURCE

CHAPTER I

JURISTIC CLASSIFICATION

MOST of the jurists are in the habit of classifying the sources of Islamic Law into two main categories:

(1) CHIEF SOURCES, which cover:
   a) The Qur'an, or the Holy Book of Islam.
   b) The Sunnah, or the authentic Traditions of Muhammad.
   c) The *Ijma'*, or the consensus of opinion.
   d) The *Qiyas*, or judgment upon juristic analogy.

(2) SUPPLEMENTARY SOURCES, which include:
   a) *Al-Istihsan*, or the deviation, on a certain issue, from the rule of a precedent to another rule for a more relevant legal reason that requires such deviation.
   b) *Al-Istislah*, or the unprecedented judgment motivated by public interest to which neither the Qur'an nor the Sunnah explicitly refer.
   c) *Al-'Urf*, or the custom and the usage of a particular society, both in speech and in deeds.

But this classification of sources is by no means a decisive or authoritative one. During the lifetime of Muhammad, only the first two Chief Sources were recognized as binding. Even the Sunnah derived its authority from clear injunctions of the Qur'an. Individual opinions did exist, but only in the absence of an applicable text in the Qur'an and the Sunnah, and within the spirit of the two Chief Sources. The forming of individual opinions in such cases was urged by the Prophet, and was thus legalized.[1] This, however, was not what jurists later meant by *al-qiyas*, which implied technical rules for the legal exactitude

[1]Ibn Kathir, I, p. 3.

of individual reasoning. With the exception of the Qur'an and the Sunnah, every other source, chief or supplementary, has been a matter of controversy as to its validity or definition. There were some jurists who even considered the Holy Book, on which depends the very authority of the Sunnah, as the sole basic source of all Islamic jurisprudence.[1]

A careful examination of these sources, and of the extensive researches relating to them, would further distinguish the line that separates the first two sources from the rest of the sources. The latter were introduced at least a century after the Prophet, and were built upon the opinions of individual jurists. Such opinions should be subordinated, as in fact they were, to the Qur'an and the Sunnah, and not placed above them. The question of the sources which the jurists relied upon, or of the opinions they derived therefrom, is always open to re-consideration as to their compliance with the Quranic and Prophetic texts and the fulfilment of their objectives.

The passing away of Muhammad came after the declaration of the Qur'an: "This day I have perfected your religion (Islam)"[2] which was explicitly emphasized by him in his last sermon, "O people, bear in mind what I am saying, for I might not see you again. I have left you two things. If you hold fast to them, never will you go astray after me. They are: God's Book, and His Prophet's Sunnah."[3]

None of the Caliphs (successors) of the Prophet claimed the right to be a new source of legislation. Abu Bakr, the first Caliph, whenever he had to pass a judgment, "looked into the Qur'an. If he found an applicable text therein, he would apply it. If not, he turned to the Sunnah. If he found an applicable text therein, he would apply it. If not, he would ask the people whether any of them knew of a judgment passed by the Prophet on the particular issue. It sometimes happened that some people would

[1]Mustafa Ahmad Zarqa, *Al-Madkhal al-Fiqhi al-'Am*, 3rd revised ed., Damascus, 1952, I, p. 56.
[2]Q. V:3.
[3]Ibn Abd al-Barr, *Jami' Bayan al-'Ilm wa-Fadlih*, V, p. 1, Arabic, publ. by Munir al-Dimashqi, Damascus, n.d.

come forward and state that the Prophet had passed a judgment on it. If there was nothing at all, he would summon the chief representatives of the people and consult with them."[1]

'Umar, the second Caliph, did the same, except that he used to ask whether Abu Bakr had passed judgment on the issue before he passed a new one. It was he who wrote the historic letter to his judge, Abu Musa al-Ash'ari, in which he stated: "*Jurisdiction is to be administered on the basis of Qur'an and Sunnah.* First understand what is presented to you before passing any judgment. . . . Full equality for all (litigants): in the way they take places in your presence, and in the way you look at them, and in your jurisdiction. That way, no highly-placed person would look forward to your being unjust, nor would a weak one despair of your fairness. . . . The burden of proof is the responsibility of the plaintiff, and the oath is upon the denying party. Compromise is always the right of litigants except if it allows what (Islam) has forbidden or forbids what (Islam) has allowed. *Clear understanding of every case that is brought to you for which there is no applicable text of Qur'an and Sunnah.* Yours, then, is a role of comparison and analogy, so as to distinguish similarities and dissimilarities—thereupon seeking your way to the judgment that seems nearest to justice and apt to be the best in the eyes of God. Never succumb to anger or anxiety, and never get impatient or tired of your litigants."[2] These are brief extracts from a long letter that has been held authentic by all Muslim jurists.[3] It vividly demonstrates the character and intelligence of 'Umar who, on the one hand, had been a leading figure among the Companions of the Prophet, and on the other, was the strongest of the early Caliphs. 'Umar's perspicacity, however, was not

[1]Ibn al-Qayyim, *I'lam al-Muwaqqi'in*, Arabic, I, 62. This primitive way of tracing the Sunnah, in consultation, was enough at the time, and could correspond with the simple way of life and the small population. This way, however, should always develop with the developing mode of living.

[2]Ibid, p. 85-86.

[3]Goldziher, however, in his book *Die Zahrinten*, Leipzig, 1884, expressed his suspicion on the authenticity of this letter of 'Umar. Emile Tyan in his *Histoire de l'organization Judiciaire en pays de l'Islam*, Paris, 1938, followed in the footsteps of Goldziher and opined that the letter was the product of the third Islamic century. Prof. Schacht, in his *Pre-Islamic Background* in *Law in the Middle East*, accepted Tyan as the only reference while opining the same, in contrast to the recorded verification of Muslim jurists. They all seem to have disregarded the fact that the letter is based on authentic sayings of the Prophet. For a complete analysis of the letter, see Ibn al-Qayyim, *I 'Lam al-Muwaqqi'in.*

so much a personal merit as it was a result of the clear concept—then prevailing—that all legal authority in Islam is confined to the Qur'an and the Sunnah. If anyone could have claimed legal authority for his own opinions side by side with Islamic Law as laid down in these two sources, it would have been easier for 'Umar than for anyone else. And if the Muslims were to allow such a thing to happen, they would have been most apt to do so under the Caliphate of 'Umar. But neither he nor they did so. The opposite is the fact. 'Umar used to be questioned and called to account for any judgment that seemed to anyone to go against the basic texts of the Qur'an and the Sunnah. History records open discussions in the Mosque of Madinah wherein these texts were the only reference, and wherein 'Umar sometimes admitted that he was wrong.[1]

In other words, the structure of Islamic Law—the *Shari'ah*—was completed during the lifetime of the Prophet, in the Qur'an and the Sunnah. This brings us to an important fact which is generally overlooked. It is that the invariable basic rules of Islamic Law are only those prescribed in the Shari'ah (Qur'an and Sunnah), which are few and limited. Whereas all juridical works during more than thirteen centuries are very rich and indispensable, they must always be subordinated to the Shari'ah and open to reconsideration by all Muslims.

[1]Muhammad al-Khudari, *Tarikh al-Umam al-Islamiyyah*, Arabic, VII, p. 17. See also Al-Amidi, *Al-Ahkam*, VIII, p. 150.

CHAPTER II

BASIC MISCONCEPTIONS

IN the course of time, however, individual opinions increased and varied—whereby nuclei of the later-established schools of law affected the basic attachment of the Muslims to the Shari'ah. Divergence from the direct adherence to the Shari'ah, as we shall see in another chapter, was something that none of the classical jurists had intended. Theirs, in fact, was the intention to help every Muslim to maintain, in every new issue, a living relation with the basic texts of the Shari'ah. Theirs was the role of interpreting, implementing and opinion on the applicability of a particular text to a particular issue or, in the absence of an applicable text, giving individual opinions. To every Muslim, such authority is dependent—or should be dependent, as we have said earlier—on its compliance with the Quranic and Prophetic texts and on the fulfilment of their objectives. Thus, the diversity of juristic opinion should be considered as an active sign of the flexibility of the Shari'ah, and not as a dogmatic seal on its applicability. But such a flexibility can be conceived only if the study of the Shari'ah precedes the endless journey amidst the extensive works of the jurists. Even that is not enough. All through this endless journey, we should not lose sight of the simple fact that Islam, in the sense of binding law, was defined forever by the Qur'an and the Sunnah, and any new claim to binding authority in the name of Islam has to be authenticated thereby. Otherwise, Muslims would be falling into what the Qur'an vehemently condemned in other religious groups: "Those who dispute concerning the messages of God without any authority that has come to them: greatly hated is it by God and by those who believe."[1]

[1]Q. XL:35.

In the light of the above, we may better judge such a statement as that of Prof. J. Schacht: "During the greater part of the first century, Islamic Law in the technical meaning of the term did not yet exist. As had been the case in the time of the Prophet, law as such fell outside the sphere of religion, and as far as there were no religious or moral objections to specific transactions or modes of behaviour, the technical aspects of law were a matter of indifference to the Muslims."[1]

It all depends on what Prof. Schacht means by "technical". If it implies any attribution of authority to any legal source outside the Qur'an and the Sunnah, then we are faced with a basic contradiction of the very concept of the Shari'ah. But if it only means the technical classification of what the Prophet in his lifetime had completely conveyed and outlined, or the technical procedure (*lex fori*) which is to be initiated by the requirements of time in execution of justice as administered by the Shari'ah, then such a statement may be tolerated despite its vagueness. However, the way Prof. Schacht elaborates on his statement gives us more than one argument to consider it to be a basic contradiction and misconception. The late dating of the coming into existence of Islamic Law, as presented by him, seems to serve him as a proof for two grand conclusions. Says he: "Mohammedan jurisprudence started about the year A.H.100. It follows not only that the whole first century of Islam was available for *the adoption of foreign legal elements by nascent Islamic society*, but that Islamic legal science began at a time when the door of Islamic civilization had been opened to potential transmitters of these legal concepts, the educated non-Arab converts to Islam."[2] But these very conclusions of Prof. Schacht, presuming their correctness, would serve more as a double proof for the build-up of foreign influence on Islamic Law. The "nascent" Islamic society which was shaped by the Prophet of Islam has to be accepted, so far as Islam and Islamic Law are concerned,

[1] J. Schacht, *Pre-Islamic Background and Early Development of Jurisprudence*, treatise in *Law in the Middle East*, p. 35.
[2] J. Schacht, *Pre-Islamic Background and Early Development of Jurisprudence*, treatise in *Law in the Middle East*, p. 36.

as the most perfect representative thereof. Its open-mindedness regarding the adoption of some foreign legal elements—wherever such adoption and foreignness are verified—should be considered as a characteristic of flexibility in Islamic Law and society. If by "foreign legal elements" Prof. Schacht means, as the vagueness of his statement and the examples he gives seem to imply, not only their introduction by non-Muslims or non-Arab converts but also the alteration, thereby, of any Islamic legal principle, one may wonder how such a diversion from Islam could be a conceivable process for the build-up of Islamic Law.

Prof. Gibb has correctly stated that "law, in the eyes of the Muslim scholars, was the practical aspect of the religious and social doctrine preached by Mohammed. . . . For Muslims its proof and texts were to be found in the Koran and Prophetic Tradition."[1] He also made the accurate remark that "only at a much later date was the Greek word 'canon' (*qanun*) adopted to denote administrative rule as distinct from revealed law. (Thus 'canon law' in Arabic should mean the exact opposite of canon law in European usage.)"[2] After surveying the growth of different schools of law, he concluded that "in spite of these derogations from its authority, the Shari'ah always remained in force as an ideal and a final court of appeal, and by its unity and comprehensiveness it formed the main unifying force in Islamic culture. Its very lack of flexibility[3] contributed to this result by preventing divergences and disintegration into purely local systems. It permeated almost every side of social life and every branch of Islamic literature, and it is no exaggeration to see *in it*, in the words of one of the most penetrating of modern students of the subject, 'the epitome of the true Islamic spirit, the most decisive expression of Islamic thought, the essential kernel of Islam'."[4]

[1]H. A. R. Gibb, *Mohammedanism*, New York; New American Library, 1955, p. 73.

[2]Ibid.

[3]The conception of flexibility is a very relative one. The second part of this treatise will deal with it at length. Suffice it now to mention that flexibility in the course of any social affair should not go to the extent of sacrificing any of the fundamental goals of social life. Thus, there should always be some inflexible outlines for flexibility.

[4]H. A. R. Gibb, *Mohammedanism*, p. 84.

These last words are the words of Prof. Schacht which we have quoted in our foreword,[1] but they are applied here to the Shari'ah, to the Qur'an and the Prophetic Tradition which provide, in the words of Prof. Gibb, "the proof-texts" of Islamic Law.

In short, a sharp line has to be drawn between Islamic Law as introduced by its Prophet (the Shari'ah), and all juristic achievements that came later, however rich and indispensable the latter may be. Their indispensability, however, goes only so far as it helps to verify the authenticity and applicability of the texts of the Shari'ah, the latter being always the basic and the sole source of legal authority.

[1]Gibb's reference is; G. Bergstraesser's *Grundzuege des Islamischen Rechts*, ed. Joseph Schacht, p. 1.

CHAPTER III

THE SHARI'AH

A. THE QUR'AN

THE Qur'an, in the belief of all Muslims, is the very Word of God. It clearly states: "Your companion (Muhammad) errs not, nor is he deceived. Whatever he utters, it is not of his own whim and fancy. It is naught else but a divine revelation revealed unto him."[1]

It was revealed in fragments, through the angel Gabriel, during the Prophetic career of Muhammad which lasted for about twenty-three years. Says the Qur'an: "And (it is) a Qur'an that We have divided, that thou mayest recite it unto the people at intervals, and We have revealed it in portions."[2]

The present form of the Qur'an is one and the same in every part of the Muslim world, and it has been so all through the centuries. This, Muslims believe, is due to the fact that the compilation and arrangement of the chapters was completed—under Divine instructions—by the Prophet himself. During his lifetime, every revealed portion used to be recorded in writing by many Companions; some of them even memorized the whole of the Qur'an.[3] Abu Bakr, the first Caliph, ordered all original manuscripts made in the Prophet's lifetime to be collected and copied. Zaid Ibn Thabit, who was entrusted with the job, had been the personal assistant of the Prophet in Madinah in charge of writing down every revelation. He applied a two-fold method of verification, comparing the original manuscripts with the texts memor-

[1] Q. LIII:2-4.
[2] Q. XVII:106.
[3] Memorization of the whole Book has been common in all Muslim countries. Even today there are many schools specialized therein, and every graduate of a religious institute is supposed to have committed to memory every word of the Qur'an.

ized by the Prophet's Companions; this method provided a double testimony for the accuracy of every injunction.

During the reign of 'Uthman, the third Caliph, Anas Ibn Malik, a Companion of the Prophet, related that "to 'Uthman came Hudhaifah, who had been fighting with the people of Syria in the conquest of Armenia and with the people of Iraq in Azarbaijan. Alarmed at their variations in the modes of reading, he said to 'Uthman: 'O Commander of the Faithful, stop the people before they differ in the Holy Book as the Jews and the Christians differ in their Scriptures'. So 'Uthman sent word to Hafsah (the widow of the Prophet) asking her to send him the Qur'an-copy in her possession so that they might make other copies of it and then send the original copy back to her. Thereupon Hafsah sent her copy to 'Uthman, and he ordered Zaid Ibn Thabit and 'Abd Allah Ibn Jubair and Sa'id al-'As and 'Abd al-Rahman Ibn Hisham, and they made copies from the original copy. 'Uthman also said to the three men who belonged to the Quraysh (Zaid only being from Madinah): 'When you differ with Zaid in anything concerning the pronunciation of the Qur'an, then write it in the language of the Quraysh, for it is in their language that it was revealed'. They obeyed these instructions, and when they had made the required number of copies from the original copy, 'Uthman returned the original to Hafsah and sent to every quarter one of the copies thus made, and ordered all other copies or leaves on which the Qur'an was written to be burned."[1] Thus the door was elaborately locked against the possibility of corruption. This established authenticity, however, has been received by Muslims more as an axiom of faith; and they often quote the Quranic injunction, "Falsehood shall not approach this Book from what has passed or from what lies ahead. It is a revelation from the Wise, the Praiseworthy."[2]

To Muslims, the Qur'an being the very Word of God, it is the absolute authority wherefrom springs the very conception of legality and every legal obligation. It is also, to them, the first and

[1]Al-Bukhari, *Al-Jami' Al-Sahih*, Arabic, 66-3. See also Muhammad Ali, *The Holy Qur'an*, p.iii.
[2]Q. XLI:43.

everlasting miracle of Muhammad's Prophethood. Says Prof. Gibb: "But the Meccans still demanded of him a miracle, and with remarkable boldness and self-confidence Mohammed appealed as the supreme confirmation of his mission to the Koran itself. Like all Arabs they were connoisseurs of language and rhetoric. Well then, if the Koran were his own composition other men could rival it. Let them produce ten verses like it.[1] If they could not and it is obvious that they could not, then let them accept the Koran as an outstanding evidential miracle."[2]

It has to be admitted, however, that the Qur'an, being basically a book of religious guidance, is not an easy reference for legal studies. It is more particularly an appeal to faith and the human soul rather than a classification of legal prescriptions. Such prescriptions are comparatively limited and few. Regarding family law, they are laid down in 70 injunctions; civil law in another 70; penal law in 30; jurisdiction and procedure in 13; constitutional law in 10; international relations in 25; and economic and financial order in 10.[3] Such an enumeration, however, can only be approximate. The legal bearing of some injunctions is disputable, whereas of some others it simultaneously applies to more than one sphere of law. The major portion of the Qur'an is, as with every Holy Book, a code of Divine exhortation and moral principles.

B. THE SUNNAH

"Sunnah", an Arabic word which literally means "method"' was applied by the Prophet as a legal term comprising what he said, did and agreed to. Its authority derives from the Prophethood of Muhammad, as expressed and defined in the Qur'an. His mission is thus stated in the Qur'an: "And We have revealed to thee the Reminder that thou mayest make clear to men that

[1]Says the Qur'an, "Or, say they: He (Muhammad) has forged it. say: Then bring ten chapters like it, and call upon whom you can, besides God, if ye are truthful" (Q. XI ; 13). Then the challenge went down to one chapter (Q. II:23); then further down to just any utterance like it (Q. LII;34). The challenge was never met by those who exhausted all their means to crush Muhammad and his religion.
[2]H. A. R. Gibb, *Mohammedanism*, pp. 40-41.
[3]Abd al-Wahhab Khallaf *Ilm Usul al-Fiqh*, Arabic, 7th ed., Cairo, 1956, pp. 34-35.

which has been revealed to them, and that haply they may reflect."[1] This statement implies the Prophet's supreme authority in the interpretation of the Holy Book, be it by word or by action. That this authority is binding on all Muslims is explicitly declared by the Qur'an: "O you who believe, obey God and His Messenger,"[2] and, "Whoever obeys the Messenger, he indeed obeys God."[3]

The Prophet, however, in order to avoid a possible confusion of his sayings with Quranic texts, did not encourage his Companions to write down what he said. But this did not affect the status of the Sunnah; it only rendered more difficult the later recording thereof. This difficulty was the price Muslims had to pay for keeping their Holy Book unquestionably authentic and unique. Such a difficulty, indeed, is a result of the basic separation between the Qur'an, which is the letter and spirit of God's Will, and the Sunnah, which is the human, though prophetic, clarification of the Qur'an by Muhammad. The latter, by virtue of its very nature, was meant to make the Revelation, through a man, clear to men. Therefore, it was no great risk to leave the recording of the Sunnah for a later authentication by the Faithful. Muhammad's formidable influence and authority, not only on individual Muslims but also on the actual shaping of their entire society, were strong enough to enable later generations of Muslims to verify what Muhammad had said or done. One of the means of verification was the faculty of memory—a noteworthy characteristic of the Arabs—particularly strong when whetted by the urge of faith and spiritual love.

"The characteristic religious activity, then, of the first century," says Gibb, "was the collection and transmission of details about the life and actions of Mohammed. . . . In view of the profound impress which the personality of the Prophet had left on his adherents, this activity was a spontaneous growth, owing nothing to outside influences. The natural centre of these studies was

[1] Q. XVI:44.
[2] Q. VIII:20.
[3] Q. IV:80.

Medina, where most of the Companions continued to live and where first-hand information was most securely to be found."[1]

But soon after this statement, a confusion between "Sunnah" in its Arabic literal meaning and "Sunnah" as a legal term seems to obscure the course of Prof. Gibb's analysis. While excluding the "Written Book" from the orbit of the "Sunnah", which is correct, he defines the latter as the self-developed tradition of the Muslim community, including all its social and legal usages "whether these were taken over from older custom or were set by the Prophet".[1] As a proof, he interprets the designation "Ahlul-Sunnah" or "Sunnis"—which applies to "orthodox" Muslims as against the "Shi'ah", or the "partisans" of Ali—as implying the adherence to the "usage of the community", and not to the "usage of the Prophet", which the Shi'ah also claim to share. But how could he conceive that the Shi'ah did not equally claim their adherence to the usage of the community? Is it because they were the minority? And if it is a numerical measure that determines the usage of the community, then on what basis does his differentiation rest when he himself says on the same page that "for most Sunnis the two were identical"?

This confusion prevails in most non-Muslim writings on the subject. Prof. Schacht, for instance, bases his opinions on similar conclusions.[2] Another example is Prof. Alfred Guillaume, who shares this confusion with astonishing ease.[3] Prof. Khadduri not only follows in the footsteps of his Western predecessors, but further brings a new definition of the Sunnah which has nothing to do with what all Muslims understand by it.[4]

The reasons behind this confusion can be epitomized by two important facts:

(1) According to our early definition of the Sunnah, which is common to all Muslim schools of law, it includes what the Prophet said, did or agreed to. This latter category has been an

[1] H. A. R. Gibb, *Mohammedanism*, pp. 61-62.
[2] J. Schacht, *Pre-Islamic Background and Early Development of Jurisprudence*, treatise in *Law in the Middle East*, pp. 34-35.
[3] A. Guillaume, *Islam*, Pelican Books, 1954, pp. 92-93.
[4] Majid Khadduri, *Nature and Sources of Islamic Law*, article in *A Symposium on Muslim Law* in the George Washington Law Review, Vol. XXII ,Oct. 1953.

open door for confusion, as well as for strong suspicion as to the authenticity of the Sunnah. Anything of utility that did not contradict a principle of Islam was accepted and sanctioned by the Prophet, and it thus became a part of his Sunnah. Western students of the Sunnah, however, failing to comprehend this aspect of Prophetic legalization and realizing that a specific deed or institution thus legalized did exist before the Prophet, are apt either to define the Sunnah as "the usage of the community", as did Prof. Gibb, or to suspect that forgeries have infiltrated therein. A good example of this attitute is that of Kenneth Cragg in *The Call of the Minaret*. He says: "Much came into the Muslim heritage of obedience in this way from the customs and cultures of the conquered territories. Muhammad became the posthumous repository of many ideas and practices which Islam had neither will nor power to eradicate from the behaviour of its new devotees. But there is little evidence that elements incompatible with crucial Muslim teachings found any such entry. . . . The fact that things must be believed to turn upon prophetic precedent is no more than a measure of the veneration in which revelation and its agent were regarded."[1] This last sentence not only implies a self-deceiving measure of veneration which would not even shrink from forgery, but also displays a grave misconception of the basic characteristics of legalization in both Qur'an and Sunnah. As we shall see later, it is an accepted principle in Islamic Law that everything is allowed unless explicitly prohibited, and not the other way around. Muslims, therefore, do not need Prophetic precedents for every act of "legalization". The very preceding sentence in Mr. Cragg's statement illustrates an historical fact which precludes this false assumption of forgery, as regards both its supposed justification and in its positive value.

We may also include among the reasons underlying this confusion the oft-repeated allegation concerning the influence of Roman Law on Islamic Law. Prof. Nallino, the famous orientalist, in his lecture before the International Congress of Roman Law

[1]Kenneth Cragg, *The Call of the Minaret*, New York, 1956, p. 144.

held in Rome in 1933,[1] stated that Dominico Gatteschi was the first to claim the existence of such an influence in his book *Manuale di diritto pubblico e private ottomano* (Alexandria, 1865). He was an advocate who lived in Alexandria, but knew neither Arabic nor Turkish. In this book he presumed that the introduction of Roman norms into Islam had been facilitated by disguising these Roman norms in the garb of apocryphal sayings attributed to Muhammad. Since that time, many others have been repeating the same allegation, with an infinite variety of nuances, and elaborating thereon. Prof. Dawalibi, in his book on Roman Law,[2] mentions Santillana, Goldziher and Massé as opining to the same effect. He then deals at length with their arguments. Both Nallino and Dawalibi not only exposed the charge as baseless but further proved its inevitable contradiction with several judicial and historical facts. Prof. Gibb states, "The principles upon which Islamic Law was constructed and—one may even say—the whole spirit of its application were entirely unrelated to those of the Roman jurists."[3]

(2) Another reason for the confusion about the Sunnah is the fact that its study has, in the course of time, evolved into a special science and, thus, a kind of "specialization" has been increasingly demanded as a basis for its utilization as an authentic reference. In the first century of Islam, as Prof. Gibb has remarked, the collection and transmission of details about the life and the actions of Muhammad was "a spontaneous growth" and "first-hand information was most securely to be found." Thus, for an early Muslim there was no problem in keeping to the Traditions of his Prophet. Actual adherence, devotion and memory had been strong guarantees for the authority and authenticity of the Sunnah. But gradually the strong hold of Islam became attenuated and pre-Islamic schism began to breathe again after a long

[1]C. A. Nallino, lecture on *The Influence of Roman Law on Islamic Law*, tr. by Dr. M Hamidullah, Islamic Review, Woking, Dec. 1933. See also *Raccolata de scritti editi e inediti* publ. by Prof. Maria Nallino, Rome, 1942, Vol. IV, pp. 85-94.
[2]Ma'roof Dawalibi, *Al-Madkhal fil-Huquq al-Rumaniyya*, Damascus, 1948, pp. 52-81.
[3]H. A. R. Gibb, *Mohammedanism*, p. 73. See also S. Mahmassani, *Falsafat al-Tashri' fil-Islam*, Arabic, Beirut, 1952, pp. 187-198, where he gives a survey of many works on the subject and discusses the views of von Kremer in his *Culturgeschichte des Orients unter den Chalifen*, I, pp. 532ff.

period of suppression—sometimes in the name of Islam itself. Political manoeuvres and intrigues became active in Muslim society. A seemingly easy instrument for playing on religious sentiments as well as for destroying the very framework of Islam was the Sunnah. Deliberate forgeries were instituted and many false sayings were ascribed to the Prophet. The counter-balance against such forgeries, however, was twofold :

A. In the first place, there were the recorded compilations of the Sunnah by early Muslims, some of which were written down in the presence of the Prophet himself. Some examples are:

(i) The important sermon of Muhammad on the day of the conquest of Maccah, which he ordered to be recorded in response to the request of a Muslim from Yaman.[1]

(ii) The private record of Abdullah Ibn 'Amr Ibn al-'As, a Companion of the Prophet. He called this record *Al-Sadiqah*, which means "The Truthful". It was later incorporated in the authoritative books of Hadith.[2] He said, "Written here is only what I did hear with my own ears from the Prophet."[3] Abu Hurayrah, a reputed authority on Hadith, said, "None is a better keeper and relater of Hadith than me, except Abdullah Ibn 'Amr Ibn al-'As. That is because he used to write whatever he heard from the Prophet."[4]

(iii) Anas Ibn Malik, the devout servant who lived with the Prophet all through his stay in Madinah, and who died as late as the year 93 H., said: "Every now and then I took down in notes interesting points from what the Prophet said in his discourses and other occasions of conversation; and I used to read these notes over to the Prophet whenever I found him having leisure, and after he had corrected them, I made a fair copy of them for my own record."[5] We later see a full chapter under the name "Anas" in the reliable reference book *Al-Musnad* of Ahmad Ibn Hanbal.

[1] Al-Bukhari, *Bab Kitabat al-'Ilm.*
[2] Hadith, an Arabic word literally meaning "saying", is used as a synonym for the legal expression "Sunnah".
[3] Ibn Sa'd, *Al-Tabaqat al-Kubra*, II-II ; 125.
[4] Al-Bukhari, *Bab Kitabat al-'Ilm.*
[5] M. Hamidullah, *Early History of the Compilation of the Hadith*, article in Islamic Review, Woking, May, 1949.

(iv) In reliable reference books of Sunnah, written documents dictated by the Prophet are frequently mentioned and authenticated.[1]

(v) In his book *Al-Wathaiq Al-Siyasiyah* (Cairo, 1956), Dr. M. Hamidullah records 250 documents emanating from the Prophet and written down in his presence.

These limited examples may serve to present the often ignored fact that the late famous compilations of Hadith were by no means the first written documents relating to the Sunnah.

B. Next to these written documents, as a counter-balance to forgery, were the great works of Muslim scholars in the field of compilation and authentication of the Sunnah. "Each hadith was thus prefaced by a chain of authorities (Sanad) going back to the original narrator, and the process was called 'isnad' or 'backing'."[2] In the course of time, a separate "science of Hadith" was built up, whereby not only the chains of authorities could be traced back to the Prophet himself, but also the biographical data about all narrators was investigated and classified. Says Gibb: "The specific application of this biographical material to the purposes of hadith-criticism was the object of a special branch of study called the 'science of impugnment and justification'. This investigated the bona fides of the guarantors of tradition, their moral character, truthfulness, and powers of memory."[3] Again he says: "In the history of Islamic science the discipline of hadith-criticism became more and more meticulous."[4]

The outcome of all this travail is the classification of every recorded item of the Sunnah according to its status of authenticity. Thereupon stands its authority as a text of Islamic Law.

The existence of the science of Hadith makes it impossible for any bona fide Muslim scholar to accept the manner in which most Western writers have been treating the Sunnah. For they,

[1]Al-Bukhari, II, 1084, 1085: and Al-Tabarani, *Al-Mu'jam al-Saghir*, pp. 217, 242; and Ahmad Ibn Hanbal, *Al-Musnad*, IV, 141: and Ibn Sa'd *Al-Maghazi*, p. 71.
[2]H. A. R. Gibb, *Mohammedanism*, p. 64.
[3]Ibid.
[4]Ibid, p. 66.

says Prof. Nallino, "have limited themselves to general affirmations: the fruit of calculations of probability rather than of profound study."[1] Prof. Vesey-Fitzgerald, for instance, refutes an Hadith which has been held authentic by all authorities on the subject, with the easy assumption that "its well-drilled regularity" is that "of a church catechism or a code of law"—and thus "unconvincing".[2] One has to ask: What, then, would remain of the structure of the Sunnah if one were to exclude from it everything that is characterized by regularity and a sense of law? And what other characteristics would Prof. Vesey-Fitzgerald suggest as an alternative to "well-drilled regularity" which, according to him, is "unconvincing", in order to establish the authenticity of the Sunnah *convincingly?* These questions are left unanswered, and indeed the more we come across such easy assumptions, the better we realize the indispensability of the science of Hadith.

To our knowledge, there does not exist such an exacting science outside the Muslim world. Even with a fair statement like Prof. Gibb's, describing one work on the subject, *Sahih Al-Bukhari*, as "a work of immense interest and scrupulous scholarship",[3] we do understand why non-Muslim scholars fail to find their way through the science of Hadith. Rather, we should not expect them to be able to do so. We often recall the words of Prof. Gibb depicting some works on Hadith-criticism as "hair-splitting" exercise.[4] Even among Muslims, only very few scholars are specialized on the Sunnah, and these can hardly find time and energy for any other subject. To expect more from Western scholars, who write at the same time on "Islamic theology" and "Islamic philosophy" and "Islamic law" and "Islamic history" and "comparative studies" and "Arabic language", etc., is only unfair. But, on the other hand, it is also unfair, on their part, to dismiss such a fully-established science

[1]Nallino, *The Influence of Roman Law on Muslim Law*, in Islamic Review, Woking, Dec. 1933, p. 9.
[2]Vesey-Fitzgerald, *Nature and Sources of the Shari'ah*, in *Law in the Middle East*, p. 92.
[3]Gibb, *Mohammedanism*, p. 66.
[4]Ibid, p. 65.

as that of Hadith with the easy assumption of forgery—the very thing this science was established to root out—or to make arbitrary accusations without a scholarly method of verification.

CHAPTER IV

THEOCRACY RULED OUT

IN the preceding two chapters, we have tried to affirm the fact that it is only the Shari'ah (Qur'an and Sunnah) that initiates the very sense of law in Islam and demarcates its legal bearing. By the exclusion of every authority other than that of the Shari'ah, we are relieving both its concept and its applicability from the accumulated heritage of different influences. We come face to face with what all Muslims believe to be the Word of God in the Qur'an, and with its human interpretation by the Prophet in his Sunnah. In other words, we come face to face with Revelation and Prophethood. Or, as Santillana has put it, "The Law, which is the constitution of the community, cannot be other than the will of God, revealed through the Prophet."[1] This gives rise to two main points regarding the characterization of the Shari'ah as a source of law: firstly, the role of mystery in Revelation and its manifestations, or, as it is usually said, the role of theocracy in Islamic Law; and, secondly, the correspondence between such a Revealed Law and the actual state of affairs, both at the time of its revelation and at all later times. This latter point, however, will be more properly dealt with in the second part of this thesis.

Theocracy, a word derived from the Greek word "theos", meaning "God", is a vague title attached to governments or states governed by God directly or through a sacerdotal class.[2] Centuries of history have endowed this governmental system with an aura of inscrutability and a dark background of evil and horror. The concept of an "Islamic State", owing to its very designation, has had to suffer from the implications that accompany the seemingly parallel title, "theocracy". No less a difficulty than the non-Muslim writers' failure to understand this problem was the influence of Western history on many Muslim writers. The long Western struggle between State and Church is of a

[1]D. Santillana, *Instituzioni di diritto Musulmano malichita*, Rome, 1926-38, Vol. I, p. 5.
[2]The Concise Oxford Dictionary, p. 1321.

nature quite alien to Islamic thought; for Islam does not authorize any material form, human or institutional, that could claim to be representative of God. God is God and man is man. The Prophet was a bearer of Revelation, and both were terminated by the Prophet's passing away. The Divine Laws that Muhammad left behind are God's laws, but they are not God. They were revealed and conveyed in clear Arabic with its linguistic rules common for all purposes of expression, and through the human example of the Prophet. And the Prophet was but a man[1] who, though perfect, passed away. It is the Divine Laws which remain, being no more than an enjoinment on the believers to adhere to them in practice. It is the Muslim belief that no man, or class of people, or mosque is privileged with a private relationship with God or a special right to speak for Him. God spoke only to Prophets, and all other men stand on equal footing. Muslims differ with regard to the Divine texts, in interpretation or in application, just as they differ with regard to any other code of law. There is no authority beyond the text itself, and the authority of the text extends only in so far as its language implies and human thought may comprehend. All men are human: no man impeccable or infallible. In clear contrast to the Western concept of "theocracy", Islam was a revolt against all anthropomorphic implications in the realm of faith. This can well explain the peculiar expression "*une théocratie laique et égalitaire*"[2] which Louis Gardet coined to characterize Islam: a peculiarity of expression revealing an inability to comprehend an ideology which is neither theocratic nor secular, in the expressional sense which either of these terms conveys. It is the impact of this paradox which renders Islam difficult to define. Prof. Gibb, however, came very close to such a definition when he remarked that "it is characteristic of the practical bent of the Islamic community and of its thought that its earliest activity and most highly developed expression is in law rather than in theology."[3] Not-

[1]Q. XVIII ; 110—"Say; I am only a mortal like you. It is revealed to me that your God is one God. So whoever hopes to meet his Lord he should do righteous deeds and make none sharer of the worship due unto his Lord."
[2]Louis Gardet, *La Cité Musulmane: Vie Sociale et Politique*, Paris, 1954, p. 31.
[3]H. A. R. Gibb, *Mohammedanism*, p. 72.

withstanding the explanation he gave for this and the many deviations from which the Muslim community afterwards suffered, it should be noted that the "earliest activity" to which Prof. Gibb referred represents the prophetic, that is, the authentic, introduction of Islam. Let us also suggest here that it might have been a deliberate plan—as, in fact, the Muslims believe it to be—and not a lack of genius that prescribed law rather than luxurious theological thought as the criterion of factual faith and as the practical test for man, enabling him to live in accordance with his beliefs. A code of action, not mysterious outlets, is the characteristic feature of Islam.

Within the Muslim concept, religion is not entirely a private affair between man and God. A privacy is there, and in fact it constitutes the essence of all religious experience. But even in this privacy the individual is ruled by a code of law which is binding on all. And this privacy is never allowed to establish any kind of "sanctity" in a man or in a class of men. Even in Muhammad's authority over the Muslims, there is a clear line between the Revelation given to him and himself as a human being. His followers' complete faith in his prophethood went hand in hand with a comprehension of his humanness. In the famous Battle of Badr[1] he was asked, "This place where we have been stationed, is it God's ordained selection (by Revelation), or is it your plan?" He replied, "It is but my plan." Then said Al-Hubab Ibn al-Mundhir, "This does not seem to be the proper stationing." And he suggested some other place for reasons which he explained. The Prophet, convinced by this reasoning, ordered the Muslim army to change station.

Even more explicit are his famous words, uttered when judging a case, "It may be that some of you fail to prove his right in the case. I am but a human being. If my judgment wrongly favours one undeserving, this shall only take him to Hell."

The early Caliphs were always careful to clarify their status as rulers under the Law, and not above it. "Caliph" is an Arabic

[1]Ibn Hisham, Vol. I, p. 620, 2nd ed., publ. by Mustafa al-Halabi, Cairo, 1955.

word meaning "successor". They were designated as successors of the Prophet on the understanding that they succeeded the Prophet only in the sense of carrying out whatever commandments he had left his followers. Revelation having been terminated, the Caliph was no more than a human being appointed by the whole community in consideration of his capacity to rule. It was a public meeting at Saqifah (a place in Madinah) that resulted in the election of Abu Bakr as the first Caliph. And it was this same Abu Bakr who assumed his office with the declaration: "I have been appointed as your ruler, but I am not the best among you. If I am right, then help me. If I am wrong, you should set me right."[1]

A grave misconception, however, has arisen on the basis of a misquotation of the Qur'an. The word "caliph" was used in the Qur'an in two places,[2] meaning the "successor" or the "viceroy". It was used in the plural in six other injunctions and its verb, *istakhlafa* and *khalafa*, in another eight. But none of these can serve as a proof-text for those who characterize the Caliph as the Viceroy of God. The very first of these quotations testifies, rather, to something else. It reads as follows: "And when thy Lord said unto the angels: Lo! I am about to place a caliph in the earth, they said: Will Thou place therein one who will do harm therein and will shed blood, while we, we celebrate Thy praise and sanctify Thee? He said: Surely I know that which ye know not. And He taught Adam all the names. . . ."[3] The angels themselves did not conceive any Divine status in the word "caliph", as attributed by God to Adam. And even if it could ever imply anything of the sort, it should be applicable to every human being of whom Adam was the father and the model. *Khalafa*, the origin of *khalif* (or "caliph" as it is usually written in English), means "to take the place of someone in his absence", and thus it cannot literally apply in conjunction with God, who is always present. It can only be a figurative expression, which

[1] Al-Khudari, *Tarikh al-Umam al-Islamiyyah*, Arabic, Vol. I, p. 170.
[2] Q. II : 30 and XXXVIII ; 25-26.
[3] Q. II : 30-31.

is characteristic of the Arabic language and which should be interpreted within its context. That is why we consider the word "ruler"[1] to be the best translation of the word "caliph" in these injunctions, thus meaning the power delegated by God to His creature Adam (and thereby to all mankind), whereby the latter rules over other creatures. And if the Arabic word "caliph" can be translated—in this sense and in these particular injunctions—as the "Viceroy of God", it should not be confused with the " Caliph of the Prophet ", which means no more than the "Successor of the Prophet". Prof. Gibb, after surveying the mistaken characterization of the Caliph as the Viceroy of God, had to remark: "But at the very heart of their theory there lay a contradiction of which the Muslim jurists were well aware, though it seldom found expression in their expositions. For the fundamental loyalty of the Muslim is given not the imam (caliph or ruler) but to the Shari'ah (Islamic law).[2]"

In his book *Mohammedanism*, he had to repeat it on many occasions and in different forms. "True," he said, "there was at one time the Caliphate. But the Caliphate was not a Papacy, and from Umayyad times on the theologians and legists had resolutely refused to concede to it any spiritual authority."[3] Again he said: "In orthodox Islam the Caliph has no interpretative functions and cannot define dogma."[4] Prof. Anderson explicitly remarked that, "true, it is the duty of the Caliph or Sultan to lead the Muslim community in war and act as its executive in peace; but he is under, not above, the sacred Law and may not meddle in what God has prescribed."[5]

It was under the Caliphate, and in sharp contrast to the intolerable yoke of theocracy in the European Middle Ages, that the state ruled by Islamic Law in Spain became the acknowledged

[1] *The Holy Qur'an*, commentary by Muhammad Ali, p. 17.
[2] Gibb, *Constitutional Organization*, treatise in *Law in the Middle East*, p. 5.
[3] Gibb, *Mohammedanism*, p. 20. In the first page of his book, the author states that Muslims dislike the terms Mohammedan and Mohammedanism, which seem to them to carry the implication of worship of Muhammad, as Christian and Christianity imply the worship of Christ.
[4] Ibid, p. 96.
[5] J. N. D. Anderson, *Reflections on Law, Natural, Divine and Positive*, lecture held at the 940th, Ordinary Meeting of the Victoria Institute at The Caxton Hall, Westminster, Dec. 10, 1956 p. 14.

centre of free thought. Says Alfred Guillaume: "Scholars from the West visited Spain to learn philosophy, mathematics, astronomy and medicine. The oldest European universities owe an enormous debt to those scholars who returned from Spain bringing with them the knowledge they had gained at the Arab universities of that country."[1]

In brief, it may be said that the rule of Islamic Law can never lead to "theocracy", for the simple reason that the absence of any priestly hierarchy lies at the very root of its conception of religion.

[1]A. Guillaume, *Islam*, Pelican Books, 1954, p. 85.

PART TWO

EVOLUTION

CHAPTER I

PRELIMINARY DISTINCTION

IT is clear, then, that the two sources from which spring the invariable texts of Islamic Law are the Qur'an and the Sunnah. All other juristic sources are dependent on these two, both in reference and authority. It follows that any charge to the effect that Islamic Law is inflexible should be directed against these texts, which alone provide the unchangeable framework of this Law.

In our foreword to this treatise, we quoted the resolution unanimously adopted on the conclusion of the "Week of Islamic Law" in Paris, 1951. It explicitly stated that the discussions that took place during the Week "demonstrated the indisputable value of the principles of Islamic Law and the fact that the variety of schools within this great judicial system implies a wealth of judicial elements and remarkable techniques, allowing this Law to respond to all the needs of adaptation required by modern life."

Clear enough is the fact that the resolution considered the systems evolved by the various juristic schools as part of Islamic Law. To us, they constitute a long development that has been going on under the term *ijtihad*, or "reasoning", as prescribed by Qur'an and Sunnah. This "reasoning" which, as we shall see, must always rest on the texts of the Shari'ah, is always apt to vary from jurist to jurist and from time to time. While the variety of opinions within this juristic reasoning implies, on the one hand, a "wealth of judicial elements and remarkable techniques", it should always, on the other hand, be regarded as subordinate to the binding texts of the Shari'ah. A particular juristic notion may be rigid or may be wrong; in neither case should it be identified with Islamic Law. Nor should any juristic school or group of schools be identified with it. Only that can be

regarded as "Islamic" which emanates from the Book of Islam and from the Prophet of Islam. All Muslim juristic thought has been meant to be Islamic, but the achievement of its Islamic character has to be judged by Islam itself, that is, by the Shari'ah.

It is in this distinction between the Shari'ah and the works of jurists that we can discern the impetus towards evolution initiated by Islam. It is a distinction that confines the finality of authoritative texts to a limited number of injunctions in the Qur'an and the Sunnah. Juristic reasoning is never final, whether it be reasoning on the implications of these very texts, or reasoning pertaining to occurrences in the absence of a directly applicable text. At first sight, this distinction may imply a dogmatic conservatism which usually means rigidity and narrow-mindedness. But soon we shall see that it is just the other way round. Says Prof. Gibb: "The Koran and the Tradition are not, as it is often said, the basis of Islamic legal speculation but only its sources. The real foundation is to be sought in the attitude of mind which determined the methods of utilizing these sources."[1] This statement presents a basic fact regarding the course of evolution in the applicability of the Shari'ah. It emphasizes the role of human thought, as called upon, urged and directed by the legal authority of Qur'an and Sunnah. Legal speculation for an ever-changing world has been left undetermined except for the authority of the Shari'ah. Whether this legal speculation can be accepted as "Islamic" or not is always dependent on how convincing to Muslims the particular attitude of mind is, both in its compliance with the basic texts and in its comprehension of the relevant issues. It is this conviction that has established the practical authority of the early jurists and of their schools. None of them, in their recorded works, ever claimed a monopoly of interpretation or finality for what he had suggested. Some later generations, however, misunderstood their attitudes, and—for reasons we shall explain in another chapter—attributed a finality to the findings of the gradually built-up schools of law. By doing so,

[1]H. A. R. Gibb, *Mohammedanism*, p. 74.

they not only acted contrary to the creative spirit of the early jurists, but they further betrayed a basic trust of Islam, which demands the direct attachment of every Muslim to the Shari'ah; an attachment of both mind and heart in every walk of life. Says the Qur'an: "This is a Book that we have revealed to thee abounding in good, that they may ponder over its verses, and that men of understanding may mind."[1]

Iqbal, in his *Reconstruction of Religious Thought in Islam*, states: "Turning to the groundwork of legal principles in the Qur'an, it is perfectly clear that far from leaving no scope for human thought and legislative activity, the intensive breadth of these principles virtually acts as an awakener of human thought. Our early doctors of law taking their clue mainly from this groundwork evolved a number of legal systems; and the student of Mohammedan history knows very well that nearly half the triumphs of Islam as a social and political power were due to the legal acuteness of these doctors. 'Next to the Romans,' says von Kremer, 'there is no other nation besides the Arabs which could call its own a system of law so carefully worked out.' But with all their comprehensiveness, these systems are after all individual interpretation, and as such cannot claim any finality. Did the founders of our schools ever claim finality for their reasonings and interpretations? Never. The teaching of the Qur'an that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems."[2]

[1]Q. XXXVIII : 29.
[2]Mohammad Iqbal, *The Reconstruction of Religious Thought in Islam*, Lahore, 1951. See also *Distinction Between Shari'ah and Juristic Works*, leading article of my magazine *Al Muslimoon* Arabic, Vol. V, 10th issue, pp. 937-942, Damascus, signed "Abu Aiman" (my pseudonym).

CHAPTER II

CHARACTERISTICS OF LEGISLATION

A THOROUGH study of the Qur'an and the Sunnah would bring out the following characteristics in their philosophy of legislation:

(1) *They are basically inclined towards establishing general rules without indulging in much detail.*[1]

a) IN CIVIL LAW:

Says the Qur'an: "O ye who believe! Appropriate not one another's wealth among yourselves in falsehood, except it be as a trade by mutual consent."[2]

This clause postulated, in the seventh century, the principle of "mutual consent" as being enough to conclude a contract at a time when formalities were abounding in Roman Law. Prof. Nallino records that "it is well known that in the Hellenistic environment the purchase-sale is a 'real' contract, whereas all the Muslim schools are unanimous in considering it a purely 'consensual' contract, and this neither by a return to the original Roman conception or because they have always posed the problem of the distinction between 'real' and 'consensual' trade, but simply on the basis of a passage of the Qur'an (4 : 33), where it is ordained that commercial acts (tijarat) should take place in virtue of consensual contracts ('an taradin: with mutual consent)."[3]

Prof. Schacht admits that the principle which this Quranic injunction introduced could be considered a complete abnormality in the history of old statutes.[4]

[1] Al-Shatibi, *Al-Muwafaqat*, III, p. 368.
[2] Q. IV : 29.
[3] Nallino, *Influence of Roman Law on Muslim Law*, Islamic Review. The number of the Qur'an verse in question is correctly quoted in the preceding footnote.
[4] J. Schacht, *Three Lectures on Islamic Jurisprudence*, translated into Arabic and pubished with his permission in *Al-Muntaqa min Dirasat al-Mustashriqin* by S. Al-Munadjid, Cairo 1955.

Says the Prophet: "Muslims have to abide by their conditions except one that makes the unlawful lawful or the lawful unlawful."[1] This saying of the Prophet implies the principle of freedom of conditions upon concluding contracts within the public order.

b) IN CRIMINAL LAW:

Says the Qur'an: "Every soul is held in pledge for its own deeds",[2] and "Each soul earneth only on its own account, nor doth any laden bear another's load."[3]

These injunctions state a basic principle in criminal law, namely, the personal responsibility and punishment of the guilty, thus suppressing all vicarious responsibility.

c) IN CONSTITUTIONAL LAW:

The Qur'an says: "And those who answer the call of their Lord and establish worship, and whose affairs are decided by counsel among themselves."[4]

One of the attributes of the believers in these injunctions is that their affairs are settled by consultation. This includes the principle of representation in government.

d) IN INTERNATIONAL LAW:

The Qur'an declares: "O mankind! We have created you male and female, and have made you nations and tribes that ye may know one another (and be good to one another). The noblest of you with God is the best in conduct."[5]

This injunction states clearly the oneness of mankind, the brotherhood of man, and the international peace which can be achieved only when nations come to know one another, be good to one another, rid themselves of all kinds of inferiority complexes as well as superiority complexes, and recall that the best in the eyes of God is the best in conduct. These all are principles without which no international law can exist. "For what is the use of

[1] M. Zarqa, *Al-Madkhal al-Fiqhi al-'Am*, p. 126.
[2] Q. LXXIV : 38.
[3] Q. VI : 165.
[4] Q. XLII : 38.
[5] Q. XLIX : 13.

international law if it does not aspire to cultivate harmony among nations?"[1]

(2) *From the very beginning, these texts were directly meant to deal with actual events. Presupposition was basically excluded from its philosophy of legislation,* thus differing from other codes of law which legislate upon the presumption and calculation of probabilities. This trend in Islamic Law is deliberate and not a matter of coincidence. Muhammad said:

> "God has enjoined certain enjoinments, so do not abandon them. He has imposed certain limits, so do not transgress them. He has prohibited certain things, so do not fall into them. He has remained silent about many things, out of mercy and deliberateness, as He never forgets, so do not ask me about them."[2]

Again, he instructed his followers to avoid asking his guidance on every issue. Said he:

> "Leave me as long as I leave you. Too much questioning brought only disaster upon people before you. Only if I forbid your doing anything, then do not do it, and if I order you to do something, then try to do whatever you can of it."[3]

The Prophet even went so far as to hold blameworthy the one whose undue questioning was responsible for the prohibition of something which had been left unspecified before his question. He said:

> "The worst guilt of a Muslim against Muslims is that of him whose undue question caused the prohibition of what would have been left permitted had he not asked."[4]

In all these sayings, Muhammad was only conveying and stressing the clear command of the Qur'an:

> "O ye who believe! Ask not of things which, if they were made known unto you, would trouble you; but if ye ask of them when the Qur'an is revealed, they will be made known unto you. God pardonneth this, for God is Forgiving, Clement.

[1]Hamidullah, *Muslim Conduct of State*, p. 43.
[2]Ibn al-Qayyim, *I'lam al-Muwaqqi'-in*, I, pp. 71-72.
[3]Ibn al-Qayyim, *I'lam al-Muwaqqi'in*, I, pp. 71-72.
[4]Khallaf, *Ilm Usul al-Fiqh*, 7th ed., Cairo, 1956.

A folk before you asked (for such disclosures) and then disbelieved therein."[1]

Ibn al-Qayyim, interpreting this Quranic text which can be translated as "when the Qur'an is being revealed" and "when the Qur'an has been revealed", says: "It would mean that questions are allowed for more elaboration on a general rule which had been revealed, and it could also mean a warning against much asking during the time when the Qur'an was being revealed."[2]

This method of legislation, intended to legislate only for actual events and not upon presuppositions, is apt to minimize the definite limitations imposed on human dealings. We may call it a method of realism. The Companions of Muhammad were filled with this spirit of realism and often refrained from speculation on hypothetical issues. Ubayy Ibn Ka'b, when once asked for his opinion on such an issue, asked: "Has it happened?" As the answer was "no", he said: "Then leave us at ease until it happens. When it does happen, we shall pass our judgment accordingly."[3]

This realistic nature of both the Qur'an and the Sunnah is dominated by a basic tendency which is not usually associated with the term "religion": the repeatedly declared will of God to make things easier for man. Here are some quotations from the Qur'an which explicitly illustrate this tendency:

"God would not place an embarrassing burden upon you, but He would purify you and would perfect His grace upon you, that you may give thanks."[4]

"God desireth for you ease, He desireth not hardship for you."[5]

"God tasketh not a soul beyond his capacity."[6]

"He hath not laid upon you in religion any hardship."[7]

When we read these injunctions within their proper contexts in the Qur'an, we see that they do not merely state theoretical

[1]Q. V : 101.
[2]Ibn al-Qayyim, *I 'lam al-Muwaqqi'in*, I, p. 72.
[3]Ibid, p. 64.
[4]Q. V : 6.
[5]Q. II : 185.
[6]Q. II : 286.
[7]Q. XXII : 78.

rules. The first injunction, for example, comes immediately after the one relieving the sick and the traveller from the obligation of fasting until the sick recovers and the traveller returns home. Muhammad was the example of this tendency throughout his Prophetic career. His wife A'ishah said:

> "Whenever the choice was his, it was always the easier of two things that he chose, unless it would have been a sin; then he was far from it."[1]

And he himself said:

> "Behold, this religion is ease, and whoever goes against its nature and overdoes it, will be overwhelmed by it. So take the middle path, and approach perfection and be of good cheer."[2]

(3) *As a rule, everything that is not prohibited is permissible.* Islamic Law was not meant to paralyze people so that they might not move unless allowed to. Man, on the contrary, is repeatedly called upon by the Qur'an to consider the whole universe as a Divine grace meant for him, and to exhaust all his means of wisdom and energy to get the best out of it. Says the Qur'an:

> "And God hath made of service unto you whatever is in the heavens and whatsoever is in the earth; it is all from Him. So herein verily are portents for a people who reflect."[3]

This characteristic is further represented in the following Quranic injunctions which prohibit certain items of food:

> "Say: I find not in that which is revealed unto me aught prohibited to an eater that he eat thereof, except it be carrion, or blood poured forth, or swineflesh, for that verily is foul, or the abomination which was immolated to the name of other than God. But whoso is compelled (thereto), neither craving nor exceeding the limit, (for him) lo! thy Lord is Forgiving, Merciful."[4]

The Qur'an also says:

> "He hath explained unto you that which is forbidden unto you, unless ye are compelled thereto."[5]

[1] Al-Shatibi, *Al-Muwafaqat*, I, p. 343, and Al-Qassas, *Ahkam al-Qur'an*, I, p. 261.
[2] Al-Bukhari, *Sahih, Kitab al-Iman, Bab Al-Din Yusr.*
[3] Q. XLV : 13.
[4] Q. VI : 145.
[5] Q. VI : 119.

And again:

"He had made clear unto them what they should guard against."[1]

On the other hand, the Qur'an blames those who had forbidden to themselves in the name of God what He had not forbidden, and about them it says:

"Then who doth greater wrong than he who deviseth a lie concerning God?"[2]

Further, the universe is described as an adornment of God meant for the enjoyment of His bondmen; thus, the more religious man is, the more alive and comprehensive his relation with the universe becomes. Says the Qur'an:

"Say (O Muhammad): Who hath forbidden the adornment of God which He hath brought forth for His bondmen, and the good things of His providing?"[3]

Ibn Kathir, the renowned interpreter of the Qur'an, records that this injunction is an answer to those who dare to prohibit what God has not prohibited.[4] Says Muhammad Ali: "As Islam discouraged rigorous practices, such as monastic life, it also prohibited questions relating to details on many points which would require this or that practice to be made obligatory, and much was left to individual will or the circumstances of the time and place. The exercise of judgment occupies a very important place in Islam and this gives ample scope to different nations and communities to frame laws for themselves to meet new and changed situations. The Hadith shows that the Prophet also discouraged questions on details in which a Muslim could choose a way for himself."[5]

(4) *Even in the field of prohibition, the Qur'an sometimes used a method which could gradually*[6] *meet a growing readiness in the society where the revealed enjoinments were to be implemented.*

[1]Q. IX : 115.
[2]Q. VI : 144.
[3]Q. VII : 32.
[4]Ibn Kathir, *Tafsir*, Arabic, II, p. 211.
[5]Muhammad Ali, *The Holy Qur'an*, p. 271.
[6]Ibn Kathir, VI, pp. 255-256.

A good example is the prohibition of intoxicants. It was gradually prohibited, first with the Quranic words:

> "They question thee about intoxicants and games of chance. Say: In both is great sin and some utility for men, but the sin of them is greater than their utility."[1]

There is not, in this text, a definite prohibition of intoxicants. Then were revealed the words of the Qur'an:

> "O ye who believe! Draw not near unto prayer when ye are drunken, till ye know that which ye utter."[2]

Prohibition in this clause is only from praying while drunk. Then were revealed the verses:

> "O ye who believe! Intoxicants and games of chance and sacrificing to stones set up and divining by arrows are only uncleanness, the devil's work; so shun it that you may succeed."[3]

A probing of these texts reveals that all the Quranic texts about intoxicants had been heading towards their prohibition. The first text stresses their evil as against their utility in order to stimulate a moral deterrent. The second text stigmatizes intoxicants as spoiling prayer, and forbids drinkers from praying until they are sober, thus backing the moral deterrent by the inescapable necessity of avoiding drunkenness in order to be able to perform the five obligatory daily prayers at the proper times. In the third text, the Qur'an describes intoxicants as "the devil's work" together with their prohibition. The Muslim society had been gradually prepared for such a prohibition; so well prepared that when the Prophet's messenger announced that the text forbidding intoxicants had been revealed, the Muslims poured forth on the ground all the intoxicants which they had stored. History records that on the very day of its prohibition, wine flowed in the streets of Madinah.[4] There is not, so far as we know, such a precedent in the history of legislation of a people complying so swiftly with the law—especially in the case of the prohibiting of drinking,

[1] Q. II : 219.
[2] Q. IV : 43.
[3] Q. V : 90.
[4] Al-Bukhari, *Al-Jami al-Sahih*, 46-20.

which was a deep-rooted habit of Arab society, glamourized by its poets and affecting its trade.

(5) *All that the Qur'an and the Sunnah have prohibited becomes permissible whenever a pressing necessity arises.* This has been reiterated throughout the Qur'an. Some examples:

"But he who is driven by necessity, neither craving nor transgressing, it is not sin for him."[1]

"But whoso is compelled (thereto), neither craving nor transgressing: (for him) lo! thy Lord is Forgiving, Merciful."[2]

"Whoso is forced by hunger, not by will, to sin: (for him) surely God is Forgiving, Merciful."[3]

It is a generally accepted rule among jurists that "necessity renders the forbidden permissible". Intoxicants, for instance, are allowed to the thirsty when water is not available, and to the sick for treatment. Carrion is allowed to the hungry who cannot get anything else to eat. Muslim jurists have elaborated in detail on the concept and extent of "necessity", all based on what the Qur'an has clearly stated.

(6) *The door is wide-open to the adoption of anything of utility, of whatever origin, so long as it does not go against the texts of the Qur'an and the Sunnah.* The Prophet, in an Hadith which is unanimously held to be authentic, stated this principle most significantly:

"It is but for the perfecting of morals that I have been sent to you",

thus not only affirming all virtues that had been practiced before him, but also including them as an inseparable part of his mission. He also said:

"The believer is always searching after wisdom, wherever he may find it; it is for him to get to it."

We have already said, while talking about the Sunnah as a source of Islamic Law, that it comprises all that Prophet has said, done or agreed to, and that the latter portion of it was even

[1]Q. II : 173.
[2]Q. VI : 145.
[3]Q. V : 3.

a cause for much suspicion in Western writings regarding the authenticity of the Sunnah, alleging as they do that much was ascribed to the Prophet that he had neither said nor done. Schacht says: "It should be noted that modern researches have brought European science to rectify its scepticism in the authenticity of some 'Hadiths'—that scepticism which was often exaggerated. Many of the sayings of the Prophet did not mention that he did say or do what later became new rules, but they stated that the Prophet tolerated, either clearly or inclusively, some customs of his people and did not denounce them."[1]

It is a basic outlook of the Shari'ah that it transcends all false barriers of man-made schisms and narrow-mindedness with a comprehensive sense of values applicable to every human being. Says the Qur'an:

> "He (the Prophet) enjoins on them that which they themselves sense as right, and forbids them that which they themselves sense as wrong. He makes lawful for them all good things and prohibits for them only the foul, and relieves them of their undue burden and of the many shackles that used to be on them."[2]

This comprehensive sense of values is not only introduced in a spirit of emancipation, but is also stimulated by the very urge of faith. Says the Qur'an:

> "Lo! In the creation of the heavens and the earth and in the difference of night and day are tokens of His Sovereignty for men of understanding",[3]

and: "We shall show them our portents on the horizons and within themselves until it will be manifest unto them that it is the Truth. Doth not thy Lord suffice, He who is witness over all things?"[4]

Muhammad, the conveyor of these injunctions and the representative thereof, very explicitly stated:

[1]Salah-ed-Din al-Munadjid, *Al-Muntaqa min Dirasat al-Mustashriqin.*
[2]Q. VII : 157.
[3]Q. III : 190.
[4]Q. XLI : 53.

"Like gold and silver, men are different in their qualities, whether before Islam or after Islam. The best of them before Islam is apt to be the best when he comes to understand Islam."[1]

He also said:

"All men are dependent on God. Of them, He loves most the one who is most useful to mankind."[2]

We shall see, in another chapter, how the conceptions of "usefulness" and "public welfare" were implemented and elaborated by successive jurists.

[1]Related by Abu Hurairah and unanimously held to be authentic.
[2]Related by Anas, and by Ibn 'Abbas, in Al-Tabarani's *Al-Mu'jam* and Al-Shibab's *Musnad*, respectively.

CHAPTER III

AL-IJTIHAD: INDIVIDUAL REASONING

A. PROPHETIC APPROVAL

Al-Ijtihad is a derivation from the Arabic verb, *ijtahda*, which literally means "to exert oneself". In the course of time, this term has come to denote a large complex of juristic definitions and conditions. To the best of our knowledge, the first time it was used with a direct legal import was during the lifetime of the Prophet in an authentic Tradition of Mu'adh Ibn Jabal. The latter was appointed by the Prophet as a judge in Yaman. On the eve of his departure to assume his office there, the Prophet asked him: "According to what shalt thou judge?" He replied: "According to the Book of God." "And if thou findest nought therein?" "According to the Sunnah of the Prophet of God." "And if thou findest nought therein?" "*Then I will exert myself to form my own judgment.*" And thereupon the Prophet said: "Praise be to God Who has guided the messenger of His Prophet to that which pleases His Prophet."[1]

The italicized portion of the above text has been translated in various ways. In Arabic it reads as follows: "Ajtahidu ra'yi wala alu", which, we think, cannot be translated except as above. Prof. Asaf Fyzee has translated it as, "Then shall I interpret with my reason";[2] but the word "reasoning" implied by the Arabic word "ra'yi"—and according to the whole context of the Tradition—is of a creative nature which functions in the absence of Quranic and Prophetic texts. Such an inaccurate translation may be responsible, along with other factors we shall explain later,

[1]Ibn 'Abd al Barr, *Jar i' Bayan al-'Ilm wa-Fadlih*, Arabic, II, p .56. See also M. Y. Musa. *Muhadarat fi Tarikh al-Fiqh al-Islami*, Arabic, I, p. 18; and Khallaf, *'Ilm Usul al-Fiqh*, p. 62,
[2]Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, 2nd ed., London, Oxford University Press 1955.

for a statement like that of Prof. Gibb: "The word 'ijtihad' literally means 'exerting one's self', in the sense of striving to discover the true application of the teachings of Koran and tradition to a particular situation, and it may not go against the plain sense of these teachings."[1] Whereas the last portion of this statement is perfectly correct, the preceding one is rather a jump from the literal sense of the word to its legal import, without a specific text to determine the latter. "Ijtihad", as used in the Tradition under discussion, is not exactly what Prof. Gibb has premised, unless by "the true application of the teaching of Koran and tradition" he has meant nothing more than not going "against the plain sense of these teachings". For only then can the words of Mu'adh, "Then I will exert myself *to form my own judgment*," and the Prophetic approval in praise thereof, make sense. There can be no "exertion" of "own judgment" without a given scope of free thought and individual opinion. The starting point of such an endeavour, according to the above Tradition, is the absence of any applicable text; and it may operate only so far as such free thinking does not contravene the Qur'an or the Sunnah. These two, as characterized earlier, are basically concerned with the general rules that only outline legal speculation. We have already quoted Prof. Gibb as considering the attitude of mind to be the real foundation of this legal speculation. He also said of the early activity of the Muslim mind in the second century of the Hijrah, the date of the flight of the Prophet from Mecca to Medina, that it had "elaborated a structure of law that is, from the point of view of logical perfection, one of the most brilliant essays of human reasoning."[2] The process of the elaboration of this "structure of law" was twofold: in the first instance, an interpretation of the basic texts and, in the second, a systematization of their applicability and of the legal speculation in cases where no text was available. For the most part, the basic medium employed in this method was the very conception of *al-ijtihad*, and a thorough study of the magnificent

[1]Gibb, *Modern Trends in Islam*, pp. 12-13.
[2]Gibb, *Mohammedanism*, pp. 73-74.

edifice of those early juristic works proves beyond a shadow of doubt the soundness and freedom of thought with which Muslim jurists admittedly produced "one of the most brilliant essays of human reasoning". How, then, can we understand the other statement of Prof. Gibb that *al-ijtihad* "in no way implies, as some modernists would like us to believe, 'freedom of judgment' "?[1] The only explanation is one which he himself admits in the course of his analysis. It is "the conception of finality" which is usually ascribed to the works of the early jurists without any authority from the Qur'an or the Sunnah. One outcome of the thinking of some early juristic schools was the expressional significance which they attached to the term *al-ijtihad*, thus transmuting its very nature as a mental process which derives its impetus directly from the Shari'ah and implies no more than individual opinion, into one that is not only bound by the rules imposed by individual jurists, but further claims to possess the status of legal finality. "Modernism", as used by Prof. Gibb to designate those who claim the right to *al-ijtihad* at all times and who challenge the finality of the theological constructions of the Middle Ages, needs no comment from us, since he himself has stated that the aim of those who practiced *al-ijtihad* was not to "modernize the doctrines of Islam, but in order to return to the practice of the primitive community."[2] We may only make one explanatory remark: the practice of the primitive Muslim community not only fully reflects the introduction of Islam by the Prophet but, further, should remain, as it originally was, the impetus and the open gate for brilliant reasoning.

The concept of "individual opinion" was even recognized and applied by the Prophet with reference to himself. Only what he said, did or agreed to in his capacity as a Prophet is to be considered a binding Sunnah.[3] The context of a particular Tradition usually indicates the legal bearing involved. In the absence of such an indication and in cases of ambiguity, it becomes for the

[1]Gibb, *Modern Trends in Islam*, p. 12.
[2]Ibid, p. 13.
[3]Gibb, *Modern Trends in Islam*, p. 12.

Muslims a matter of consideration, in which spiritual factors as well as individual and collective reasoning should play the decisive role.

We have quoted earlier Al-Hubab Ibn al-Mundhir's conversation with the Prophet during the famous battle of Badr, and have seen how he differentiated between an instruction sanctioned by Revelation and an instruction initiated by the Prophet's personal consideration. We have also seen how the Prophet not only accepted the differentiation, but even gave up his own plan in favour of Al-Hubab's. The renowned compiler of Hadith, Muslim, records in his *Sahih* a still more illustrative incident. On his arrival at Madinah, the Prophet observed some Madinites pollinating their palm-trees. He made the remark: "Perhaps it would be better if you did not do it." The people concerned took his remark as an order, and the result was not what he had expected. This being reported to him, he said: "I am but a human being. Only when I order you something of your religious duties will you have to abide by it. But if I issue an instruction upon my personal opinion, then it is a mere guess and I am only a human being. Rather, you may better know your worldly affairs."[1] It has also been reported that the Prophet, on some occasions, sought the opinions of Abu Bakr and 'Umar by saying, "Advise, for in the absence of revelation I am like you."[2]

B. AMONG THE COMPANIONS

This conception of individual opinion was a clear aspect of the intellectual life of the earliest Muslim society. Ibn al-Qayyim records many authentic incidents to this effect. 'Umar, the second Caliph, once asked a litigant after his case had been judged by 'Ali and Zaid, who had both been Companions of the Prophet: "How was the judgment?" The man told him. 'Umar then said: "Had I been the judge, I would have decided differently." The man asked him: "Why, then, don't you force your decision, you

[1]Muslim, *Sahih*, VII, p. 95. See also Al-Qasimi, *Qawa'id al-Tahdith*, Arabic, p. 256; and Khallaf. *Usul al-Fiqh*, p. 47.
[2]*Kashf al-Asrar*, Arabic, II, p. 930.

being the Caliph?" 'Umar answered: "If it were a decision based upon a specific ordinance of the Book or the Sunnah, I should have done that, but this here is a matter of opinion, and thus we are all the same."[1]

In his accurate survey of the many Traditions on the subject (i.e., individual opinion) and in his sound analysis thereof, Ibn al-Qayyim tried to establish three conditions for the course and validity of individual opinion: (1) that it may be resorted to only in the absence of an applicable text of the Shari'ah; (2) that in no way should it contravene the Shari'ah; and (3) that the course of reasoning should not become entangled in any kind of sophistry or complication of expression which might affect the people's direct attachment to the Shari'ah or distort the brilliant clarity thereof.

In the whole of his analysis Ibn al-Qayyim is, in fact, dealing with two problems at the same time: the first being the development of *al-ijtihad* into a variety of schools of law following the eminent jurists of the early centuries of Islam; and the second, the misconception of *taqlid*, or blind following of these schools, which has been paralyzing most Muslim minds and to which the natural Islamic reaction has been a series of movements aiming at the restoration of the free function of *al-ijtihad*, as initiated by the Shari'ah and practiced by the early Muslims. The restrictive conditions Ibn al-Qayyim gives are, as we have seen, in complete agreement with the Shari'ah.

Prof. Sachau, while admitting that this aspect of individual opinion did exist among the Companions of the Prophet, describes it as the practical attitude of mind which they adopted in the face of the new state of affairs following the conquests, and in the absence of applicable texts in the Shari'ah. He made a distinction between this free attitude of mind and what was later introduced by the schools of law under the juristic terms *al-ijtihad*, *al-qiyas* and *al-fiqh*.[2]

[1]Ibn al-Qayyim, *I'lam al-Muwaqqi'in*, I, pp. 81-85.
[2]E. Sachau, *Zur aeltestan Geschichte des Muhammedanischen Rechts*, Wien, 1870, pp. 5-11.

Prof. Goldziher states that the role of reasoning in Muslim jurisprudence in the first generation of Islam had been extending as a matter of necessity in the practical field of jurisdiction. This role, he records, was attained in the course of the development of individual legal speculation in cases where no sacred texts were available. This course of development which he premises, is, to him, a substitute for the authentic Traditions which introduced, or rather prescribed, *al-ijtihad*, and which he, on no valid ground, suspects and off-handedly rejects.[1] He even dates the beginning of *al-ijtihad* after 'Umar, the second Caliph, whereas it is common knowledge that the exercise of *al-ijtihad* was best represented by 'Umar.[1]

Prof. Goldziher, however, admits the existence of judgment upon reasoning in the first generation of Islam, but without a specific method of positive bearing, this having been first introduced by Abu Hanifah under the juridical term *al-qiyas*.[2]

So here again we find ourselves confronted by the entangled outlook which either confuses the principle of *al-ijtihad*, as initiated by the Shari'ah itself, with the technical employment of it by the later jurists, or gets so involved with the works of these jurists that it loses sight, at least for all practical purposes, of the Shari'ah, and identifies it, consciously or unconsciously, with what the jurists understood by it or with the methods they applied in understanding it—whether in historical authentication, lexicology, terminology or specific courses of analogy.

C. IMPACT OF JURISTIC WORKS

Iqbal called *al-ijtihad* "the principle of movement in the structure of Islam". He defines its significance in the terminology of Islamic Law as meaning "to exert with a view to form an independent judgment on a legal question". He suggests that the idea "has got its origins in a well-known verse of the Qur'an—'and to those who exert We show Our path'. We find it more definitely

[1]Goldziher, *Die Zahiriten*, Leipzig, 1884, pp. 5-8.
[2]Goldziher, *Die Zahiriten*, Leipzig, 1884, pp. 11-13.

adumbrated in a tradition of the Holy Prophet."[1] He then relates the already-quoted Tradition of Mu'adh Ibn Jabal, whereupon he launches into a healthy discussion of the exceedingly strange impact of the different schools of law on the dynamic spirit of the Shari'ah. "It is therefore necessary, says Iqbal, "to discover the causes of this intellectual attitude which has reduced the Law of Islam practically to a state of immobility."[2] We may here summarize the three causes which he presents with eloquent accuracy. They are as follows:

(1) The bitter controversy about the dogma of the eternity of the Qur'an became more impossible to resolve and more complex as two opposing camps, the Rationalists and the Conservatives, grew farther apart in the nature of their convictions. To preserve the social integrity of Islam, the Conservatives wished to render the structure of their legal system as rigorous as possible.

(2) The dry-as-dust subtleties of the contemporary legists drove some of the most acute minds of Islam to Sufism, which fostered a kind of revolt against the verbal quibbles of our early doctors of law. But gradually developing, under influences of a non-Islamic character, a purely speculative side, ascetic Sufism with its spirit of total other-worldliness not only absorbed the best Muslim minds, to whom unrestrained speculation appealed greatly, but further obscured from men's vision the very important aspect of Islam as a social polity. "The Muslim State was thus left generally in the hands of intellectual mediocrities",[3] and the unthinking masses of Islam, having no personalities of a higher calibre to guide them, found their security only in blindly following the schools.

(3) If these developments were not enough to undermine the flexibility of Islamic Law, the destruction of Baghdad by the

[1]Iqbal, *The Reconstruction of Religious Thought in Islam*, Lahore, M. Ashraf, 1951, p. 148. A better translation of the Quranic verse which he has quoted might be : "And those who strive hard for Us, We shall certainly guide them in Our paths." (Q. XIX : 6a).

[2]Ibid, p. 149.

[3]Incidentally, this reminds us of the remark of Prof. Nallino, while discussing some accusations against Islamic Law by Western students of Islamic questions, "who in their turn have 'mediocre' equipment in legal matters" (from *The Influence of Roman Law on Muslim Law*, op. cit.). Thus, Islam has been the victim of a double mediocrity, both from within the world of Islam and from without.

Mongols certainly was. This blow, in the middle of the 13th century, brought in its wake a period of political decay, during which the conservative thinkers of Islam, fearing further disintegration, "focussed all their efforts on the one point of preserving a uniform social life for the people by a jealous exclusion of all innovations in the law of Shari'ah as expounded by the early doctors of Islam". But the resulting over-organization of legal thought had bitter and inevitable consequences. For, "in an over-organized society the individual is altogether crushed out of existence. He gains the whole wealth of social thought around him and loses his own soul. . . . The tendency to over-organization by a false reverence of the past as manifested in the legists of Islam in the 13th century and later, was contrary to the inner impulse of Islam."[1]

D. MOVEMENTS TO RESTORE *Al-Ijtihad*

It was against the background of that period of decay and of the state of petrifaction to which Islamic Law had been reduced, that Ibn Taymiyah—at the beginning of the 14th century—represented the Muslim reaction to all innovations contrary to the Book of God and the Tradition of His Prophet. Prof. Gibb called him a "fundamentalist" and "the most downright opponent of the medieval schoolmen and of Sufi innovations".[2] He not only claimed the right to *al-ijtihad* as initiated by the Shari'ah, but also challenged the two basic instruments of most schools of law: the *qiyas* (judgment upon juristic analogy) and the *ijma'* (consensus of opinion). His revolt, in spite of untold persecution, represents a turning point in the history of Islamic renaissance. The works of his disciple, Ibn al-Qayyim, soon followed, providing the propulsive force of a spirited scholarship. The Wahhabite movement of the 18th century was one of its ripe fruits. This latter, in its turn, inspired a series of movements throughout the Muslim world, all aiming at the emancipation of both Islam and

[1]Iqbal, *The Reconstruction of Religious Thought in Islam*, pp. 149-152.
[2]Gibb, *Modern Trends in Islam*, pp. 34-35.

the Muslims. "Even in such distant regions as Nigeria and Sumatra," says Gibb, "Wahhabi influence contributed to the outbreak of militant movement."[1] By the end of the 19th century, the Islamic Movement, with Jamaluddin al-Afghani as its political leader and Muhammad Abduh as its scholarly exponent, gradually took the shape of the "Salafiyyah School". *Salafiyyah* is an Arabic expression which implies following in the footsteps of the early Muslims, thus revealing a characteristic tendency in line with the old revolt of Ibn Taymiyah. Prof. Gibb called Muhammad Abduh a "fundamentalist" and quoted his explicit statement: "I say that Islam has not given whether to Caliph or to qadi or to mufti or to Shaikh al-Islam the smallest authority in the matter of doctrines and the formulation of rules. Whatever authority is held by any one of these is a civil authority defined by Islamic Law, and it is inadmissible that any of them should claim the right of control over the belief or worship of the individual or should require him to defend his way of thought."[2]

The most influential centre of activity of this "Salafiyyah School" was for years the magazine *Al-Manar*, published in Cairo. Its editor, Rashid Rida, was famous for his harsh criticism, which brought down on him many attacks. On his death in 1935, however, the magazine of Al-Azhar University, *Nur al-Islam* (VI, 510), accorded him for the first time a generous tribute, "acknowledging his learning and his services to Islam, above all in 'overthrowing the reign of taqlid (blind following of the schools), which had imposed upon Muslims a division into two parties, one that remains petrified in its following of traditional usages which are opposed to the spirit of the Faith, and a second group which revolted against Islam and has adopted a way that is not the way of the true Believers.' "[3]

It is significant that the man who took the place of Rashid Rida in editing the leading article of *Al-Manar* magazine was Hasan al-Banna, the founder of the Muslim Brotherhood, the

[1]Gibb, *Modern Trends in Islam*, pp. 34-35.
[2]Ibid, p. 132.
[3]Ibid, p. 133.

strongest and most controversial movement in the present-day Muslim world. Louis Gardet describes the general line of this movement as the "enlargement and simplification of Salafi tendencies to which it remains very near; more of a programme of action than a scholastic doctrine; a special insistence on social and economic problems".[1] In a treatise on *The Islamic Community and Communism*, Dr. Nabih Faris, a Christian Arab author, said of the Muslim Brotherhood that "though suppressed in Egypt in 1954, this movement is still active in other Muslim lands, and its idea and ideals continue to represent the innermost aspirations of Muslims from Morocco to Indonesia."[2] Speaking about the general movement in the Arab world, Hans E. Tuetsch says that "one of its main organizational expressions is the Muslim Brotherhood, which demands a return to the old laws of Islam".[3]

From all the above, one may easily say that the conception of *al-ijtihad* as it was simply presented in the words of Mu'adh Ibn Jabal, "Then I will exert myself to form my own judgment," not only initiated the healthy course of early Muslim jurisprudence, but has as well been a guardian and a reminder of the unique authoritativeness of the Shari'ah. It is, indeed, the elixir of life in the applicability of Islamic Law or, as Iqbal put it, "the principle of movement in the structure of Islam".

[1]Louis Gardet, *La Cité Musulmane, Vie Sociale et Politique*, Paris, 1954.
[2]Nabih Amin Faris, *The Islamic Community and Communism*, treatise in *The Middle East in Transition*, London, 1958, p. 353.
[3]Hans E. Tuetsch, *Arab Unity and Arab Dissensions*, treatise in *The Middle East in Transition*, p. 20.

CHAPTER IV

AL-FIQH: MUSLIM JURISPRUDENCE

A. PROBITY OF JURISTS

'UMAR, the second Caliph, who was described by the Prophet as a man of great intuitive power, is reported to have said: "Tradition is only what the Prophet has laid down and prescribed. Do not permit an error of opinion to become a Tradition for the Community."[1]

Two or three centuries after 'Umar's death, and throughout Muslim history ever since, his statement proved to be not only a sound intuition but also a shrewd anticipation of the basic defect of the Muslims' actual relationship with Islamic Law. As we have repeatedly stated, this basic defect consists in confusing what God and His Prophet have prescribed with what the jurists have been opining.

The very appellation *al-fiqh*[2]—a term attributed to the works of Muslim jurists—reveals the original impulse that brought these works into existence. The verb *faqaha* means "to comprehend"; thus *fiqh*—its noun-form—means "comprehension". Says Prof. Asaf Fyzee: "Fiqh literally means 'intelligence'. It is the name given to the whole science of jurisprudence, because it implies the independent exercise of intelligence in deciding a point of law, in the absence or ignorance of tradition on the point."[3]

In his *Al-Risalah*, which is generally considered to be the earliest sound work on the science of Muslim jurisprudence, *Al-Shafi'i* answers the question, "What is *al-qiyas?* Is it *al-ijtihad*

[1] Al-Shawkani, *Al-Qawl al-Mufid fil-Ijtihad wa'l-Taqlid*, p. 32.
[2] *Al* in Arabic is the definite article equivalent to "the" in English.
[3] Fyzee, *Outline of Mohammedan Law*, p. 17.

or is it different?", by saying, "They are two expressions of one meaning." Asked, "What is it?", he answers, "For every issue concerning a Muslim, either there is a binding text (of the Shari'ah) that rules it, or there is a guidance that may indicate the way to truth. *If there is a text, then the Muslim has to follow it. In case there is no text directly applicable, then he has to seek a guidance to truth by al-ijtihad. Al-ijtihad* is *al-qiyas.*" Then follows a series of questions: "And when people exercise *al-qiyas*, can they be sure that what they have opined is the truth in the eyes of God? And can they differ in their *qiyas?* And do they have one way of reasoning or different ways? . . . And is there a differentiation between the authoritativeness of one's *qiyas* upon himself and upon others? . . ." In sound answer to all that, he states: "Knowledge applies to two categories of truth: one which is a factual truth in appearance and in fact, and one which is a seeming probability of truthfulness. The first category applies only to *the texts of the Qur'an and the Sunnah successively authenticated generation after generation. These texts alone may allow or forbid, and this, in our opinion, is the basic fact that no Muslim may either ignore or doubt. . . . Knowledge attached through the medium of al-ijtihad by al-qiyas, belongs to the second category; thus what it attains is binding only on the one who exercised al-qiyas and not on other men of knowledge.*" Thereupon Al-Shafi'i proceeds to illustrate the differentiation between the two categories by means of an example. He asks: "When we find ourselves in the Sacred Mosque at Mecca and see the Ka'aba before us, are we obliged to face it with exactitude?" When his interlocutor answers, "Yes," Al-Shafi'i proceeds: "Are we obliged, wherever we may be, to turn in our prayers towards the Ka'aba?" The answer is naturally, "Yes". Thereupon Al-Shafi'i asks, "Are we in such a case absolutely certain that we are facing the Ka'aba with exactitude?" The answer is: "If you mean that you are facing it with the same exactitude as when you had it before your eyes, then the answer is no. But even so, you have done your duty." Then Al-Shafi'i states: "It follows, therefore, that our obligation with regard to something that is not visible

to our eyes is different from our obligation with regard to something that is directly seen. Similar is the case with regard to *that on which there is no binding injunction in the text of Qur'an or Sunnah; for in this case we are striving only by means of al-ijtihad and we are* obliged only the extent of what we consider to be the truth."[1]

Speaking about *al-ijtihad* in a later chapter, Al-Shafi'i answers a question about its validity by recalling the Prophetic Tradition: "Whenever a ruler does his best and rules correctly, he will be doubly rewarded (by God). If he does his best but the result is incorrect, he will also be rewarded." Thereupon he presents the three main conclusions on the whole issue: (1) *that al-ijtihad, by virtue of its nature and function, cannot guarantee correct results;* (2) *that rules arrived at by means of al-ijtihad are apt to differ; and* (3) *that these rules should by no means be binding on anyone other than those who consider them to be the truth.* He again recalls the example of the Ka'aba, quoting the Quranic verse: "From whatsoever place thou comest forth, turn thy face toward the Sacred Mosque, and wheresoever ye may be (O Muslims), turn your faces towards it when you pray." (Q. II : 150) Then he says that God has only mentioned the Sacred Mosque and prescribed that every Muslim should turn his face in prayers thereto. As for the exactitude with which they face the Ka'aba, it is left to the Muslims who, with the minds God has granted them and with all possible means of knowledge, should try their best to achieve such an exactitude. One of the Quranic verses which he quotes is: "And (He has cast) landmarks and by the stars they may find the right way." (Q. XVI : 16) "If they exert their minds and means of knowledge, then they have done their duty. *It is only this 'exertion' that God has enjoined on them, not the 'certainty of 'exactitude', which they may not reach. On the other hand, they have no right to say, 'since the certainty of exactitude is unattainable, then let us turn our faces any way we like.'* "[2]

[1]Al-Shafi'i, *Al-Risalah*, Arabic, pp. 476-486.
[2]Al-Shafi'i, *Al-Risalah*, pp. 487-503.

A probe into all that we have just quoted from the first recorded work on Muslim jurisprudence proves beyond doubt not only that the misconception regarding the finality of juristic works did not exist at that time, but also that these works had never claimed to possess a binding authority over Muslims. Furthermore, Al-Shafi'i, in his famous book *Al-Umm*, states that in cases of differences between those who exercise individual reasoning in the absence of binding texts, *each of them is bound only by what he himself opines, and none of them may abandon what he personally considers to be right in order to follow blindly the opinion of another person.*[1]

This probity of attitude is not, however, a uniqueness of Al-Shafi'i. We have quoted him first because his work is generally admitted to be the first record on Muslim jurisprudence. Al-Shawkani reports many statements explicitly made by the great jurists in whose names the four Sunni schools of law were gradually built up. Here are some of these statements:

Said Abu Hanifah (d. 150 H.):

"It is not right on the part of anyone to adopt what we opine unless he knows from where we derived it."

He also said:

"Slanderous is their saying that we give our *qiyas* any priority over the Shari'ah. Do we need to opine when there is a sacred text?"[2]

Said Malik (d. 179 H.):

"I am but a human being. I may be wrong and I may be right. So first examine what I say. If it complies with the Book and the Sunnah, then you may accept it. But if it does not comply with them, then you should reject it."

Said Al-Shafi'i (d. 204 H.):

"If ever I opine in deviation from a Tradition, then you should follow the Tradition and never imitate me. And if a report is later authenticated as being a Tradition, then whatever I had

[1]Al-Shafi'i, *Al-Umm*, Arabic, VII, pp. 148-149.
[2]Al-Sha'rani, *Al-Mizan*, Arabic, p. 51.

opined contrary to it is no more valid, and you should only follow the Tradition."

Said Ibn Hanbal (d. 241 H.):

"Do not imitate me, or Malik, or Al-Shafi'i, or Al-Thawri, and derive directly from where they themselves had derived."[1]

Ibn al-Qayyim records specific statements testifying to the fact that all of these jurists even gave priority to Traditions which were not fully authenticated over their own individual conclusions.[2] An incident illustrative of the probity of our early jurists is the famous attitude of Malik against the Caliph's proposal to enforce *Al-Muwatta* (Malik's book) as a uniform legal code throughout the Islamic State. Harun al-Rashid, the Caliph in question, insisted on this proposal and even went so far as to suggest that the book be hung in the Ka'aba and this to symbolize the general reverence for the book and to bring about the legal uniformity of the nation. But Malik, with a clarity of mind and heart, rejected the enticing proposal of the Caliph and said, "O Leader of the Believers! The Companions of the Prophet went here and there carrying with them what they had heard and seen during the lifetime of the Prophet. They also carried with them different opinions on many details. Difference among Muslim scholars is but a divine mercy for this nation. Each of them is following what he considers to be right, and each of them has his argument, and all of them are sincerely striving in the way of God."[3]

B. SCHOOLS OF LAW

"Schools of Law" is the usual translation of *al-madhahib*, which literally means "the ways of going". In most works on Islam the term *al-madhhab* has become identical with Islamic Law. This identification, in itself a basic misconception, seems in addition to overlook two main facts about these schools:

[1]Al-Shawkani, *Al-Qawl al-Mufid fil-Ijtihad wa'l-Taqlid*, pp. 15-27.
[2]Ibn al-Qayyim, *I'lam al-Muwaqqi'in*, pp. 31-33.
[3]Abu Zahrah, *Malik*, Arabic, pp. 213-214.

(1) The four famous schools—the Hanafite, the Malikite, the Shafiite and the Hanbalite—are by no means the only schools in the history of Muslim jurisprudence, nor are they even fully representative of Sunnite jurisprudence. "From about the middle of the first century up to the beginning of the fourth," says Iqbal, "not less than nineteen schools of law and legal opinion appeared in Islam. This fact alone is sufficient to show how incessantly our early doctors of law worked in order to meet the necessities of a growing civilization."[1]

Most of these schools, it is true, were overwhelmed by the stronger influence of the famous four, but their disappearance as influential schools does not imply their ineffectiveness, whether in the very making of Muslim jurisprudence or in setting its trends. Muslim libraries still cherish the outstanding works of Ibn Shibrimah (d. 144 H.), Ibn Abi Layla (d. 148 H.), Al-Awza'i (d. 157 H.), Sufian al-Thawri (d. 161 H.), Al-Layth Ibn Sa'd (d. 175 H.), Dawud al-Zahiri (d. 270 H.), Abu Ja'far al-Tabari (d. 310 H.), and many others, all of whom had contributed in almost every sphere of legal speculation, and all of whom have been quoted either in praise or in criticism by other schools of law. Dawud al-Zahiri's work was, in fact, a kind of reaction to what he considered to be mere speculative innovations fabricated upon juristic rules without any authority of the Shari'ah. More than three centuries after his death at Baghdad, the famous Ibn Hazm in Spain became the staunchest representative of this way of thinking and contributed some of the most brilliant books in Muslim literature. In his book *Al-Ihkam fi Usul al-Ahkam*, Ibn Hazm epitomized the whole outlook of the Zahirite school by saying, "The Quranic injunction: 'And if ye (Believers) have a dispute concerning any matter, refer it to God and to his Messenger' (Q. IV : 59), should be the uniform ruling over every issue of dispute among all Muslims."[2] His thought-provoking method of research, along with his pungent—but often, indeed, intolerably harsh—criticism did not allow the Zahirite school to

[1]Iqbal, *The Reconstruction of Religious Thought in Islam*, p. 165.
[2]Ibn Hazm, *Al-Ihkam fi Usul al-Ahkam*, I, p. 9.

acquire a large following. It is worthy of note, however, that in spite of Ibn Hazm's revolt against the many juristic elaborations, one can meet all through his works innumerable bold notions directly deduced from the texts of the Shari'ah. For example, he quotes the Quranic verse: "Mothers shall suckle their children for two whole years; (that is) for those who wish to complete the suckling. The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child. No one should be charged beyond his capacity. A mother should not be made to suffer because of her child, nor should he to whom the child is born (be made to suffer) because of his child. *And a similar duty devolves on the father's heir.*"[1] Thereupon Ibn Hazm states that "in case the husband is poor and unable to maintain himself while his wife is rich, the latter is obliged to spend on him, the legal ground being the fact that she is his heir after his death."[2] This deductive rule introduced by Ibn Hazm was, in spite of its clever argumentation, uniquely held by him and his followers.

There is also the Shiite school of law. *Shi'ah* is an Arabic expression which means "partisanship". It was first used by a section of Muslims who attached themselves to 'Ali, the son-in-law of the Prophet. This attachment not only asserted itself after the death of the Prophet, but it also took no concrete shape of any legal bearing until after the death of 'Ali, the fourth Caliph. Says Prof. Asaf Fyzee, himself a Shiite: "When the caliphate came into the hands of the Umayyads after the death of the first four caliphs and religion itself was made the plaything of political ambitions, the murder of Husayn, the Prophet's grandson, set the seal on official Shiism. This faith preserved the passionate remembrance of this tragedy at Karbala, created an 'imam' who would be the focal point for the love normally showered on the founder of Islam, and systematically formulated a theology (kalam) and a law (fiqh) in opposition to the Sunni creed."[3]

With the exception of the Shiite concept of the infallibility of the *imam* or the caliph, which the Sunnites basically reject, and

[1]Q. II : 233.
[2]Ibn Hazm, *Al-Muhalla*, X, p. 92.
[3]Fyzee, *Shi'i Legal Theories*, treatise in *Law in the Middle East*, p. 113.

the difference in authentication due to some subjective political elements, there is no great difference between the two schools of law. Says Prof. Fyzee: "Apart from the doctrine of Imamat, the difference between the Sunnite and the Shiite schools is not very great. . . . As has been pointed out by Goldziher, there are really no 'sects' in Islam but only 'schools', *madhahib* (sing. *madhhab*), of Muslim law. Strictly speaking, belief in the one and only God and the apostleship of the Prophet Muhammad are the only two beliefs necessary in Islam. In the theory of the law all Muslims are brothers and equals, and differences in opinion on questions of law do not constitute them, speaking legally of course, into separate sects of the kind, for example, which we find in Hindu law."[1]

There are still several schools of thought within the Shiites, the most important of which are the Ithna-Asharis and the Isma'ilis. "The Zaydis, who are concentrated in the Yaman," says Prof. Fyzee, "combine Shi'i and Sunni doctrines."[2] The number of Shiites, as approximately figured by him, is 20 millions, while the total number of Muslims as surmised by Prof. Gibb is 350 millions.[3] A basic fact about such a total census, however, is that it was not figured by Muslims themselves. Neither in the vastness of Africa nor in the obscure world behind the Iron Curtain can there be any conceivable possibility of a total or even fair census. Prof. Gibb, for instance, has reckoned the population of Egypt and eastern Sudan in a figure of 24 millions,[4] whereas the population of Egypt alone is today definitely above this figure.

(2) The second fact which is often overlooked about *al-madhahib*, or the schools of law, is that none of them was really established during the lifetime of the jurist with whose name it later became identified. This reveals yet another fact, namely, that our early jurists did not mean to establish schools; they only meant to exert all their means of knowledge—whether in historical

[1] Fyzee, *Outlines of Muhammadan Law*, p. 36.
[2] Fyzee, *Shi'i Legal Theories*, p. 114.
[3] Gibb, *Mohammedanism*, p. 26.
[4] Ibid, p. 25.

authentication, linguistic implications, or in the comprehension of new occurrences—having the common purpose of contributing to a healthy relation between the Muslims and their Shari'ah. None of them ever thought of erecting himself as a barrier between the Muslims and the Shari'ah. Significant enough is the fact that in all books about Abu Hanifah—in whose name the first school was gradually established—one can easily discover that the methods and opinions which later became characteristic of this school were neither introduced by him nor recorded by him in writing. Even as regards the two basic conceptions of *al-ijma'* and *al-qiyas* (the latter being usually, but inaccurately, ascribed to Abu Hanifah, as being peculiar to his *fiqh*), it is recorded that it was the Hanifite scholars who, after his death, deduced those juristic rules from what they had collected of his opinions on different issues.[1] Still more significant is what is reported in these books about the very method which Abu Hanifah applied in his intellectual activity. Says Prof. Abu Zahrah: "The way he preached was more a method of learning. Whenever a problem was brought to him, he used to place it before his students and then join them in opining on its solution. Each one was free to present his opinion, which sometimes contravened Abu Hanifah's. This led sometimes to hot discussions and even to shouting. Not until the issue became clear before them did Abu Hanifah present the resumé of this collective study and suggest what he himself thought on the subject. The fact that Abu Hanifah had been applying this method of learning until his death made him always a student whose knowledge continued to grow and whose thought continued more and more to flourish."[2]

We have also seen how Malik, in whose name the second school came into being, rejected the Caliph's proposal to enforce his book *Al-Muwatta* as a general legal code.

No different from the attitudes of Abu Hanifah and Malik was that of Al-Shafi'i, whom we have quoted earlier. Even during his lifetime he changed his opinions on many issues after moving

[1]Abu Zahrah, *Abu Hanifah*, Arabic, pp. 309, 324.
[2]Abu Zahrah, *Abu Hanifah*, p. 76.

from Iraq to Egypt. When asked, "Why have you changed your mind?", he answered, "That was according to what we saw, and this is according to what we see." Under his name, however, the third school came into existence.

Ibn Hanbal did not write any book on jurisprudence. He left only a compilation of authenticated Traditions. He explicitly stated: "I am not a man of dogmatic theology. Rather, I am against it. Only what is in the Book and the Sunnah, or what has been authentically related by the Companions of the Prophet, may be considered."[1] Many authors considered Ibn Hanbal to be more of a "Traditionist" than a jurist. In fact he was, and it was under the impact of this "Traditionism" that Ibn Taymiyah, who was himself a Hanbalite, revolted against the petrifaction of Islamic Law caused by the blind following of the schools. It was another Hanbalite, Al-Tufi (d. 716 H.), who became identified with his conception of *al-maslahah*, or "utility", which he based on the famous Tradition, "There shall be no harm done, nor suffered", thus introducing the consideration of utility, the counterpart of harm, as the foremost principle that should be given priority in the applicability of all texts of the Shari'ah.[2]

The fact that none of all these jurists, including those whose names are associated with the four Sunnite schools, ever intended to establish a definite school gives rise to the natural question: *Why and how, then, were these schools gradually established?* The answer to this question is well indicated in the very conception of *ijma'* (consensus of opinion) which these schools presented as a third source of Islamic Law.

With the door wide open to individual interpretations of the sacred texts and to individual opinions in the absence of an applicable text, it was easy to anticipate chaos and to fear a gradual disintegration of the community. Under the early Caliphs, such a danger or fear was out of the question, for two main reasons. The first was the admitted piety of the early Muslims,

[1]Ibn al-Qayyim, *Al-Manaqib*, p. 156.
[2]Mustafa Zayd, *Al-Maslahah fi'l-Tashri' al Islami wa Najmuddin al Tufi*, Cairo, 1954, p. 116. The whole book is a discussion of Al-Tufi's conception.

which was a powerful check on their indulging in whims and forgery. The second was the strong leadership of those early Caliphs who, through continuous consultation with their people, as we have mentioned earlier, were able to maintain a oneness of purpose and a uniformity of legal speculation for the entire nation. With the weakening of these two restraining factors, some other basis for uniformity had to be sought.

The usual arguments for the validity of *al-ijma'* can be summarized as follows:

(1) The Quranic injunction: "And whoever acts hostilely to the Messenger after guidance has become manifest and follows other than the way of the believers, we turn him to that to which he (himself) turns and make him enter hell; and it is an evil resort."[1]

(2) The Prophetic Tradition: "My nation shall never be unanimously in error."[2]

There are, however, many other texts to the same effect. The question before us is: can such texts provide a real sanction for a new source of legislation? A study of juristic works on *al-ijma'* reveals a basic disagreement not only as regards its validity, but even as regards its very existence. Abu Hanifah, for instance, was never reported to have introduced by himself a definite conception of *ijma'* with a definite legal bearing. Malik considered the unanimity of the Madinites as a probable reflection of some early Prophetic practice. Al-Shafi'i, in his *Al-Risalah*, almost denies the existence of *al-ijma'*, except on fundamentals of religion which have been handed down from generation to generation and the validity of which rests on some authentic text. Ibn Hanbal is known to have said that any claim of unanimity is a mere lie and that the most one could claim is that he does not know of any disagreement on the particular issue. The Shiites totally deny the conception of *ijma'*. Ibn Hazm considers only the consensus of opinion among the Companions

[1]Q. IV : 115.
[2]Mustafa Zayd, *Al-Maslahah*, pp. 121-127.

of the Prophet as being a sign of an early Prophetic sanction or approval.[1]

How, then, can we explain the later development of the concept of *al-ijma'*? And since later jurists have repeatedly stated that there should be some text upon which the consensus of opinion is established, what is the exact legal import of *al-ijma'*? And is it to be a consensus of opinion of all Muslims, or a consensus of opinion of all jurists? And, in either case, how can we guarantee that it is a real consensus? And who are the jurists?

Says Prof. Abu Zahrah: "The very validity of *al-ijma'* is not a matter of consensus among Muslims. There are prominent jurists who have explicitly denied its very existence. There are others who have admitted its validity, but when an issue came with a claim of a previous *ijma'*, they denied its very existence."[2] He then concludes (as we have earlier done): "It was but for the maintenance of national unity and as a check against individual deviations, that *al-ijma'* was legalized as an authority after the sacred texts."[3]

While the development of the concept of *al-ijma'* was a concrete expression of a commonly-felt need for a collective authority, as against individual interpretations and opinions, the juristic rules relating to *al-qiyas* came to be considered next to *al-ijma'* as a means of bringing about a unification of thought. The result was the division of Muslims into various legal schools. That the desire for social unity was an overriding factor in the establishment of these schools is clear from the fact that their works are mostly similar. Says Prof. Gibb: "It is true that the differences among them came down mostly to relatively minor points of law and ritual."[4]

[1]Abu Zahrah, *Ibn Hanbal*, p. 259.
[2]Abu Zahrah, *Abu Hanifah*, p. 322.
[3]Abu Zahrah, *Abu Hanifah*, p. 323.
[4]Gibb, *Modern Trends in Islam*, p. 14.

CHAPTER V

LEGAL SPECULATION

IT is an obvious fact that our jurists, in the variety of their works and methods, were all trying to serve the Shari'ah, the code of Islamic Law. Some of them opined in an official capacity, mainly in the field of jurisdiction. Others wrote or dictated in their seminars, or preached in public. There was no single centre from which a legal uniformity could be maintained. It was a matter of course, therefore, that subjective influences and actual convictions were apt to create circles of followers which gradually took the shape of schools. The obscure concept of *al-ijma'* was, in fact, the inevitable outcome of the will of the community. Says Prof. Abu Zahrah: "We have gone back to all references relating to the biography of Abu Hanifah, in order to find something that would testify to what his followers ascribed to him concerning the implementation of *al-ijma'*. We could find only two statements: one by Al-Makki to the effect that 'Abu Hanifah was a strict follower of the common usage of his fellow-citizens', and the second by Sahl Ibn Muzahim: 'The course of Abu Hanifah was (1) the authoritativeness of authentic texts; (2) the strong reaction to all indecency; and (3) the consideration of human dealings in order to see what is best for their benefit and stability'."[1]

The juristic rules of analogy (*al-qiyas*) were the development of a simple rule, that is, that for every rule of the Shari'ah concerning human dealings, there is a conceivable point of utility aimed at by its legislation. If this point can be defined, then the applicability of the text should logically extend to every new issue wherein the same point of utility can be discerned. This

[1] Abu Zahrah, *Abu Hanifah*, p. 309.

conception of utility is called, in the terminology of Muslim jurisprudence, *al-maslahah*. Said the famous jurist Al-izz Ibn 'Abd al-Salam: "A thorough study of the objectives of the Shari'ah with regard to the conception of *al-maslahah* leads to the firm conviction that wherever and whenever *al-maslahah* exists, it should be considered even in the absence of a specific text. This is the inevitable aim of the Shari'ah."[1] We may also quote the accurate remark of Al-Tufi: "Whereas the conception of *al-maslahah* is a matter of consensus among all jurists, *al-ijma'* is a question of disagreement."[2] Significant is the fact that it was Malik—the jurist who was so strict a follower of Tradition that he even accepted the consensus of opinion of the Madinites—who elaborated most on the concept of *al-maslahah*.

But were the Muslims really in need of such a groupment under various legal schools? Was the concept of *al-ijma'* the correct translation of the will of the nation as prescribed by the Shari'ah? Was the development of *al-qiyas* by different schools the proper course to serve the concept of *al-maslahah?*

The answer to all these questions is a definite "no". It was exactly this type of groupment that 'Umar, the second Caliph, feared most. He ordered all the Companions of the Prophet to preach whatever they wished in the public Mosque of Madinah, but never to allow themselves to become the centres of different circles. By doing so, he was not imposing a bar on their freedom of opinion or speech. He was only trying to let all opinions become known to all. In this he was guided by the basic concept of "the nation as a whole". Both the Qur'an and the Sunnah introduced this concept as the sole source of authority both in implementing their rules and in legislating for every issue of utility in the absence of such rules. One of the characteristics of the Muslim society is, as the Qur'an explicitly states: ". . . (those) *whose affairs are decided by counsel among themselves.*"[3] Two principles are clearly implied in this verse. The first is that of

[1] Al-'Izz Ibn Abd al-Salam, *Qawa'id al-Ahkam*, II, 62.
[2] M. Zayd, *Al-Maslahah fi'l-Tashri' al-Islami*, p. 127.
[3] Q. XLII : 38.

"consultation" as the means of deciding upon every national affair. The second is that of the representation of the entire nation in making the decision. How to set these principles in action is left for the nation to work out and to evolve with the requirements of time. Muhammad, in elucidation of these principles, not only said, "Follow the majority," but even gave up his own opinion out of respect for that of the majority during the battle of Uhud.

Prof. Gibb says: "The conviction underlying ijma', that religion is best left in the safekeeping of the consciences of ordinary intelligent believers, and its corollary of toleration of differences on secondary points seem also to explain one striking difference between the religious institutions of Christianity and Islam. I mean the absence of a hierarchy and of all that organization of councils, synods, and sees which plays so large a part in the history of the Christian church. It may be that this lack of organization is to be related to that atomism of the Arab mind . . . but it is a point on which I do not feel competent to express an opinion." He then proceeds to seek an explanation for the sound Islamic conception which he calls "the general will" of the nation, in the assumption that the Arab society must have possessed a highly-developed social instinct. Whatever the real explanation may be, the general will of the nation is admittedly established. We may recall here, however, what Prof. Gibb says in his book *Mohammedanism:* "Islam never identified itself with the Arabs, although at times Arabs have identified themselves with it."[1] We may also add that the earliest jurist in the history of Muslim jurisprudence, Abu Hanifah, was a Persian, and that the most prominent authority on the science of Hadith, Al-Bukhari, was also, as his very name indicated, of non-Arab origin.

Thus, the edifice of all Muslim jurisprudence may be epitomized by three fundamentals:

(1) The Shari'ah, meaning the Qur'an and the authentic Traditions of the Prophet.

[1]Gibb, *Mohammedanism*, p. 59.

(2) The general will of the nation, as ordained by the Qur'an and practised by the Prophet and the early Caliphs—not as conceived obscurely and variably by the disputable *ijma'*. This general will is to be sought through *consultation* and full *representation.*

(3) The conception of *al-maslahah*, or common interest, being the obvious outcome of all texts of the Shari'ah, has to be considered in both the application of the sacred texts and in the legal speculation for all occurrences in the absence thereof.

With this clear and simple synthesis, we may quote and fully subscribe to Iqbal's suggestion that "the transfer of the power of ijtihad from individual representatives of schools to a Muslim legislative assembly which in view of the growth of opposing sects, is the only possible form ijma' can take in modern times, will secure contributions to legal discussions from laymen who happen to possess a keen insight into affairs. In this way alone we can stir into activity the dormant spirit of life in our legal system and give it an evolutionary outlook."[1]

[1]Iqbal, *The Reconstruction of Religious Thought in Islam*, p. 174.

PART THREE

SPHERE OF INFLUENCE

CHAPTER I

IMPACT OF HISTORY

DISCRIMINATION because of religion is a much-feared aspect of any society based on a particular religious ideology—the more so when the latter is based on a code of law with a religious connotation and spirit. It is only to be expected, therefore, that one meets with violent controversy whenever one discusses the applicability of Islamic Law in a society which is composed of non-Muslim as well as Muslim citizens.

It should be recalled, however, that this controversy has not always been of a purely academic nature. A background of biassed historical notions seems to have misguided many writers on the subject. In the Introduction to his autobiographical book, *The Road to Mecca*, Muhammad Asad has advanced a theory, conceived by him many years ago, which may help us to understand the prejudice against Islam commonly found in Western thought. He suggests that the ideas concerning Islam held by occidentals today might be traced back to the impact of the Crusades on the Western mind. He refers to "the incredulity which greeted the early discoveries of the psychoanalysts when they tried to show that much of the emotional life of a mature person—and most of those seemingly unaccountable leanings, tastes and prejudices comprised in the term 'idiosyncrasies'—can be traced back to the experiences of his most formative age, his early childhood . . .", and adds, "Are nations and civilizations anything but collective individuals? Their development also is bound up with the experiences of their early childhood. As with children, those experiences may have been pleasant or unpleasant; they may have been perfectly rational or, alternatively, due to the child's naive misinterpretation of an event; the *moulding* effect of every such experience depends primarily on its original

intensity. The century immediately preceding the Crusades, that is, the end of the first millennium of the Christian era, might well be described as the early childhood of Western civilization. . . . This was the age when, for the first time since the dark centuries that followed the breakup of Imperial Rome, Europe was beginning to see its own cultural way. Independently of the almost forgotten Roman heritage, new literatures were just then coming into existence in the European vernaculars; inspired by the religious experiences of Western Christianity, fine arts were slowly awakening from the lethargy caused by the warlike migrations of the Goths, Huns and Avars; out of the crude conditions of the early Middle Ages, a new cultural world was emerging. It was at that critical, extremely sensitive stage of its development that Europe received its most formidable shock—in modern parlance, a 'trauma'—in the shape of the Crusades."[1]

After describing the effects of this "shock" on Europe, he observes: "The traumatic experience of the Crusades gave Europe its cultural awareness and its unity; but this same experience was destined henceforth also to provide the false colour in which Islam was to appear to Western eyes. . . ."[2]

Robert Jackson, ex-Associate Justice of the Supreme Court of the United States, later conceived a similar view. He said: "These long and fanatical hostilities, often shamefully conducted on both sides, engraved on the racial memory of the West a fierce and hateful rejection of Islam and all its works as alien to our civilization, our religion and our law."[3]

It is really amazing to see many a good Western writer fall prey to misconceptions about Islam which are in absolute contradiction to its basic tenets. Even some Western-educated Muslim authors have not always been able to overcome the confusion between their attachment to Islam and to what they read about it in modern Western literature. As for "old-fashioned" Muslim books, they are, as a rule, either composed in an antiquated style

[1]Muhammad Asad, *The Road to Mecca*, Simon & Schuster, New York, 1954, pp. 7-8.
[2]Ibid, p. 9.
[3]R. H. Jackson, from his Foreword to *Law in the Middle East*, I, p. vii.

which the modern mentality can neither appreciate nor grasp, or their authors are themselves unable to differentiate between the basic tenets of Qur'an and Sunnah and the traditional views about Islam held by individual scholars who, however erudite and famous they might be, were always fallible.

After an exhaustive study of many books on the subject, it appears to us an endless task to try to deal with all kinds of criticism of and misconceptions about Islamic Law, particularly with regard to its ordinances relating to non-Muslims. However, a condensed survey of the authentic Islamic principles, both Quranic and Prophetic, relating to this subject should supply the key to most of the relevant points of controversy.

CHAPTER II

INTERNATIONAL CRITERIA OF EQUALITY

IN a report prepared by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,[1] we find a comprehensive definition of the principles of equality, or non-discrimination, which we shall utilize here to probe the legal impact of religious distinction on the non-Muslim subjects of an Islamic State.

Says the report: "The principle of equality or non-discrimination implies the following two consequences. In the first place the members of the minority have the *right to the nationality* of the State which exercises sovereignty over the territory where they reside. In a modern State, the possession of nationality implies equal rights for all those possessing it. Secondly *discrimination de facto or de jure* against minority elements is forbidden."

The report also states that "the only States with obligations concerning minorities owe these obligations under international undertakings contracted by themselves. These undertakings are of two kinds: treaties or declarations made before the Council of the League of Nations."[2] Those undertakings, continues the report, "recognized in formal terms the principles of strict equality between individuals belonging to the minority element and others: *equality of all persons before the law*, equal treatment de facto and de jure."[3]

In a memorandum on the Definition and Classification of Minorities submitted by the Secretary-General to the Sub-Commission, he admits "the difficulties of giving a clear-cut

[1] United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, document prepared for the First Session (24 Nov. to 6 Dec., 1947), UN Doc. E/CN.4/Sub.2/6, Nov. 7, 1947, p. 14.
[2] Ibid, p. 1.
[3] Ibid, p. 15.

definition of the term 'minority' from a scientific point of view". Thus, "it is safe to say that, at least in the field of political science, this term is most frequently used to apply to communities with certain characteristics (ethnic, linguistic, cultural or religious groups, etc.), and almost always to communities of a national type".[1] Of all these characteristics, only that of religion is relevant to Islamic Law. Furthermore, all distinctions made by Islamic Law on the basis of religion are, as we shall see, far from the conception of "minority" as interpreted and enacted in international documents and undertakings.

The right to nationality and equality before the law, *de facto* and *de jure*—both being internationally agreed-upon criteria of equality as opposed to discrimination—will be separately treated in the course of the following chapters.

[1]United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Definition and Classification of Minorities, memorandum submitted by the Secretary General, Lake Success, N.Y., 1950, p. 9.

CHAPTER III

BASIC NOTION: HUMAN PRINCIPLES

SAYS the Qur'an: "And if ye (O Muhammad) judge between *mankind*, judge justly. Lo! Comely is this which God admonisheth you. Lo! God is ever Hearer, Seer."[1] All moral values, such as justice, equality, honest dealings, etc., are to be held sacred and to be practiced irrespective of differences of religion. Their authority is dependent only on their equity, which recognizes no barrier between man and man. In other words, they are the human standards of an honest attachment to religion, and thus the more "Islamic" the Muslims become, the better the guarantee to non-Muslims that these moral values will be practised. It should be borne in mind, however, that a Muslim—like any other human being—may fail to live up to those high standards; nevertheless, he never has the right to attribute his deviation to any Islamic principle. Nor has he the right to justify that deviation on any political or economic pretext. For, according to the Islamic concept, moral values are meant to be realized in action and not merely to be accepted in theory. They are alive only when people live according to them. Muhammad once entered the Mosque of Madinah where he found some Muslims busy studying together. He addressed them in these words: "Acquire of knowledge as much as you can afford. But always remember that God's reward comes only with action."[2]

In other words, the *de-facto* status of non-Muslim subjects might be one of unfair discrimination—as occasionally happened in the course of history—but their *de-jure* status is always there in both the Qur'an and the Sunnah: a status meeting the highest standards of equity and equality. This *de-jure* status is as stable

[1] Q. IV : 58.
[2] Al-Shatibi, *Al-Muwafaqat*, I, pp. 64-65.

as any Quranic or Prophetic text could be, and every struggle for re-establishing it in practice in an Islamic State is thereby rendered a constitutional one. Thus, religious conscience is not only not opposed to such a struggle, but definitely demands it. It was in accordance with this principle that Muslim jurists led the Muslim public in a strong protest against the Caliph Walid Ibn Yazid when, fearing a Roman attack, he exiled the non-Muslim citizens of Cyprus to Syria. Not before they were brought back to Cyprus was the Caliph allowed to have rest.[1] Baladhuri, the famous Muslim historian, reports that once some of the hill-tribes of Lebanon rose in revolt against the Islamic State. "Thereupon the Governor, Saleh bin 'Ali bin 'Abdullah, despatched an army to crush it and the army put all the male combatants of the revolting group to death. As for the civilians, he exiled some of them and allowed the remaining to live there. Imam Awza'i was alive in those days, and when he learnt of it he reprimanded Saleh vehemently. The following extract from the letter that he wrote to him speaks for itself: 'Dhimmis of the hill-tracts of Lebanon have been exiled and you know the fact. Amongst them are men who had not taken part in the revolt. I fail to understand why common people should be punished for the sins of particular individuals and be deprived of their homes and properties. The Quranic injunction is quite clear that ultimately everybody will have to account for his own actions and nobody shall be held responsible for anybody else's actions. This is an eternal and universal injunction, and the best advice therefore, that I can give to you is to remind you of one of the directives of God's Prophet that he himself will stand up as plaintiff against all such Muslims, who are unkind to those Non-Muslims who have entered into an agreement with them and tax them beyond endurance.' "[2]

Says Dr. Hamidullah: "One should not forget the grea practical importance attached to the fact that Muslims obey their

[1]Abul-'Ala Maudoodi, *Islamic Law and Constitution*, Karachi, Jamaat-e-Islamic Publications 1955, p. 188.
[2]Maudoodi, *Islamic Law and Constitution*, p. 188.

system of law as something of Divine origin, and not merely the will of the majority of the leaders of the country. In this latter case, the minority permits itself a struggle so that its own conceptions prevail; and in the democracies of our time, not only the majorities change from election to election, but are also constituted or disintegrated by all sorts of commutations and combinations, and the party in power tries to upset the policy pursued by its predecessors, causing, among other changes, the modification of laws. Without entering here into the question of the adaptability of Islamic laws to the exigencies of social evolution, it is incontestable that there is greater stability in the Muslim law due to its Divine origin—than in any other secular legislation whatsoever. Now the Islamic law ordains justice to, and observance of certain rules regarding the Non-Muslims. These latter therefore feel no apprehension in the face of political quarrels and parliamentary elections of the country of their residence, with regard to the Islamic laws in force."[1]

The Quranic verse, "Lo! We reveal unto thee the Scripture with the truth, that thou mayest judge between mankind by that which God showeth thee. And be not thou a pleader for the treacherous"[2], was revealed along with eight other verses acquitting a Jewish citizen of a false charge and condemning a Muslim instead. All commentators unanimously agree that these verses were revealed on the occasion of a dispute between a Muslim and a Jew. The Muslim, Ibn Ubayriq, had stolen a coat of mail, and having hidden it in the house of a Jew, afterwards accused the latter of the theft; he was supported in his false accusation by his tribe. The Prophet, notwithstanding the political intrigues of many Jews at that time, cleared the Jew of the charge and convicted the Muslim. This, as Muhammad Ali recalls, "was at a time when every Muslim hand was sorely needed for the defence of Islam, and a verdict against a man supported by his whole tribe meant the loss of that tribe. But such considerations

[1]Hamidullah, Foreword to *Introduction to Islam*, publications of Centre Culturel Islamique, Hyderabad, Citizen Press, 1957, No. I, p. 135.
[2]IQ. V : 105.

did not carry any weight with the Prophet."[1] Two of the verses revealed in the dispute read as follows: "Whoso committeth sin, committeth it only against himself. God is ever Knower, Wise. And whoso committeth a delinquency or crime and then throweth (the blame) thereof upon the innocent, hath burdened himself with falsehood and a flagrant crime."[2] Thus was established the stable balance of equity, which was applied even at the risk of losing a whole tribe and accompanied by the humiliation of a Muslim at a time when the non-Muslim's co-religionists were intriguing against the State. The guilty is guilty and the innocent is innocent, to whatever religion they may belong. Says Dr. Vaglieri: "It is no exaggeration to insist that Islam was not satisfied with preaching religious tolerance, but that it made tolerance a part of its religious law."[3] And even the word "tolerance" is not the right term for what we are discussing. For "tolerance" suggests a sense of superiority tempered by charity—which does not apply in this case. It is, rather, placing the honest observation of justice between man and man above all other considerations: a dignified observation that corresponds with the Quranic declaration, "Surely We have accorded dignity to the sons of Adam."[4] This can well illustrate the background of such a statement as that of Sir William Muir: "Leniency towards the conquered and their justice and integrity presented a marked contrast to the tyranny and intolerance of the Romans. . . . The Syrian Christians enjoyed more civil and popular liberty under the Arab invaders than they had done under the rule of Heraclius and they had no wish to return to their former state."[5]

Not only does the authority of moral values, in the name of Islam, transcend every difference of religion; it goes far beyond that. One of Islam's moral principles is the conception that human beings, wherever they live, are fundamentally one and the same. Says the Qur'an: "O men, revere your Lord, Who created

[1]Muhammad Ali, *The Holy Qur'an*, Arabic Text, Translation and Commentary, 4th rev. ed. Lahore, Ahmadiyyah Anjuman Isha'at al-Islam, 1951, p. 220.
[2]Q. IV : 111-112.
[3]Laura Veccia Vaglieri, *An Interpretation of Islam*, Beirut, 1957, p. 25.
[4]Q. XVII : 70.
[5]Sir William Muir, *The Caliphate, Its Rise, Decline and Fall*, London, 1891, p. 128.

you from a single soul and made out of it a pair, and thereupon brought forth multitudes of men and women."[1] The goal of human life is for people to come closer together and to know each other better, and not to become estranged from, and hostile to, one another: "O people! Behold, We have created you from a male and a female and made out of you nations and tribes so that you may know one another (and be good to one another). The noblest among you before God is the best in conduct. Behold, God is the Knower, the Aware."[2] This implies that the Muslim, by virtue of his faith, ought to be deeply attached to mankind as a whole, conscious of the fact that geographical borders, political divisions, and differences in appearances, race or language, must not be a barrier between man and man. Or as Canon Taylor has put it: "It (Islam) thrust aside the artificial virtues, the religious frauds and follies, the perverted moral sentiments, and the verbal subtleties of theological disputants. It replaced monkishness by manliness. It gave hope to the slave, brotherhood to mankind, and recognition to the fundamental facts of human nature."[3]

[1]Q. IV : 1.
[2]Q. XLIX : 13.
[3]Paper read before the Church Congress at Wolverhampton, Oct. 7, 1887. Quoted by Arnold in his book, *The Preaching of Islam*, pp. 71-72.

CHAPTER IV

THE ISLAMIC CONCEPTION OF NATIONALITY

IT is upon this basic notion that the Islamic conception of nationality should be sought. The very term "nationality", which is a derivation from "nation",[1] implies an historic attachment to the distinctions of race, common descent, language, history or political institutions, all of which have contributed to the build-up of a legal definition of "nationality". That is why Oppenheim[2] had to warn of the confusion between nationality, in the sense of citizenship of a certain state, and nationality in the sense of belonging by race to a particular nation. There is no such confusion in Islam; of all this gradually-developed conception of nationality, only the administrative concept of nationality is acceptable to it. By this we mean the necessary organization which men need for their grouping, as well as for the inter-relations between the various groups. Such an organization should be so administered that no prejudices and no considerations other than ideals and moral values are allowed to separate man from man or group from group. "Nationality" should neither involve a separating border between human beings, nor should it imply the narrow conception of nationalism that is based on an alleged supremacy on linguistic or ethnological lines. In other words, the character or quality deriving from membership of a particular nation or state can only be determined by each member's basic allegiance to his conscience: a conscience which is free of all prejudices. Thus, the political status and allegiance which arise from this membership are to be based upon two fundamentals: (1) allegiance to one's own conscience, and (2) social allegiance to the society in which one lives. Any deviation from either of

[1]"Nation: Distinct race or people having common descent, language, history, or political institutions", The Concise Oxford Dictionary, p. 785.
[2]Oppenheim, *International Law*, ed. H. Lauterpacht, 8th ed., London, 1958, I, p. 644.

these fundamentals constitutes individual or social hypocrisy, for sound membership of a society can only result from conscientious reciprocity. But once conscience is involved, religion steps in with its claim to authority: and thus has it been all through history. Whether one likes it or not, conscience and religion are very intimate; rather, they are one in every religious conception, and in every religion. How, then, could social life be built up among people whose consciences are dominated by different religions? An adequate answer to this question, however, is more of an ethical nature, and, therefore, not quite relevant to our subject. The fact remains that in any society religion should be given its proper place, so that every individual could act in accordance with his conscience, and all individuals could co-operate in spite of their adherence to different religions.

This is particularly true of Islam, which, since its very birth, not only discarded all artificial barriers between man and man, but further introduced the objective conception of the ethnological oneness of all men as a matter of faith and of polity. As with every other of its moral principles, Islam meant to set in practice what it preached. Says Kenneth Cragg: "Muhammad founded a state. He did not merely launch a religion. Perhaps even that distinction is unsound. We should perhaps say he launched a religion in founding a State."[1] History records how heterogeneous races, nations and linguistic units have mingled peacefully in the Islamic State for many centuries. A. von Kremer writes: "Out of the numerous tribes, big and small, of a hundred different kinds that were incessantly at feud with one another, Muhammad's word created a nation. The idea of a common religion under one common head bound the different tribes together into one political organism which developed its peculiar characteristics with surprising rapidity. Now only one great idea could have produced this result, viz. the principle of national life in heathen Arabia. The clan-system was thus for the first time, if not entirely crushed—that would have been impossible—yet

[1]Kenneth Cragg, *The Call of the Minaret*, New York, 1956, pp. 159-160.

made subordinate to the feeling of religious unity. The great work succeeded, and when Muhammad died there prevailed over by far the greater part of Arabia a peace of God such as the Arab tribes, with their love of plunder and revenge, had never known; it was the religion of Islam that had brought about this reconciliation."[1]

But this reconciliation was not brought about only between Muslims in the Islamic State. It was an all-embracing society in which people of different religions lived side by side as equals. Romera Navarro, a Spanish historian, writes in his book *Histoire d'Espagne* that "under their (the Muslims') regime, the Hispano-Roman and Visigothic inhabitants of the peninsula preserved their property, their laws, their judges, their churches and their priests. The living conditions of the cultivators of the soil, of the slaves and of the Jews were much improved. The Jews, in particular, who had been cruelly persecuted during the period of Visigothic monarchy, enjoyed during the Arab epoch, entire liberty; they were allowed to participate in the new Government and to occupy positions in its administration. . . . There, men of all sects and of all races lived together in liberty. While in Christian Europe fanaticism reigned, here tolerance was practised."[2]

And let us say here, before discussing the legal structure of such an achievement, that—however strange it might sound to people reared in the modern conceptions of nationality and nationalism, whether based on theory or on recorded history—the fact remains, as Arnold Toynbee puts it, that "as things are now, the exponents of racial intolerance are in the ascendant, and, if their attitude towards 'the race question' prevails, it may eventually provoke a general catastrophe. Yet the forces of racial toleration, which at present seem to be fighting a losing battle in a spiritual struggle of immense importance to mankind, might still regain the upper hand if any strong influence militating against race consciousness that has hitherto been held in reserve

[1]A. von Kremer, *Geschichte der herrschenden Ideen des Islams*, Leipzig, 1888, pp. 309, 310. Quoted and translated by Arnold, *The Preaching of Islam*, pp. 32-33.
[2]Zaki Ali, *Islam in the World*, 2nd rev. ed., Lahore, M. Ashraf, 1947, p. 148.

were now to be thrown into the scales. It is conceivable that the spirit of Islam might be the timely reinforcement which would decide this issue in favour of tolerance and peace."[1]

The meeting of faiths, which Islam admittedly brought about thirteen centuries ago, is even more direly needed today. Modern science, which provides human life with an increasing sense of the physical oneness of the world, can hardly deny the fact that this physical oneness is no answer or remedy to the ever-increasing uneasiness, or rather, hypocrisy which exists between man and man.

We have said above that the political status and allegiance which arise from one's membership of a nation or state are to be designed upon two fundamentals: (1) allegiance to one's own conscience; and (2) social allegiance to the society in which one lives. To us, these two fundamentals constitute the characteristic structure of the Islamic conception of nationality. The first implies the role of religion in determining the status of citizens belonging to different faiths, the second implies the legal contract underlying citizenship, with its reciprocal rights and duties.

A. RELIGION AND NATIONALITY

1. General Observations

ISLAM recognizes religion as the domain wherein conscientious commitment is to be sought and established. This is only logical, since a serious faith in God implies a basic adherence to His commands in every sphere of life. "Give unto God what is God's and unto Caesar what is Caesar's" is as alien to Muslim thought as it would be to say, "Obedience to God is subject to Caesar's demands." Both sayings would imply a limit to God's authority and a merely conditional adherence to His commands. Says the Qur'an: "Say: My prayer and my sacrifice and my life and my death are surely for God, the Lord of the worlds. He hath no partner. This am I commanded, and I am first of those who

[1] Arnold Toynbee, *Civilization on Trial*, Oxford University Press, 1953, pp. 205, 206.

submit (to Him)"[1]; and: "Nay, but the commandment is wholly God's"[2]; and: "His, verily is all creation and all commandment."[3] This "totalitarian" outlook is the inevitable result of the very faith in God. Religion, in the conventional sense of an institution with traditional functions and occasional spiritual satisfactions on Sunday or Saturday or Friday, is, from the viewpoint of Islam, a degenerated state of mind and spirit; and it is self-deception if man regards it as an established relationship with God. But this applies not only to Islam. Says Prof. Gibb: "Islam has often been described as a 'totalitarian' religion. But all religious ideas that shape the imaginative outlook and content of human mind and that determine the action of the human will are potentially or in principle totalitarian. They must seek to impose their own standards and rules on all social activities and institutions from elementary schools to law and government. Judaism is in this sense totalitarian; so also is Christianity. If we have forgotten it, it is only because from its earliest years Christianity was forced to recognize the authority of Roman law and because, when it seemed to be on the point of victory in its long struggle with Germanic feudalism in the Middle Ages, it had to suffer the assault of two new and deadly enemies: Humanism and science. And science itself is coming very near to evolving a totalitarian idea, after breaking down the opposition of religion by its alliance with humanism and economic liberalism. If we may judge by the foretastes of it in Germany and Russia, indeed, scientific totalitarianism is preparing for the world a straight-jacket of a stiffness and harshness beyond anything yet experienced by the human race.

"Compared with this, the totalitarianism of religious faith is a light and easy yoke. However 'obscurantist' the religious authorities may be, they at least recognize the value and personality of the individual and so preserve for it a considerable range of liberty. In Islam, as we have seen, this liberty was further extended

[1]Q. VI : 163-164.
[2]Q. XIII : 31.
[3]Q. VII : 54.

by the looseness of its organization, the absence of a hierarchy, and the principle of toleration of differences."[1]

On the basis of this wide concept of religion and upon the true conscience of every individual, Islam designed the dignified relationship between Muslims and non-Muslims. This began with relationship between Muslims, on the one hand, and Christians and Jews, on the other. The Qur'an called the latter *ahl al-kitab*, which means "People of the Book". By the "Book", the Qur'an refers to the Bible and to the religious traditions attributed to Revelation, thus making faith the basis of their relation with the Muslims. This basis, on the part of the Muslims, is strengthened by the fact that they believe in all former Prophets and Revelations. Says the Qur'an: "Say (O Muslims): We believe in God and that which is revealed unto us and that which was revealed unto Abraham, and Ishmael, and Isaac, and Jacob, and the tribes, and that which the prophets received from their Lord. We make no distinction between any of them, and unto him we have surrendered."[2] This, however, does not imply a unanimity in all matters of faith. Differences are there. But as the Qur'an restates: "Unto this, then, summon (O Muhammad) and be thou upright as thou are commanded, and follow not their lusts, but say: I believe in whatever scripture God hath sent down, and I am commanded to be just among you. God is our Lord and your Lord. Unto us our deeds and unto you your deeds; no contention between us and you. God will bring us together, and to Him is the eventual coming."[3] It was after the Qur'an had established this close bond with Christians and Jews that the Prophet extended it to adherents of other creeds. This followed upon the first Muslim contact with the Zoroastrians of Bahrain, when the Prophet said: "Let it be with them as it is with *ahl al-kitab*."[4] The practice of the early Caliphs implied their understanding that the Prophetic rule with regard to the Zoroastrians was a precedent applicable to any other people with different creeds.

[1]Gibb, *Modern Trends in Islam*, The Haskell Lectures in Comparative Religion, delivered at the University of Chicago, 1945. University of Chicago Press, 1954, pp. 85-86.
[2]Q. II : 136.
[3]Q. XLII : 15.
[4]Abu Yusuf, *Al-Kharaj*, pp. 130-131.

2. Non-Muslims in an Islamic State

But Islam cannot stop at this generalization since it requires the establishment of a state which is ruled in all spheres of life by its tenets. How, then, could this generalization be translated into practice within an Islamic State? What would be the status of the inhabitants who do not subscribe to the ideology of such a state? Are they to be considered as foreigners or as equal subjects, and how?

Islam considers non-Muslims under two categories:

(1) Those who settle within the territorial limits of the Islamic State, and whose status is to be determined by a kind of socio-political contract which is called *aqd al-dhimmah*. This literally means "a contract the fulfilment of which is a pledge upon the conscience of the community". Once this contract is concluded, the contractees become basically entitled to equal and reciprocal rights and duties. This, in our opinion, grants non-Muslim citizens a status that corresponds with the modern conception of nationality. In other words, *they are full subjects of the Islamic State.*

(2) Those who enter the Islamic State for a limited period, and whose status is subject to the regulations and conditions upon which the permission of sojourn is granted. Neither in the Qur'an nor in the Sunnah is there any text against the granting of such permission. On the contrary, there are precedents of non-Muslim foreigners visiting Madinah in the Prophet's lifetime and doing business with the Prophet himself.[1] Even with regard to subjects of a belligerent state, the principles of Islam ordain their full protection once an *a-posteriori* permission of sojourn has been granted and the *bona fides* of the visitors have been established. In the early Islamic State, with its primitive state of affairs, the permission of sojourn could even be given by individual citizens and thereby became binding upon the State; this, however, was later developed by Muslim jurists. Sojourners were termed

[1] Al-Bukhari, *Kitab al-Buyu'*.

by the Prophet "holders of a covenant of protection"[1], and they were granted, as a rule, the right to live according to their religious codes.

3. Religious Differentiation in Modern Constitutions

Differentiation between holders of different creeds, however, is not a uniqueness of Islam. Religion has influenced the framework of the basic laws of many states. In some of them its hold tightens to the extent of affecting the political status, and sometimes the religious rights, of minority groups. By "minority" we mean here the numerical significance of the word, and its reference, directly or indirectly, to the formal adherence to a particular religion. The religion of the majority is considered dominant; under this domination, however, there are always constitutional texts prescribing equal citizenship irrespective of difference of religion. Some examples:

From the Constitution of SWEDEN:

> "The King shall always belong to the pure Evangelical faith adopted and explained in the unaltered Augsburg Confession and the resolution of the Upsala Synod." (Art. 2)
>
> "The King shall summon and appoint as Members of the Council of State capable, experienced, honourable and generally respected native Swedish citizens who belong to the pure Evangelical faith." (Art. 4)

From the Constitution of NORWAY:

> "The Evangelical-Lutheran religion shall remain the public religion of the State. The inhabitants professing it shall be bound to bring up their children in the same. Jesuits shall not be tolerated." (Art. 2)

From the Constitution of IRELAND:

> "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His name in reverence and shall respect and honour religion. The State recognizes the special position of the Holy Catholic Apostolic and Roman

[1] Al Shawkani, Nayl al-Awtar, VII, p. 14.

Church as the guardian of the faith professed by the great majority of the citizens." (Art. 1)

From the Constitution of ARGENTINA:

"The Federal Government shall sustain the cult of the Catholic Apostolic Church." (Art. 2)

"To be eligible to the office of President or Vice-President of the nation one must belong to the Catholic Church." (Art. 77)

From the Constitution of BURMA:

"The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union." (Art. 1)

"The study of Pali and Sanskrit shall enjoy the protection and support of the State." (Art. 43)

From the Constitution of THAILAND:

"The King professes the Buddhist faith and upholds religion." (Art. 7)

From the Constitution of SPAIN:

"The profession and practice of the Catholic religion, which is that of the Spanish State, will enjoy official protection." (Art. 6)

"No external ceremonies or manifestations will be permitted except those of the Catholic religion." (Art. 6)

From the Constitution of GREECE:

"The established religion in Greece is that of the Eastern Orthodox Church of Christ. Every other known religion is tolerated and the forms of its worship are carried out without hindrance under the protection of the laws, proselytism and all other interference with the established religion being prohibited." (Art. 1)

"Every successor to the Greek throne must profess the religion of the Eastern Orthodox Church of Christ." (Art. 47)

From the ENGLISH Bill of Rights:

"The Protestant subjects should have arms for their defence as allowed by law." (Art. 7)

"That any Papist or person marrying a Papist should be excluded from inheriting, possessing or enjoying the Crown.

That every King and Queen should make, subscribe and repeat the declaration against transubstantiation, and certain doctrines of the Roman Catholic Church contained in the statute 30 Car:11.St.2.C.1." (Art. 2)

"That any person inheriting the Crown under the Act who should profess the Roman Catholic religion or marry a Papist should be subject to the incapacities provided by the Bill of Rights." (1. Act of Settlement)

"That any person coming into possession of the Crown under the Act should join in communion with the Church of England." (3. Act of Settlement)

Part of the oath the King or the Queen has to swear is that he, or she, will maintain to the utmost of his or her power the true profession of the Gospel and the Protestant reformed religion established by law, and preserve unto the bishops and clergy of the realm and the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them.

B. NON-MUSLIM SUBJECTS

1. Basic Texts

Membership of the Islamic State is accorded to non-Muslims under the Arabic term *ahl al-dhimmah*, or *dhimmis*, which means "those whose obligations are a trust upon the conscience and pledge of the state or the nation". They are also called *al-mu'ahidun*, which means "the contractees" or "the holders of a covenant", because their membership of the nation is based on contracts concluded between them, or their ancestors, and the Islamic State. Their rights and obligations are determined according to: (1) basic texts in the Qur'an and the Sunnah; and (2) treaties. Examples:

From the Qur'an:

"God forbiddeth you not regarding those who warred not against you on account of religion and drove you not from

your homes, that ye should be good and benevolent to them and deal justly with them. Lo! God loveth the just."[1]

"O ye who believe! Fulfil your contracts."[2]

"And if ye give your word, do justice thereunto, even though it be against a kinsman; and fulfil the covenant of God. This He commandeth you that haply ye may remember."[3]

"So long as they (non-Muslim contractees) are true to you, be true to them."[4]

"O ye who believe, be upright for God, bearer of witness with justice, and let not hatred of any people seduce you that ye deal not equitably. Be just; that takes you nearer to perfect observance of duty. And keep your duty to God. Lo! God is aware of what ye do."[5]

From the Sunnah: Said the Prophet:

"Beware! Whosoever is cruel and hard on a contractee, or curtails his rights, or burdens him with more than he can endure, or takes anything of his property against his free will, I shall myself be a plaintiff against him on the Day of Judgment."[6]

"And once they (non-Muslims) are willing to conclude the *dhimmah*-contract, then let it be clearly known to them that all rights and duties are equal and reciprocal between you and them."[7]

"Only faithfulness, not treachery, with every given pledge."[8]

2. Practice of the Prophet

The migration of Muhammad from Maccah to Madinah marked a turning-point in both the major subjects of Revelation and the framework of his activities. In Maccah, he was a preacher whose mission and whose followers had nothing except faith and

[1]Q. LX : 8.
[2]Q. V : 1.
[3]Q. VI : 152.
[4]Q. IX : 7.
[5]Q. V ; 8.
[6]Abu Dawud, *Kitab al-Jihad;* also, *Al-Kharaj*, p. 125.
[7]Abdullah Mustafa al-Maraghi, *Al-Tashri' al-Islami li-Ghairi'l-Muslimin* (Islamic Legislation for Non-Muslims), Egypt, p. 64.
[8]Ibid, p. 29.

fortitude to stand against an untold persecution. In Madinah, only a few weeks after his arrival, he established a kind of city-state embracing those who believed in him as a Prophet and those who were willing to accept his authority as a political head. The basic outlook and objective of that State were to realize a co-existence between those who chose to have it and a collective defence against any sort of aggression, external or internal. The constitutional law of that State was in the form of a long written document designing the inter-relations between Muslim tribes and clans among themselves, on the one hand, and between the Muslims and the Jews, on the other. It was a State of a confederal type due to the multiciplity of the population-groups. A recognition was granted to every group within a common bond that applied in two ways: to Muslims upon the authority of their faith in Islam, and to Jews upon whatever provisions a mutual agreement would include. Here are some precisely translated extracts from this constitutional document.

Said the Prophet: "All Jews who choose to join us shall have all the protection that Muslims have. Neither will they be oppressed, nor may there be a Muslim communal agitation against them. To the Jews their religion, and to the Muslims their religion. The Jews of Bani Awf *constitute a community with the Believers.* Between all there should be benevolence and justice. Responsibility for any act of oppression or wickedness shall always be personal. Between them there shall always be a mutual council and advice. There shall also be a joint responsibility for defence against every attack on Madinah and against every aggression directed towards any of those who adhere to this written document. Jews shall share with Muslims the expenditure of war as long as fighting continues. None shall leave the city except upon an 'exit permit' issued by the Prophet. Other Jewish clans (eight of whom were specifically mentioned) and their associates and dependents shall have, with this document, the same status as Bani Awf. This written document, however, should by no means be a shelter for any transgressor. Those who choose to leave can leave in safety, and those who choose to

settle in Madinah can settle in safety, except if held responsible for injustice or transgression."[1]

The italicized phrase of the above text is a literal translation. In its Arabic form it could mean that the Jews constitute a part of a whole community, and it could also mean that they are a community in alliance with the Muslim community. But, in either case, there are three definite facts which this document establishes:

(1) The creation of a socio-political set-up which embraces Muslims and Jews.

(2) The status of Jews in this set-up is determined by a document to which they willingly subscribe. In other words, it implies a kind of mutual agreement which, as we shall see, develops into treaties arrived at by negotiation both in peace and after wars.

(3) There is an equality of protection and security, irrespective of religious differences. The document explicitly introduces a sense of "belonging" to its contents which applies to all, and a conception of personal responsibility which subdues all communal considerations.

Commenting on this document, Dr. Hamidullah says: "The constitutional law of this first 'Muslim State'—which was a confederacy as a sequence of the multiplicity of the population groups—has come down to us in toto, and we read therein not only the clause: 'To Muslims their religion, and to Jews their religion', but even the unexpected clause: 'The Jews . . . are a community (in alliance) with—according to Ibn Hisham and in the version of Abu 'Ubayd, a community (forming part) of—the believers (i.e., Muslims).'

"The very fact that, at the time of the constitution of the City-State, the autonomous Jewish villages acceded of their free will to the confederal State, and recognized Muhammad as their supreme political head, implies in our opinion that the Non-Muslim subjects possessed the right of vote for the election of the head of the Muslim State, at least in the political life of the country.

[1] *Ibn Hisham*, 2nd ed., Cairo, 1950, I, pp. 503—504.

"The military defence was, according to the document in question, the duty of all elements of the population, including the Jews. This implies their participation in the consultation, and in the execution of the plans adopted."[1]

This document was followed by several treaties with Christian tribes. As an example of these, we quote the famous treaty with the Christians of Najran.[2] It begins with the explicit clause, "Being the subjects of his government, they have to . . .", and it proceeds to lay down a specific taxation. Here are some other extracts from the treaty: "For Najran and its dependents, they have God's enjoined protection, and the pledge of His Prophet and Messenger Muhammad (for the same), this equally applying to their property, life, religion, the absent and the present, kith and kin, churches and all that they have in hand, little or much. No bishop in his bishopric can be changed (by Muslims), nor a monk in his monastery. . . . Never will they be humiliated.[3] Military service is not compulsory on them.[4] Between them only justice shall prevail. . . . And whosoever accepts what remains due from previous usurious dealings, my pledge for him shall no more be valid. (Responsibility is personal) and none shall be held responsible for the guilt of another."

In this second document, we see a developed elaboration of what was first enacted regarding the Jews. A specific tax is imposed. An all-embracing conception of protection is prescribed. Humiliation is precluded and military service is not compulsory. Usurious dealings are declared as an act of rebellion, thus equalizing Muslims and non-Muslims before the Quranic text: "O you who believe, keep your duty to God and relinquish what remains due from usury, if you are believers. But if you do (it) not, then be apprised of war from God and His Messenger."[5]

The fact that this treaty between the Prophet and the Christians of Najran was an obligation to which all caliphs afterwards had

[1]Hamidullah, *Introduction to Islam*, p. 136.
[2]Hamidullah, *Al-Watha 'iq al-Siyaslyyah* (Political Documents), 2nd ed., Cairo, *Lajnat al-Taalif wa'l-Tarjumah wa'l-Nashr*, 1956, pp. 111-112.
[3], [4]Abu Yusuf, in *Al-Kharaj*, records two reported forms of the same text; one discarding humiliation and the other exempting the contractees from conscription. We have chosen to record them both on the ground of equal authenticity. (*Al-Kharaj*, pp. 72-73.)
[5]Q. XI : 278, 279.

to subscribe,[1] is enough to characterize the commitment it bears and the status it provides. It was not a political manoeuvre meant to gain time or to annex more territory. When 'Amr Ibn Hazm[2] was appointed by the Prophet to supervise the execution of this treaty in Najran, his appointment was ordained by a Prophetic decree which began with the Quranic injunction: "O ye who believe, fulfil your contracts."[3] In other words, whatever status such a treaty provided for a Jew or a Christian or the adherent of any other creed, it is as authoritative as any other authentic text of Islamic Law.

[1] Q. XI : 128.
[2] Abu Yusuf, *Al-Kharaj*, p. 72.
[3] Q. V:1.

CHAPTER V

CHARACTERIZATION OF STATUS

THERE are other Prophetic documents which differ in wording from those just quoted, but have the same implications. These documents, together with the basic texts from which we have quoted earlier, constitute the legal ground on which the status of non-Muslim citizens and residents of an Islamic State should be based.

If we apply the modern conception of nationality as a measuring stick, we can distinguish two relevant characteristics. The first corresponds with the definition of nationality as given by Prof. Oppenheim, "the nationality of an individual is his quality of being a subject of a certain State, and therefore its citizen"[1], since there is no doubt that the *ahl al-dhimmah* are subjects of the Islamic State. The second characteristic emerges from the fact that there exists a specific differentiation between Muslim and non-Muslim subjects. This differentiation, according to all authentic texts of Islamic Law, pertains to only three spheres: (A) taxation; (B) political rights; and (C) personal laws.

A. TAXATION

1. Misconception

Non-Muslim subjects are obliged to pay a tax which Muslim subjects do not have to pay. This tax has been prescribed by the Qur'an under the title of *jizyah* and was, thereupon, included in every treaty and charter. This, at first sight, may imply an inequality before the law. In fact, it does imply a certain inequality, but not, as we shall see, the kind of inequality which could be

[1]Oppenheim, *International Law*, I, p. 642.

described as "discrimination". Many authors, Muslims and non-Muslims alike, have misunderstood this institution of *jizyah*, and some of them have even gone so far as to see in it a confinement of full citizenship to Muslims alone.[1]

After quoting Hughes' words that the People of the Book were "not guilty of an absolute denial, but only part of the punishment for disbelief is due," Dr. Majid Khadduri goes on to say: "These scriptuaries, or Ahl-al-Kitab (People of the Book), were allowed to live in the Islamic State unmolested on the condition that they paid the poll tax and accepted the status defined by treaties or charters issued to them by the Muslim authorities."[2] But he makes it unnecessary for us to discuss his interpretation, or that of Hughes, for he immediately follows with: "The rules governing the relations between the Muslims and the Dhimmis were partly derived from the Qur'an and hadith and partly from local traditions and practices which the Muslim jurists later expounded as part of the sacred law."[3] This statement reveals a method of research that reflects a basically wrong approach to Islamic Law. Muslim jurists have no right to declare any local tradition or practice as forming part of Islamic Law. They may interpret a specific text, or apply it to a specific issue, or opine in the absence of an applicable text; but in no case have they any authority of their own to elevate local traditions or practices to the status of sacred law. Sacredness, the very term Dr. Khadduri has used, is a unique attribute of God and cannot mysteriously emerge from human sources.

If we discard every source other than the Quranic and Prophetic texts, there remains the injunction of the Qur'an which enjoined *jizyah;* and the misinterpretation of this injunction was responsible for the basic misconception. Here are four recorded translations of the same injunction:

[1]A. S. Tritton, *Islam Belief and Practices*, ed. E. O. James, 2nd ed., London, Hutchinson's University Library, 1954, p. 117. In this chapter, and in constant adherence to his method of writing, Prof. Tritton consults controversial political history while discussing purely legal issues.
[2]Majid Khadduri, *International Law*, treatise in *Law in the Middle East*, pp. 362-363.
[3]Ibid.

(i) By Muhammad Ali: "Fight those who believe not in Allah (God), nor in the Last Day, nor forbid that which Allah (God) and His Messenger have forbidden, nor follow the Religion of Truth, out of those who have been given the Book, until they pay the tax *in acknowledgement of subjection.*"[1]

(ii) By Marmaduke Pickthall: "Fight against such of those who have been given the Scripture as believe not in Allah (God) nor the Last Day, and forbid not that which Allah (God) hath forbidden by His Messenger, and follow not the Religion of Truth, until they pay the tribute readily, *being brought low.*"[2]

(iii) By A. J. Arberry: "Fight those who believe not in God and the Last Day and not forbid what God and His Messenger have forbidden—such men as practise not the religion of truth, being of those who have been given the Book—until they pay the tribute *out of hand and have been humbled.*"[3]

(iv) By N. S. Dawood: "Fight against such of those to whom the Scriptures were given as believe neither in Allah (God) nor the Last Day, who do not forbid what Allah (God) and His apostle have forbidden, and do not embrace the true faith until they pay tribute out of hand and *are utterly subdued.*"[4]

Let us first make it clear that this injunction should be understood in the light of other injunctions which are explicit on the subject (i.e., fighting), such as, "Permission to fight is given to those upon whom war is made, because they are oppressed"[5], and, "And fight in the Way of God against those who fight against you, but begin not hostilities. Lo! God loveth not aggressors."[6] The revelation of the injunction in question came at a time when the Roman Empire had mobilized its forces with the purpose of attacking Arabia and subjugating the newly-established Islamic

[1]Q. IX : 29, p. 390.
[2]Q. IX : 29, pp. 243-244.
[3]Q. IX : 29, p. 210.
[4]Q. IX : 29, p. 313.
[5]Q. XXII : 39.
[6]Q. II : 190.

State. The main subject of the whole chapter wherein this injunction was revealed was the expedition which the Prophet led in answer to the Roman Empire's move. On his arrival at Tabuk, however, he found that the Romans had not yet taken the initiative, and thus led the expedition back without thinking of attacking their territory.

The variety of translations of the portions italicized by us is due to the phrasing of the injunction. *'An yadin* are two Arab words (the second of which literally means "hand") denoting "out of a position of power" or "being in power to" or "being completely able to". The same expression is used in the Qur'an, in its plural form, with reference to the "possessor of power",[1] and with reference to the creation of heaven: "And the heaven, We raised it high with power."[2] There can be no doubt about the fact that *'an yadin* in the Arabic text is connected with the paying of *jizyah* by the People of the Book. Thus, it can only mean "until they pay the *jizyah*, being completely able to afford it." Every stress on "power" that *'an yadin* may imply goes only to the credit of the People of the Book and would, correspondingly, imply an exemption from *jizyah* for those who cannot afford to pay it. As we shall see, the early Muslim practice of this law confirms this interpretation. We have already quoted the authentic saying of Muhammad: "Beware! Whosoever is cruel and hard on a contractee, or curtails his property against his free will, I shall myself be a plaintiff against him on the Day of Judgment." Also significant are the recorded words of 'Umar, the second Caliph, uttered on his deathbed: "The recommendation I leave unto my successor is for the *dhimmis:* to fulfil their contract, to fight in their defence and never to tax them beyond their capacity." The significance of this statement is further enhanced if we recall that 'Umar was assassinated by Abu Lulu'ah, the Zoroastrian, who was a *dhimmi* himself!

There is yet another difficulty of language which gave rise to a far-reaching controversy. The Arab word *saghirun* with which

[1], [2]Q. XXXVIII : 17.

the injunction ends is a derivation from the verb *saghara*, which means "to submit" or "to be subjected to". The forcefulness of this word, however, has imparted the sense of humiliation to many interpretations. But if we only quote the same word as used in the Qur'an[1] when referring to the magicians of Pharaoh at the moment of their submission to Moses, this sense of humiliation must be ruled out: for their submission was a dignified act of faith, humble though they were. The forcefulness of the word was the only suitable language in the face of the Roman Empire's challenging mobilization. Otherwise, objectively speaking the word conveys no more than the subjection of the People of the Book to the Islamic State. Both the paying of the tax within their means and their status as subjects of the Islamic State, with humiliation ruled out, were the explicit provisions of the Najran Treaty.

2. The Jizyah

The *jizyah*, which is usually translated as "poll tax" and generally understood to be a tax imposed on non-Muslims in exchange for allowing them to maintain their faith, is, in fact, of quite a different nature, being imposed with the implication of a fair partnership between equal citizens of the Islamic State.

Jaza, which is the Arab root-word of the term *jizyah*, means "to give what is due in return for something given". For Muslims, *jizyah* cannot be a price received from non-Muslims for their disbelieving in Islam. Religion, in both the Qur'an and the Sunnah, rises far above all material values. In answer to a letter from a Muslim governor to 'Umar Ibn Abd al-Aziz,[2] the well-known Caliph, complaining that conversion to Islam among non-Muslims was badly affecting the income derived from *jizyah*, the Caliph said: "Our Prophet was sent as a messenger and caller for truth, and not as a money-collector." *Jizyah* also cannot be considered as a punishment for disbelief in Islam, for it would

[1] Q. VII : 119.
[2] Abu Yusuf, *Al-Kharaj*, p. 131.

then be a form of compulsion which runs counter to the Quranic statement, "No compulsion in religion."[1] Were it a fine for the disbelief in Islam, *jizyah* would have been treated under the regular rules of fines. The fact that women, children, the poor, monks, and all those who cannot afford it are exempted from paying *jizyah* is enough to prove that it is not a fine.[2]

Furthermore, non-Muslim subjects who become bankrupt are not only exempt from paying *jizyah*, but are entitled to be given pensions from the Islamic Treasury. Khalid Ibn al-Walid, in his famous "Covenant of Peace" given to the people of Hirah, wrote: "I have stipulated that if any one of them becomes unfit to work on account of old age or for some other reason, or if anyone who was formerly rich becomes so poor that his co-religionists have to support him, then all such persons will be exempt from paying the *jizyah* and they, together with their dependents, will get a pension from the Islamic Treasury as long as they choose to reside in the Islamic State."[3]

If any non-Muslim citizen dies leaving arrears of *jizyah*, those arrears cannot be realized from his heirs.[4] Abu Yusuf, in his *Al-Kharaj*, writes: "If any *dhimmi* has to pay *jizyah* and dies before paying it, the same will not be realizable from his heirs nor from his residual properties."

It is also out of the question that the *jizyah* could be imposed on non-Muslims in order "to let them live". For the Qur'an clearly states: "And kill not the human soul which God has made sacred, except in the course of justice"[5]; and thus the safety of every human being, Muslim or non-Muslim, is not only an established principle, but a sacred one.

The nature of the *jizyah* can be well understood if we recall the fact that military service is not compulsory upon non-Muslims. This is only fair inasmuch as the Islamic State is based on an ideology in which non-Muslims do not believe. They are, on the

[1]Q. II : 256.
[2]Khadduri, *International Law*, treatise in *Law in the Middle East*, p. 363.
[3]Abu Yusuf, *Al-Kharaj*, p. 144.
[4]Maudoodi, *Islamic Law and Constitution*, Karachi, 1955.
[5]Q. VI : 152.

other hand, subjects with rights and duties equal to those of any Muslim subject, and thus they have to be protected and defended against both internal and external aggressions. For this they pay the *jizyah*, and for this alone. That is why it was called by some Muslim jurists "protection tax".[1]

There can be no better proof for this than the recorded incident which took place during the reign of 'Umar, the second Caliph. On being informed that the Romans had raised an enormous army with which to attack the Muslim-occupied territory, Abu Ubaydah, the Muslim general, ordered the local governors of Syria to refund all the *jizyah*. He explained: "We have received word that a powerful army is advancing against us, and so we have refunded to you the money that was collected. For this money was paid upon the understanding that you would be protected and defended by us, and upon our pledge to fulfil this duty. We are now in no position to keep our pledge. However, if God grants us victory over the Romans, you can consider us bound to what we have taken upon ourselves in our mutual agreement."[2] Historians have recorded that the Christians, overwhelmed by the justice of the fact, gave their blessing to the Muslims, desiring their victory over the Romans, who would not have acted in such fairness and honour.[3]

Says Thomas Arnold: "This tax was not imposed on the Christians, as some would have us think, as a penalty for their refusal to accept the Muslim faith, but was paid by them in common with the other dhimmis or non-Muslim subjects of the state whose religion precluded them from serving in the army, in return for the protection secured for them by the arms of the Mussulmans. When the people of Hirah contributed the sum agreed upon, they expressly mentioned that they paid this jizyah on condition that 'the Muslims and their leaders protect us from those who would oppress us, whether they be Muslims or others'. Again, in the treaty made by Khalid with some towns in the

[1]Hamidullah, *Muslim Conduct of State*, p. 108.
[2]Abu Yusuf, *Al-Kharaj*, pp. 138-139.
[3]Ibid.

neighbourhood of Hirah, he writes: 'If we protect you, then jizyah is due to us; but if we do not, then it is not due.' "[1]

That the *jizyah* was imposed as a tax for exempting the non-Muslim subjects from conscription can be concluded from the treaty with the Najran Christians. While considered as subjects of the State, they were required to pay a special tax and were given a special right to complete protection. The reciprocity between these two stipulations can have no explanation except in the third stipulation, which is their exemption from conscription. As Arnold puts it: "The *jizyah* was levied on the able-bodied males in lieu of the military service they would have been called upon to perform had they been Mussulmans; and it is very noticeable that when any Christian people served in the Muslim army, they were exempted from the payment of this tax."[2] He then refers to specific incidents, related by the two historians, Baladhuri and Tabari, when non-Muslim tribes were exempted from paying the *jizyah* in consideration of their military service. Tritton has mentioned other incidents of non-Muslims joining the Muslim army and thereupon being exempted from paying *jizyah*.[3] Some caliphs even accepted valuable services rendered to the State by non-Muslim subjects as a contribution in exchange for which the *jizyah* could be remitted.[4] On the other hand, when the Egyptian peasants, although Muslim in faith, were made exempt from military service, a tax was imposed upon them as on the Christians, in lieu thereof.[5]

3. The Letter of Abu Yusuf

An oft-quoted reference on the subject of *jizyah* is the letter sent by Abu Yusuf, the then Chief Justice of the Abbaside Caliphate, to Harun al-Rashid, the Caliph. Here is a precise translation of its relevant points:

[1], [2]Arnold, *The Preaching of Islam*, pp. 60-61.
[3]Tritton, *Ahl al-Dhimmah fi'l-Islam*, Arabic translation by Hasan Habashi, publ. by Dar al-Fikr al-Arabi, Cairo, p. 199.
[4]Al-Suyuti, *Husn al-Muhadarah bi Akhbar Misr wa'l-Qahirah*.
[5]Arnold, *The Preaching of Islam*, p. 62.

"The capitation tax is exacted only from males. Women and minors are exempted. The rich have to pay 48 drachmas,[1] the man with average means 24, and the one practicing handicraft for livelihood, like the peasant, 12 only, which will be collected from them once a year. Instead of cash, they may pay the value.... Further the capitation tax is not exacted from the indigent who receive charities, nor from the blind who have no profession and do not work, nor from the chronically sick receiving charities, nor from the crippled—except those chronically sick and crippled and blind who are rich—nor from the monks in convents . . . nor from the very old who can neither work nor have wealth, nor from the lunatic. . . . And, O Commander of the Faithful! May God help thee! It is necessary that thou shouldst treat the people who were protected by thy Prophet and thy cousin Muhammad (i.e., the non-Muslim subjects) with leniency, and inquirest about their conditions so that they are neither oppressed nor given trouble nor taxed beyond their capacity, nor anything of theirs is taken from them except with a duty encumbering them. For it is reported from the Messenger of God who said: 'Whoever oppresseth a non-Muslim subject or taxeth him beyond his capacity, then I shall be a party to him.' And the last words, which the Caliph 'Umar Ibn al-Khattab uttered on his deathbed, included the following: 'I exhort my successor regarding the treatment to be meted out to the people protected by the Messenger of God (i.e., non-Muslim subjects). They should receive the fullest execution of their covenant, and their life and property should be defended even by going to war (in their defence), and they should not be taxed beyond their capacity. . . .' Once 'Umar passed along a street where somebody was asking for charity. He was old and blind. 'Umar tapped his shoulder from behind and said: 'From which community art thou?' He replied: 'A Jew.' 'Umar said: 'And what hath constrained thee to what I see thee in?' He replied: 'I have to pay the Jizyah: I am poor; and I am old.' At this 'Umar took him by the hand and led him to his

[1]The rate of the drachma varied according to the economic set-up at different periods of Muslim history. During the lifetime of the Prophet, it was about two shillings. In the time of 'Umar, it was about one shilling and sixpence.

own house and gave him something from his private coffers. Then he sent word to the cashier of the Baitul-Mal (State Treasury): 'Look at him and his like. By God! We should never be doing justice if we eat out his youth and leave him deserted in his old age. "*The government taxes are meant for the poor and the indigent*" (Qur'an, IX : 60)—the poor are the Muslims, and this one is an indigent from among the Scriptuaries.' And 'Umar remitted the Jizyah from him and his like."[1]

4. The Amount of Jizyah

It should be noted, however, that the amount fixed by Abu Yusuf in his letter is not a binding standard. Neither in the Qur'an nor in the Sunnah is there any amount fixed. The financial capacity of the *dhimmis* was the only standard of measurement introduced by the authentic texts, and the fixation of *jizyah* was thereupon left to the consideration of Muslim authorities and to mutual agreements. It even differed during the lifetime of the Prophet and under the caliphs. Tritton has quoted different amounts fixed by 'Umar Ibn al-Khattab, Khalid Ibn al-Walid and Abu Ubaydah, all of whom were Companions of the Prophet. He then stated that financial capacity was the standard taken into consideration for such a fixation, whereby the amount varied, and was even remitted in case of shortage of money.[2]

5. Other Taxes

Besides *jizyah*, there are the land tax and the trade tax. The discussion of these two, however, is not relevant to this thesis. The land tax, which in legal terminology is called *al-kharaj*, remains due from non-Muslim landowners even if they accept Islam. Thus, it is a tax attaching to the land, irrespective of the religion of the owner. The trade tax, which is given the Arabic term *al-ushur*, and which has long been a controversial issue

[1]Abu Yusuf, *Al-Kharaj*, pp. 69-72: and Hamidullah, *Muslim Conduct of State*, pp. 106-107.
[2]Tritton, *Caliphs and Their Non-Muslim Subjects*, Arabic, translated by Hasan al-Habashi under the title *Ahl al-Dhimmah fi'l-Islam*, Cairo, p. 22.

among Muslim and non-Muslim jurists, was first introduced by the Caliph 'Umar. Abu Yusuf states: "It was 'Umar Ibn al-Khattab who introduced *al-ushur*, and we may apply it upon strict measurements of justice for all."[1] The differentiation between Muslim and non-Muslim subjects in the percentage imposed by 'Umar might have been—as some scholars have suggested—due to the fact that Muslim subjects were then mostly engaged in the battlefields for the defence of the State, and business was left almost entirely in the hands of the non-Muslim subjects.[2] It should also be noted that one of the general principles upon which such taxes were imposed was the consideration of the economic conditions of the time. Abu Yusuf records an interesting correspondence exchanged between 'Umar and his governor, Abu Musa al-Ash'ari. Al-Ash'ari wrote: "Some Muslim traders go to non-Muslim territory where they are subject to tithes." 'Umar replies: "Levy those also on theirs as they levy on Muslim traders."[3] The "tithes" which were mentioned in this correspondence are the literal translation of *al-ushur*, which has been a very controversial issue among jurists. *Al-ushr*, the singular of *al-ushur*, means "one-tenth".

In other words, except for the ordinances regarding *jizyah*, there is not a single authentic text of Islamic Law that enjoins any differentiation in taxation between Muslim and non-Muslim subjects of the Islamic State. Tritton admits this when he fails to support the detailed conclusions which he derives from the study of papyri discovered in Egypt with a single Quranic or Prophetic text. Says he: "The commonly-accepted tradition is that 'Umar I imposed two taxes, land and poll, which were uniform throughout the empire."[4] He must have meant the *fixation* of the poll tax, for it is common knowledge that the tax itself was first instituted by the Qur'an. The precision of both the legal terminology and the binding authority of any historical Tradition can

[1] Abu Yusuf, *Al-Kharaj*, p. 134.
[2] Maudoodi, *Islamic Law and Constitution*, p. 186.
[3] Abu Yusuf, *Al-Kharaj*, p. 135: and Hamidullah, *Muslim Conduct of State*, p. 145.
[4] Tritton, *Islam and the Protected Religions*, in the Journal of the Royal Asiatic Society, Part III, July, 1928, pp. 485-508.

be established only on the basis of its conformity with Quranic and Prophetic texts. Hasan Habashi, the translator of Prof. Tritton's book, *Caliphs and Non-Muslims*, had to add footnotes in order to clarify the basic confusion in the book between poll tax and land tax, and between historical records and various specific issues.[1]

6. Special Tax on Muslim Subjects

But one cannot characterize the impact of *jizyah* on the status of non-Muslim subjects without considering the tax which is obligatory only for Muslim subjects. This tax was given the Arabic designation *zakat*, which literally means "purification". It was also called *al-sadaqat*, which means "alms". Both terms were responsible for a basic misunderstanding, namely, conceiving them as a kind of charity left to the discretion of the individual. But this is not so. "Purification", as expressed in the first term, represents the primary philosophy of social cohesion in an Islamic State. Its operation begins in the conscience of the individual, wherein it implants a sense of purity embracing every sphere of life. While prayer is essential both as an expression of and food for man's spirit, it is by itself not sufficient to establish the purity of human life. The supremacy of spiritual values over man's property and possessions is the most precise criterion of such a purity. This may well explain why *zakat* has been linked with prayer in eighty-two injunctions of the Qur'an. Alms-giving on a voluntary basis was first introduced as a sign of actual faith. But once the Islamic State was established in Madinah, a compulsory institution of alms-giving was prescribed. Says the Qur'an: "Take (O Muhammad) alms out of their property so that thou cleanse them and purify them thereby."[2] When the Prophet delegated Muadh Ibn Jabal to Yemen, he instructed him: "You will be going to *ahl al-kitab*. Call upon them to believe in the One God and His Prophet. If they defer to that, then tell them

[1]Tritton, *Caliphs and Their Non-Muslim Subjects*, pp. 223, 227.
[2]Q. IX : 103.

that God has enjoined five prayers every day and evening. If they do it, then tell them that God has prescribed a tax on their property, to be taken from the rich and to be spent on the poor."[1]

That it was a compulsory tax is made even more explicit by the words of the Prophet: "Those who give it seeking God's reward for what they pay, for them God's reward is due. But as for those who refuse to give it willingly, we shall have to exact it from them, even at a higher rate in punishment. That is one of God's commandments. Members of Muhammad's family are not allowed to receive anything of it."[2] Says Kenneth Cragg: "On the basis of Qur'anic injunction and traditional exhortation the practice of alms-giving became a basic social institution in Islam. . . . The agencies for the collection and distribution of Zakat payments varied from time to time. In early days the state played a large role."[3] Those early days, when the Islamic State "played a large role" in the exaction of *zakat*, reflect the Prophetic application of this tax. Abu Bakr, the first Caliph, ordered his army to fight the Muslims who refused to pay it. When asked, "How could you fight a Muslim?", his answer was, "I have to fight against any Muslim who differentiates between prayers and *zakat*. *Zakat* is an obligation on every Muslim property." Such an attitude was a simple outcome of the Quranic statement, ". . . except those who pray; who are constant in their prayers; and in whose wealth there is a right acknowledged for the needy and the destitute."[4]

The rate prescribed by the Prophet was at two and one-half per cent of the surplus property in money, and at a variety of rates in other categories. It is due only on the net surplus above a given minimum of each category. Jurists differ in both the consideration and the standardization of modern means of investment, but they are almost unanimous regarding the fact that the surplus is considered as net only after the human necessities of life have been realized. The income of *zakat* goes to a

[1] Al-Shawkani, *Nayl al-Awtar*, IV, p. 123.
[2] Ibid, p. 130.
[3] Cragg, *The Call of the Minaret*, New York, 1956, pp. 151-152.
[4] Q. LXX : 22-25.

special treasury and is to be spent only on the objects explicitly mentioned in the Quranic injunction: "The alms are only for the poor and the needy, and for those employed in its collection, and for those whose hearts are to be reconciled, and to free the captives and the debtors, and for the cause of God, and for the wayfarer; they are a duty imposed by God."[1]

In keeping with its basic philosophy of social cohesion (i.e., that social life is an indivisible unit of which conscience should be the basis), Islam confined the obligation of alms-giving to Muslim subjects alone, thus introducing an instrument of social justice which is prompted by faith and exacted in the name of God far beyond any implications of "class struggle". This, however, does not imply the exclusion of non-Muslim subjects from this social justice and security. History records the state document issued by the commander Khalid Ibn al-Walid, conveying to the Caliph the text of a treaty concluded with the non-Muslim subjects of Hirah. In this document, which we have quoted earlier, non-Muslim subjects are not only exonerated from the payment of *jizyah* if they cannot afford it, but are always entitled to full social security at the expense of the central exchequer.

While discussing *zakat* as one of the fundamentals of Islam, or, as he calls them, "the acts of devotion which are enjoined on Believers in the Qur'an," Prof. Gibb says: "It is to be exacted from all who, whether voluntarily or under constraint, enter into the brotherhood of Islam; but it is not a tax. Rather is it to be regarded as a loan made to God, which He will repay many-fold."[2] But once it is to be exacted and paid even under constraint, it must be considered—in terms of positive law—a tax. Its religious background is no more than a moral emphasis on its obligatory character. This also might be the answer to such a statement as Prof. Tritton's that, "no Muslim is recorded as paying taxes"[3]; for he himself says in another book: "Legal

[1]Q. IX : 60.
[2]Gibb, *Mohammedanism*, pp. 54-56.
[3]Tritton, *Islam and the Protected Religions*, p. 486.

alms or religious tax would be better names for this institution. From the first Muhammad insisted on charity; later he fixed the minimum by law."[1] He even states in his book, *Caliphs and Non-Muslims*, that the tax paid by non-Muslim subjects was by far lower than the tax Muslim subjects had to pay.[2]

7. Comparison and Conclusion

A comparison between *jizyah* and *zakat*, based upon the above-mentioned texts and comments, leads to the following conclusions:

(1) Both *jizyah* and *zakat* are instituted upon religious considerations applying to non-Muslim and Muslim subjects respectively.

(2) *Jizyah*, which is imposed on non-Muslim subjects, represents their voluntary choice to pay a tax rather than to render military service to the State. The latter can always reconsider its exaction according to the exigencies of the time and the reciprocal impact in its function. 'Umar, the second Caliph, exempted the Christian subjects of Bani Taghlib from the payment of *jizyah* upon receiving convincing evidence that they were strong enough and willing to face the enemies of the State on their borders.[3] As for *zakat*, it is compulsory and cannot be remitted in any case.

(3) The rate of *jizyah* is far lower than the rate of *zakat*. The former is due only from able-bodied male adults. The clergy and monks are exempted; nor can it be realized from the residual property of non-Muslim subjects. As for *zakat*, it is due at a fixed rate on the property of every Muslim, male or female, adult or under-age, and the payment of its arrears even has priority on the assets of the deceased.

(4) *Jizyah* goes to the public treasury, whereas *zakat* goes to a special treasury and for specific objectives, the main being the establishment of social cohesion. This social cohesion, however, is not exclusively for the benefit of Muslim subjects. According

[1]Tritton, *Islam: Belief and Practices*, p. 25.
[2]Tritton, *Caliphs and Non-Muslims*, Arabic ed., p. 237.
[3]Abu Yusuf, *Al-Kharaj*, p. 120.

to 'Umar II's interpretation[1] of the relevant Quranic injunction, the indigents from among the Scriptuaries are to be included among the beneficiaries of *zakat*. Ibn Sa'd (VIII, 260, 272) records that "'Umar-ibn-Abd'ul-Aziz ordered during his caliphate that Non-Muslim subjects, taken prisoner by an enemy, should as much be ransomed and liberated on government expenses as any Muslim subjects."[2]

(5) The exaction of both taxes, with the background of their religious considerations, does not imply a confinement of taxation to these two. Nor does it imply a principle of inequality in that sphere. It is equality, rather, which has been established as the general rule. We have already quoted the Prophetic statement, "And once the non-Muslims are willing to conclude the *dhimmah*-contract, then let it be clearly known to them that all rights and duties are equal and reciprocal between you and them." 'Ali Ibn Abi Talib, the fourth Caliph and cousin and Companion of the Prophet, is reported to have said: "Their agreement to conclude the *dhimmah*-contract is upon the clear understanding that their property is to be like our property and their blood like our blood."[3] The inborn equality of all men is a principle which reputable Muslim jurists have applied in innumerable disputes. Al-Sarakhsi states that whenever, after a war, the two parties differ regarding the status of certain individuals, the presumption will be that they are free people, since originally every man is free.[4]

B. POLITICAL RIGHTS

1. Confinement of Command

Of all authentic texts, there is one basic injunction in the Qur'an that implies a point of differentiation in the realm of political rights. This injunction reads as follows: "O ye *who believe*, obey God, His Apostle, and those set in command from among you."[5] It is clearly understood throughout the Qur'an

[1]The letter of Abu Yusuf.
[2]Hamidullah, *Muslim Conduct of State*, p. 110.
[3]Al-Kasani, *Al-Badai*, VII, pp. 110-111.
[4]Al-Sarakhsi, *Sharh al-Siyar al-Kabir*, Arabic ed., III, p. 64.
[5]Q. IV : 59.

that only Muslims are addressed by the term, "O ye who believe". The supreme authority after Muhammad is thereby confined to those who are set in command from among the Believers. This is only logical since it is an ideological state which basically depends on the conscientious allegiance of its adherents. Islam, by virtue of its very title, means "submission", and a Muslim is "one who submits". This submission is owed only to what God and His Apostle have prescribed. The Muslim's obedience thereupon can only be pledged to such an authority as could conceivably be capable of setting this prescription into practice. Only a believer in an ideology can be expected to follow the way of life prescribed by it.

But the Quranic term *uli'l-amri minkum*, or "those in command" as above translated, can well apply to the Head of the State and to all those at the helm of State-affairs. This, we believe, has been purposely left vague, the reason being the fact that Islam had not prescribed any specific form of government. It only set forth certain principles, leaving the details to be evolved in accordance with the requirements of the time and with the progress of human knowledge and administration. And since it is on the *form* of government that the limitation of actual command depends, it was but a principle of fairness that kept the confinement of authority at vague applicability.

In other words, we may say that the actual Head of the Islamic State should be a Muslim. We may also say that the final word on policy-making should rest with him, or in a Muslim subject appointed by him.

Otherwise, we can cite in the early Islamic State, and throughout Muslim history since, innumerable cases of non-Muslims occupying important posts of high status. Significant enough is the fact that the first ambassador of the Prophet to the Negus of Abyssinia was Amr Ibn Umayyah al-Damri, who had not yet embraced Islam. 'Umar, the second Caliph, appointed a Greek Christian as the chief accountant in Madinah. Reputable jurists like Al-Mawardi and Abu Ya'la al-Farra, belonging to the

Shafi'ite and Hanbalite schools respectively, have not hesitated to support the view that "the Caliph may lawfully nominate Non-Muslim subjects as ministers and members of Executive Councils."[1] Arnold recorded many incidents of Christians and Jews appointed by the Caliphs as governors, state-secretaries and even as prime ministers.[2] Tritton quoted similar examples.[3]

2. Elections

Mention should be made of the right of non-Muslim subjects to voting and to membership of the parliament. Clear enough is the fact that the whole parliamentary set-up is a modern institution which has to be considered in the light of basic principles of Islam. We have already cited, from the first written constitution of the city-state of Madinah, such clauses as, "There shall always be a mutual council and advice (between Muslim and Jewish subjects)"; and, "There shall also be a joint responsibility for defence . . ."; and, "Jews shall share with Muslims the expenditure of war. . . ." We have also recorded the statement of the Prophet that rights and duties between Muslim and non-Muslim subjects are equal and reciprocal. All this definitely implies the right of non-Muslim subjects to both voting and membership of the parliament. On the other hand, such a parliament has a legislative power which should be subordinated to the binding texts of Islamic Law, in which non-Muslim members do not believe. This problem could be solved by stipulating in the constitution that it is *ultra vires* of the parliament or the legislature to enact any law which is repugnant to the Qur'an and the Sunnah.[4]

3. Social Autonomy

There is not a single text in the Qur'an or the Sunnah that would prevent non-Muslim subjects from maintaining their languages, cultures and religious practices and traditions.

[1]Hamidullah, *Introduction to Islam*, p. 139.
[2]Arnold, *The Preaching of Islam*, pp. 63-65.
[3]Tritton, *Caliphs and Non-Muslims*, Arabic ed., pp. 19-37.
[4]Maudoodi, *Islamic Law and Constitution*, p. 189.

Ibn Hisham recorded that the *Bayt al-Midras* was an active educational centre for the Jews of Madinah during the lifetime of the Prophet.[1] He even used to visit it and to answer many questions about Islam. When a Jew and a Jewess were brought before him in a case of adultery, he called on the rabbis of the *Bayt al-Midras* to consult their knowledge of the Torah for the punishment applicable in the case.[2] Another significant incident is related by Al-Maqrizi. After the conquest of Khaybar and the surrender of its Jewish population, the Prophet ordered that all copies of the Torah taken as booty should be given back to the Jews.[3] This single episode brings to full light a superb line of policy which—even in conquest—remains far above any tendency to confiscate man's right to religious freedom.

It may further be said that Islam is the only code of law that has prescribed complete judicial autonomy for what are now called "minorities". Says A. von Kremer: "The Non-Muslim communities enjoyed an almost complete autonomy, for the government placed in their hands the independent management of their internal affairs, and their religious leaders exercised judicial functions in cases that concerned their co-religionists only."[4] This judicial autonomy was based, as we shall see, on Quranic texts and practice of the Prophet.

4. Freedoms

From the basic notions which we have mentioned earlier, and from the many texts we have been quoting in every chapter, it may be no exaggeration to conclude that all principles of good morals and human dignity are equally applicable to Muslim as well as to non-Muslim subjects of the Islamic State. The inviolability of the human personality is the foundation of the justice demanded by God for all men. Freedom of opinion, oral or written, of worship, association, choice of profession and of

[1]Ibn Hisham, I, p. 552.
[2]Ibid, p. 564.
[3]Al-Maqrizi, *Imta' al-Asma'*, I, p. 323.
[4]A. von Kremer, *Culturgeschichte des Orients unter den Chalifen*, Vienna, 1875, I, p. 183.

movement is guaranteed to all subjects, Muslims and non-Muslims alike. This right flows from the principle of every individual's complete responsibility to himself and to God. Says the Qur'an: "Every person is held in pledge for what he does."[1]

Difference of opinion has been described by the Qur'an as a continuous aspect of human life and even as a purpose of creation: "And if thy Lord had willed, He verily would have made mankind one nation, yet they cease not differing, save those on whom thy Lord hath mercy; and for that He did create them."[2] Again and again this is repeated in the Qur'an, and Muhammad, in the loftiness of his spirit, could only deny to himself the right to force his own conception of truth on others. "He (Muhammad) said: O my people! Bethink you, if I rely on a clear proof from my Lord and there hath come unto me a mercy from His presence, and it is obscure to you, can we compel you to accept it when ye are averse thereto?"[3] Even when the Muslims were most severely persecuted in Maccah, Muhammad was instructed, "Call unto the way of thy Lord with wisdom and fair exhortation, and argue with them in the best of manners."[4]

It is not permissible, therefore, to restrict the freedom of the individual in any way, except if he transgresses his legal rights at the expense of the rights or the integrity of others, or harms the interests of the nation by an act of illegality. Any restriction of the above freedoms is a deviation from the letter and spirit of Islamic Law. The sense of responsibility of every human being to himself and to God, as established by the Qur'an, goes hand in hand with a status of honour and dignity. The Qur'an declares: "Surely We have accorded dignity to the sons of Adam."[5]

Particularly with regard to its non-Muslim subjects, the Islamic State has to see to it that their rights, in every sphere, are well protected. And let us quote here once again the warning of the Prophet: "Beware! Whosoever is cruel and hard on a

[1] Q. LXXIV : 38.
[2] Q. XI : 118, 119.
[3] Q. XI : 28.
[4] Q. XVI : 125.
[5] Q. XVII : 70.

contractee (non-Muslim subject), or curtails his rights, or burdens him with more than he can endure, or takes anything of his property against his free will, I shall myself be a plaintiff against him on the Day of Judgment."[1]

5. Suggested Basis for Islamic Constitution

We may well illustrate the above by recording some articles of the "Basic Principles of an Islamic Constitution", as suggested by the *unanimous* vote of thirty-one Muslim jurists of Pakistan, after a four-day convention on the 21st-24th January, 1951:[2]

"Article 6: It shall be the responsibility of the Government to guarantee the provision of basic human necessities, i.e., food, clothing, housing, medical relief and education to all citizens who might temporarily or permanently be incapable of earning their livelihood due to unemployment, sickness or other reason, and to make no distinction of religion or race in that regard."

"Article 7: The citizens shall be entitled to all the rights conferred upon them by the Islamic law, i.e., they shall be assured, within the limits of the law, of full security of life, property and honour, freedom of religion and belief, freedom of worship, freedom of person, freedom of expression, freedom of movement, freedom of association, freedom of occupation, equality of opportunity and the right to benefit from public services."

"Article 8: No citizen shall, at any time, be deprived of these rights, except under the law, and none shall be awarded any punishment on any charge without being given full opportunity of defence and without the decision of a court of law."

"Article 10: The Non-Muslim citizen of the State shall have, within the limits of the law, complete freedom of religion and worship, mode of life, culture and religious education. They shall be entitled to have all their matters concerning Personal Law administered in accordance with their own religious codes, usages and customs."

[1]For a condensed survey of the subject, see our *Ma'alim al-Tariq*, Arabic, Damascus, 1955, pp. 67-70.
[2]Maudoodi, *Islamic Law and Constitution*, pp. 197, 199.

"Article 11: All obligations assumed by the State, within the limits of the Shari'ah, towards the Non-Muslim citizens shall be fully honoured. They shall be entitled equally with the Muslim citizens to the rights of citizenship as enunciated in paragraph 7 above."

"Article 12: The Head of the State shall always be a male Muslim in whose piety, learning and soundness of judgment the people or their elected representatives have full confidence."

"Article 14: The function of the Head of the State shall not be autocratic but consultative (Shura'i), i.e., he will discharge his duties in consultation with persons holding responsible positions in the Government and with the elected representatives of the people."

We must assert that these basic principles were "suggested" by the Muslim jurists of Pakistan. Their suggestion, it is understood, does not imply any binding authority of its own. However, the fact that they made those proposals unanimously, in spite of their belonging to different schools of thought, may serve as a testimony to our own interpretation of the basic texts of Islam. Again, the failure of Pakistani politicians to have a constitution based on these proposals, and on many other similar ones, is neither the responsibility of Muslim jurists nor is it the responsibility of Islam, which many politicians do not understand.

6. Conclusion

Thus, the only differentiation in political rights lies in the confinement of supreme authority, as interpreted above, to Muslim subjects. This, however, is not a uniqueness of Islam. We have already quoted from the Constitutions of Argentina, Burma, Greece, Ireland, Norway, Spain, Sweden, Thailand, and from the English Bill of Rights, all of which prescribe a specific religion to which the supreme Head of the State must belong. Some of them even stipulate the profession of a particular sect of Christianity. Others exclude followers of a different sect, and even those who are married to one of them, from inheriting, possessing or enjoying the Crown.

In a memorandum submitted by the Secretary-General of the United Nations on "Definition and Classification of Minorities", he said: "According to article 2 of the Universal Declaration of Human Rights, 'everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind. . . .' It will be noted, however, that article 21 of the Declaration refers to the right of everyone to take part in the government of *his* country and the right of everyone of equal access to public service in *his* country—a recognition that certain political rights legitimately may be granted only to citizens."[1] It follows, therefore, as a matter of logic that the confinement of certain political rights to citizens corresponds to the basic elements of citizenship that distinguish the predominant national group. And once religion is accepted as a distinguishing characteristic that may constitute a particular minority—as repeatedly is mentioned in the memorandum and recorded in many international undertakings—a reciprocal consideration should apply to the implication of the term "citizenship".

In a resolution[2] adopted at Lima on December 23, 1938, the American States declared that the system of protection of linguistic or religious minorities has no application in America "where the conditions which characterize the groups known as minorities do not exist". But despite their rejection of the very concept of minority on the basis of language or religion, they had to seek another conception of majority which could guarantee the stability of the States. According to Article 2 of the Constitution of the United States of America, a naturalized alien can never be elected President.[3] Thus, we see here the difference between two criteria of a person's conceivable adherence and loyalty to the state: one is the attachment to it by birth, and the other is the belief in its ideology.

A word should also be said about what seems to be a current confusion in the use of the terms "subject" and "citizen" with

[1] *Definition and Classification of Minorities* (Memorandum submitted by the Secretary-General), United Nations, Commission on Human Rights, Sub-Commission of Prevention of Discrimination and Protection of Minorities, Lake Success, New York, 1950, p. 11.
[2] Oppenheim, *International Law*, p. 715.
[3] Ibid, p. 662.

regard to the legal implication which either term conveys. We have earlier quoted Oppenheim's definition of a person's nationality as "his quality of being a subject of a certain State, and therefore its citizen". But such a definition is meant to characterize nationality only in so far as the Law of Nations is concerned. Municipal laws, however—as Oppenheim says—may distinguish between different kinds of subjects: for instance, those who enjoy full political rights and are on that account named citizens, and those who are less favoured, and are on that account not named citizens. In some Latin-American countries the expression "citizenship" denotes the sum total of political rights of which a person may be deprived, by way of punishment or otherwise, and thus lose citizenship without being divested of nationality as understood in International Law. In the United States of America, while the expressions "citizenship" and "nationality" are often used interchangeably, the term "citizen" is, as a rule, employed to designate persons endowed with full political and personal rights within the United States, while some persons are described as "nationals". They owe allegiance to the United States, but they do not possess full rights of citizenship in the United States.[1] Again, the two terms imply different denotations for British "subjects" and Commonwealth "citizens".

According to the Islamic conception of nationality, as mentioned earlier, the allegiance of subjects is twofold: that of Muslim subjects, which is established on the basis of their faith in the ideology of the State, and that of non-Muslim subjects, which is established on the covenant of *dhimmah*. No allegiance is conceivable otherwise. In the realm of political rights, except for the confinement of command to Muslim subjects, there can be no deprivation of any political right on the grounds of place of birth, ethnic origin, language or religion. Thus, such a confusion of modern terminology should not be allowed to complicate our approach to the authentic Islamic texts. Nor should it be permitted to affect our being objective regarding the facts.

[1]Oppenheim, *International Law* '1' p. 645.

C. PERSONAL LAWS

1. Judicial Autonomy

The judicial autonomy accorded to non-Muslim subjects is one of the basic characteristics of Islamic Law. It is the fair impact of religion on the applicability of law at large. And it is here, more than anywhere else, that distinction because of religion ensures the integrity of all religious groups living on Muslim territory. This judicial autonomy was prescribed by the following verses of the Qur'an:

"*If then they have recourse unto thee* (*Muhammad*), *judge between them or disclaim jurisdiction.* If thou disclaimest jurisdiction, then they cannot harm thee at all. *But if thou judgest, judge between them with equity.* Lo! God loveth the equitable.

"How come they unto thee for judgment when *they have the Torah, wherein God hath delivered judgment* (*for them*)? Yet even after that they turn away. Such (folk) are not believers.

"Lo! We did reveal the Torah, wherein is guidance and a light, by which the prophets who surrendered (unto God) judged the Jews, and the rabbis and the priests (judged) by such of God's Scripture as they were bidden to observe, and thereunto were they witnesses. So fear not mankind, but fear Me. And barter not My revelations for a little gain. Whoso judgeth not by that which God hath revealed: such are disbelievers.

"And We prescribed for them therein: The life for the life, and the eye for the eye, and the nose for the nose, and the ear for the ear, and the tooth for the tooth, and for wounds retaliation. But whoso forgoeth it (in the way of charity), it shall be expiation for him. Whoso judgeth not by that which God hath revealed: such are wrong-doers. And We then sent Jesus, son of Mary, to follow in their footsteps, confirming that which was (revealed) before him in the Torah, and We bestowed on him the Gospel wherein is guidance and a light, confirming that which was (revealed) before it in the Torah—a guidance and an admonition unto those who ward off (evil).

"*Let the People of the Gospel judge by that which God hath revealed therein.* Whoso judgeth not by that which God hath revealed: such are evil-livers. And unto thee have We revealed the Scripture with the truth, confirming whatever Scripture was before it, and a watcher over it. *So judge between them by that which God hath revealed,* and follow not their desires away from the Truth which hath come unto thee. *For each We have appointed a divine law and a traced-out way.* Had God willed He could have made you one community. But that He may try you by that which He hath given you (*He hath made you as ye are*). *So vie one with another in good works.* Unto God ye will all return, and He will then inform you of that wherein ye differ.

"So judge between them by that which God hath revealed, and follow not their desires, but beware of them lest they seduce thee from some part of that which God hath revealed unto thee. And if they turn away, then know that God's Will is to smite them for some sin of theirs. Lo! Many of mankind are evil-livers.

"*Is it a judgment of the time of* (*pagan*) *ignorance that they are seeking? Who is better than God for judgment to people who have certainty* (*in their belief*)?"[1]

From these verses, two principles are explicitly established. They are:

(1) Judicial autonomy is prescribed for non-Muslim subjects according to their respective religions; and

(2) Islamic jurisdiction is, however, applicable to them whenever the two non-Muslim parties so choose.

Neither in these verses nor in any other place in the Qur'an or the Sunnah is there any authentic text that confines this judicial autonomy to personal behaviour or to inter-group relations of non-Muslim communities. Rather, it tends to relieve non-Muslim subjects from any Islamic prohibition relating to matters which are permitted in their respective religions. Best examples of this are intoxicants and pork. The practice of the Prophet and that of all caliphs had been that whereas these are forbidden to

[1]Q. V : 42-50.

Muslims, *dhimmi* subjects are permitted their free use and allowed to trade in them. Muslim jurists are unanimous on the point that in any suit of law regarding trade in intoxicants or pork wherein one of the parties is a Muslim, only the rights of the *dhimmi* party are recognized and guaranteed. If the latter's petition is based upon a contract concluded with a Muslim, such contract is to be considered as valid for the *dhimmi* and invalid for the Muslim. 'Umar is reported to have written to some of his governors instructing them not to accept intoxicants from non-Muslim subjects in payment of taxes and instead to "let them do the selling and give you the price thereof".[1] Tritton quoted from the Greek papyri in the British Museum an amusing record of a Muslim governor's decree, in the first Muslim century, ordering the supply of wine to the *dhimmi* officials of his court.[2]

Jurists differ, however, on two main points:

(1) The equal applicability (to Muslims and *dhimmis*) of the civil and penal laws of Islam in the absence of a contrary text in other religious codes.

(2) The status and role of Muslim jurisdiction in cases of conflict of laws.

2. Territoriality of Islamic Law

In other words, Muslim jurists have differed on the extent to which the principle of territoriality may apply to Islamic Law. Most of these differences were the result of different attitudes towards specific texts either in their authenticity or in their implications. A survey of all this is both irrelevant to our method of approach to the Qur'an and the Sunnah and beyond our scope because of the many works which already exist on the subject. Dr. Choucri Cardahi had to admit that "an exhaustive study of conflict of law in Islam cannot be presented in a limited number of pages. . . . It will be useful, however, to state *some* facts from the works of *ancient* Muslim jurists and try to *systematize* the empirical solutions recommended in various

[1] Al-Gassas, *Akham al-Qur'an*, VII, p. 530.
[2] Tritton, *Caliphs and Non-Muslims*, Arabic ed., p. 209.

schools of law."[1] But this very statement represents a method of research which is not only uncontrollable but systematically baseless. There can be no better proof of this than Dr. Cardahi's statement that "Quranic decisions confirm the status of inferiority of the Dhimmi, whose murder, as in the Germanic laws of the West (*leges Barbarorum*), was more easily expiated than that of a Muslim." He then quoted the Maliki school as proof-example. Why he did not quote Abu Hanifah, who stood for full equality between Muslims and *dhimmis* before the law, except for family law, intoxicants and pork, is a legitimate question to ask. And how he did not fail to quote Abu Hanifah's opinion that *diyyah* payment, instead of talion, should be imposed on a Muslim who murders a *musta'min* (non-Muslim sojourner), is still another question. Had he consulted the basic texts of the Shari'ah upon which all juristic opinions revolved and in the light of which they should be examined, the "systemization" Dr. Cardahi sought would have been readily available.

3. Capital Punishment

And let us take up this particular example of murder and capital punishment. The Qur'an clearly states:

"And there is life for you in retaliation, O men of understanding, that ye may ward off evil."[2]

"And We prescribed for them therein the life for the life."[3]

"We decreed for the Children of Israel that whosoever killeth a human being for other than manslaughter or corruption in the earth, it shall be as if he had killed all mankind."[4]

"And kill not the human soul which God has made sacred except in the course of justice."[5]

And the Prophet said:

"In every murder retaliation is due."

[1]Choucri Cardahi, *Conflict of Law*, treatise in *Law in the Middle East*, p. 334.
[2]Q. II : 179.
[3]Q. V : 45.
[4]Q. V : 32.
[5]Q. VI : 152.

"It is my proper trust (to impose retaliation) in favour of and in faithfulness to *dhimmis*." With these words, as reported by Abd al-Rahman al-Baylamani, the Prophet ordered the execution of a Muslim who had murdered a *dhimmi*.[1]

From all these texts it is clear that retaliation has been prescribed in every case of murder, irrespective of religion. But there is another recorded Hadith which gave rise to controversy. It reads as follows: "A Muslim should not be killed for (murdering) an infidel. Nor should a holder of a covenant be killed so long as he holds his covenant."[2] Jurists accept the authenticity of this Hadith, but they opine differently over its implication. Some of them, like Malik and Al-Shafi'i, take it as implying a restriction of the general principle of retaliation. Others, like Abu Hanifah, interpret it within the general implication of Quranic and other Prophetic texts. Abu Hanifah states that the very wording of the Hadith, using "infidel" (*kafir*) in the first portion and "holder of a covenant" (*dhu-'ahdin*) in the second, implies two different categories. Thus, "infidel", according to Abu Hanifah, should mean the belligerent non-Muslim and the Hadith should thereby imply that neither a Muslim nor a *dhimmi* is to be executed for killing a belligerent non-Muslim. The reasonableness of such an interpretation can well be appreciated if we recall the fact that in the early days of Islam there were only two active camps: the subjects of the Islamic State (Muslims and non-Muslims) and their hostile neighbours. The actual relation between the two camps was a state of war. This may well explain why Abu Hanifah suggested the *diyyah* payment instead of talion in the case of a Muslim killing a *musta'min:* the reason being the traditional juristic division of *Dar-al-Islam* (the Islamic State) and *Dar al-Harb* (belligerent states), and thus the sojourner could only be an enemy subject who, out of Muslim courtesy, has been granted a temporary safe-conduct. Al-Shafi'i, however, did break this traditional division by introducing the concept of *Dar al-'Ahd,*

[1] Al-Shawkani, *Nayl al-Awtar*, VII, p. 12. See also Al-Maraghi, *Al-Tashri' al-Islami li-Ghayri'l-Muslimin*, p. 83.
[2] Ibid, p. 82.

which means the non-Muslim states willing to live in peaceful relations with the Islamic State. His conception was based on Quranic texts, such as: "And if they incline to peace, incline thou also to it, and trust in God."

But Al-Shafi'i did not, in fact, introduce this principle of peaceful foreign relations. He only introduced a juristic *expression* for a *status quo* which did exist both *de facto* and *de jure*. It was given prior consideration over religious matters concerning Muslim subjects in alien states. Says the Qur'an: "And (as for) those who believed but did not emigrate (with you to Madinah), you have no duty to protect them till they emigrate; but if they seek help from you in matters of religion, then it is your duty to help them, except against a people between whom and you there is a treaty."[1] Such an injunction should have sufficed to establish, for the technical use of later jurists, the medium of treaty-making for both the recognition of autonomous alien states and the establishment of peaceful relations with them. Many jurists, however, opined in actual deviation from this Quranic line of policy. Prof. Khadduri admits the fact that "certain Quranic rules, it is true, emphasize the tendency towards peace, but the jurists' interpretations do not stress this tendency and they even hold that the Imam should not resort to peace unless he were under necessity."[2]

The Prophet also said: "Whoever kills a holder of a covenant (*mu'ahid*), he surely has broken a pledge of God and never shall he have a smell of Paradise."[3] Al-Shawkani, after relating this Hadith and another one to the same effect, records that *mu'ahid* here applies to sojourners coming from belligerent countries, and not to *dhimmis*. This Hadith is on the authority of Abu Hurayrah, a Companion of the Prophet and a reputable source of Hadith. Thus, the covenant of peace in the early Islamic State was granted even to subjects of hostile countries. And once it was granted, a pledge of safe-conduct was due, irrespective of all

[1]Q. VIII : 72.
[2]Khadduri, *International Law*, treatise in *Law in the Middle East*, p.360.
[3]Al-Shawkani, *Nayl al-Awtar*, VII, p. 14.

differences of religion and of all belligerent actions of the sojourner's state.

But why has such forceful language of warning been used by the Prophet in favour of *dhimmis* and sojourners when the general principle established by the Qur'an[1] is the absolute prohibition against murder of any human being? The only possible explanation may lie in the fact that at that time a state of war existed in which this principle was not being generally applied. A pledge given under the circumstances would imply either a state of "back to normal as equal human beings", or "back to some kind of normalcy in so far as a mutual covenant could go". A pledge of protection given at the time of actual state of war would need, as it did, a special emphasis in order to be respected. With the covenant of *dhimmah*, the pledge became an all-embracing one, and the state of war was thereby declared to be terminated. The words of the Prophet, "All rights and duties are equal and reciprocal", was a definite sanction of a state of co-existence in full equity and peace. But with the covenant of sojourn, a differentiation had to be made. A sojourner coming from a belligerent country would be apt to provoke sentiments of hostility among the population of the Islamic State. If emotion overwhelms principle and the pledge for the protection of the sojourner's life is broken, the one who breaks it, whether a Muslim or a *dhimmi*, is to be punished, but not to the extent of capital punishment: the reason being the simple fact that the state of belligerency between the Islamic State and that of the sojourner constitutes a weighty factor in the case.[2] Not so, for sure, is the case with a sojourner coming from a friendly or neutral state. For in the absence of belligerency, only the human consideration of equity prevails. Says the Qur'an: "And if ye judge between mankind, (God commandeth) that ye judge justly"[3]; and, "So, if they hold aloof from you and wage not war against you and offer you peace,

[1] Q. VI : 152.
[2] Al-Kasani, *Badai' al-Sanai,'* VII, pp. 71-88, states that the state of belligerency is apt to throw a suspicion over the sanctity of the *musta'man's* life, and thus neither a Muslim nor a *dhimmi* should be executed for killing him.
[3] Q. IV : 58.

God alloweth you no way against them."[1]

One of the main arguments of Abu Hanifah in placing Muslim and non-Muslim subjects on an equal footing before the law of retaliation was the fundamental principle of full equality accorded to the *dhimmah*-contractee in every sphere of law other than personal status, intoxicants and pork. Besides the Prophetic texts which we have quoted to this effect, Abu Hanifah specifically stressed the prohibition, both to Muslims and *dhimmis*, of usurious dealings laid down in the Najran Treaty. He often quoted the explicit statement of 'Ali Ibn Abi Talib, the fourth Caliph and a Companion of the Prophet: "Their agreement to conclude the *dhimmah*-contract is upon the clear understanding that their property is to be like our property and their blood like our blood." Significant enough is the fact that 'Ali, who uttered these words, is the same person who related the Hadith that gave rise to the controversy.[2]

4. Status of Islamic Jurisdiction

From the Quranic verses cited at the beginning of this chapter, and from the Prophetic practice connected with the incident of the Jewish *Bayt al-Midras*, the following could be inferred:

(A) The competence of Islamic jurisdiction as regards non-Muslim subjects is left optional in every case which is originally within the compass of their judicial autonomy. They are entitled to it if they so choose. Jurists, however, have differed on whether this competence is of an obligatory nature on the part of Muslim judges: the reason being their different interpretations of the Quranic verses. Some of them opined that the first verse, "Judge between them or disclaim jurisdiction," implies an optional role. Others opined that the later-revealed verse, "So judge between them by that which God hath revealed," repealed that option. We would rather apply *both* injunctions, thus giving more flexibility to the administration of justice and allowing the inter-

[1] Q. IV : 90.
[2] Al-Shawkani, *Nayl al-Awtar*, VII, p. 10.

relations between the different religious courts to evolve with the requirements of time.

(B) In such cases, the Muslim judge has before him two ordained rules: (1) "But if thou judgest, judge between them with equity", and (2) "So judge between them by that which God hath revealed". Clear enough is the fact that the Muslim conception of equity is circumscribed by those rules of Islamic Law which are pertinent to the suit in trial. One of these rules is the right of non-Muslim litigants to be judged by their own religious codes. The Prophet did apply the law of the Torah against the adulterous Jew and Jewess who might have sought to evade it by taking refuge under Islamic jurisdiction. In cases of conflict of law, whether between any *dhimmi* code and Islamic Law, or between different *dhimmi* codes, the judicial autonomy, we understand, should be the basis. This, of course, must comply with the general rule of equality before the law, as above interpreted, except with regard to family law, intoxicants and pork. In other words, Islamic jurisdiction is the State jurisdiction except in matters for which there are applicable rules in *dhimmi* religious codes, even if the latter conflict with the laws of Islam. On the other hand, all jurists of the Hanafi school unanimously opine that a will made with an intention which is considered legal under Islamic Law but illegal under the testator's religious code, is to be held invalid.[1] Dr. Cardahi, however, attributed this unanimity to all jurists, thus misquoting the word *bittifaq*, which is used by Hanafi books as meaning the consensus of Hanafi jurists. Relying as a rule on Hanafi books but neglecting them, as he did, in respect of capital punishment, is a matter for which we can hardly surmise a scholarly explanation.

5. Conclusion

Thus, religious differentiation in personal laws can by no means be characterized as discrimination because of religion.

[1]Al-Kasani, *Badai' al-Sanai'*, VII, pp. 331-341. See also Cardahi, *Conflict of Law*, in *Law in the Middle East*, p. 339.

It is, on the contrary a judicial translation of an ideological co-existence that goes hand in hand with full integrity for all religious groups living within the Islamic State. Says Arnold: "The introduction of Islam into Arab society did not imply merely the sweeping away of a few barbarous and inhuman practices, but a complete reversal of the pre-existing ideals of life."[1]

So characteristic of Islam was this judicial autonomy that Muslims, because of it, lost the autonomy of their own Islamic Law in most Muslim states. The rule of the civil, penal and public laws of Islam has been weakened partly because of foreign domination and partly because of the lack of knowledge of many Muslim statesmen regarding the legal structure of Islam. Throughout history, Islam has been the victim of its basic conception of "respectful tolerance" for all creeds; so much so that you can even find a Muslim professor of jurisprudence, like Asaf A. A. Fyzee, entitling his book *Outlines of Muhammadan Law*, while there is nothing except family law in the whole book. This is a typical illustration of the price which Islam has paid in terms of its own judicial entity in return for its recognition of the judicial autonomy of other religious groups.

On the other hand, it was not until the 10th September and the 27th November, 1919, that a part of this judicial autonomy was granted to Muslim minorities in Yugoslavia and Greece respectively. Albania followed in the declaration of 2nd October, 1921. Only then, and under international pressure, treaties and declarations began to promise that "suitable provision will be made in the case of Muslims for regulating family law and personal status in accordance with Muslim usage."[2]

[1]Arnold, *The Preaching of Islam*, p. 42.
[2]United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, document prepared for the First Session (24 Nov. to 6 Dec., 1947), UN Doc. L/CN 4/Sub. 2/6, 7 Nov., 1947. See also Oppenheim, *International Law*, I, p. 713.

CHAPTER VI

OTHER DISTINCTIONS

VARYING opinions of Muslim jurists, together with political conflicts in the course of Muslim history, have gradually resulted in the introduction of many points of distinction between Muslim and non-Muslim subjects which, if properly examined, have not been authorized by any authentic text of Islamic Law. Much has been built on the so-called ordinance of 'Umar Ibn al-Khattab, the second Caliph, which allegedly imposed certain restrictions on non-Muslims in matters of dress, education, social behaviour, and even religious practice. This alleged "ordinance" is nothing but a falsification of history and goes against all that historians know of 'Umar. Arnold admits that the earliest mention of this document is made by Ibn Hazm, who died in the middle of the fifth century of the Hijrah, more than four hundred years after 'Umar.[1] Tritton expressed his suspicion of its authenticity, and even described it as "fictitious".[2] Arnold said that its provisions represented the more intolerant practice of a later age. This may well explain why such a document was falsified. Either it was a reaction to intolerant practice which went so far as to condemn even the early history of Islam, or it was the innovation of some Muslim in a shameful effort to justify his deviation from the proper practice of Islam. In either case, it is the implications of political history which should be examined, with a special consideration of its human elements and the reactions, one to another, of all parties concerned. Tritton himself, all through his book, records contradictory incidents from different quarters, pointing either to the mistake of a particular Muslim ruler or of a particular *dhimmi* community, or to the political intriguing of

[1]Arnold, *The Preaching of Islam*, p. 59.
[2]Tritton, *The Caliphs and Their Non-Muslim Subjects*, Arabic ed., p. 127.

Jews between Muslims and Christians. In many cases, the injustice done by a Muslim ruler was directed against all of his subjects, and often *dhimmis* were much better off than Muslims.

Something has still to be mentioned in this respect. Whatever the impact of religious sentiments and of controversial political history may be, professors and lawyers ought to maintain a scholarly standard of research and expression which would help to elucidate the true facts of history. Thus, we cannot help admitting our failure to understand, for instance, why a man like Prof. Tritton includes in his enumeration of distinctions between Muslim and non-Muslim subjects the statement that "water, which has been used by a Dhimmi, must not be used for ablution",[1] while the complete truth is that water which has been used by *anyone*, Muslim or non-Muslim, must not be used for ablution. Again, we fail to understand Prof. Khadduri when he says, "If the musta'min killed a Muslim, acted as marauder, or entered into sexual intercourse with a Muslim woman (which is not permitted by the sacred law) or a dhimmi woman, he was not considered to violate the aman. . . ."[2]—a form of expression which implies that adulterous sexual intercourse with a *dhimmi* woman is permitted, whereas all Muslim jurists, as Prof. Khadduri well knows, are unanimous in placing both crimes on an equal footing as regards condemnation and punishment. Such specious forms of expression are not only far from scholarly, but do not, in the long run at least, clarify any fact or serve any purpose.

[1]Tritton, *Non-Muslim Subjects of the Muslim State*, from the Journal of the Royal Asiatic Society (January, 1942), p. 40.
[2]Khadduri, *International Law*, treatise in *Law in the Middle East*, pp. 361-362.

CHAPTER VII

ACQUISITION AND LOSS OF NATIONALITY

WE have stated earlier that membership of the Islamic State is accorded to non-Muslims under the Arabic designation of *ahl al-dhimmah* or *dhimmis*, which means "those whose status is a trust upon the conscience and pledge of the state or the nation". They are also called *al-mu'ahidun*, which means "contractees" or "holders of a covenant", because their membership of the nation is based on contracts concluded between them, or their ancestors, and the Islamic State. We have also said that their rights and obligations are determined by basic texts of the Qur'an and the Sunnah and by treaties. A clarification, however, is needed in order to distinguish between treaties concluded by the Prophet and treaties concluded by successive Muslim rulers thereafter, the reason being the basic understanding that Prophetic practice is part of Islamic Law, which remains unchangeably binding on every Muslim ruler to come. But the principle of treaty-making as a legal medium of "dhimmification" remains valid and provides every Muslim government with the flexibility necessary for the administration of matters pertaining to naturalization. Such a flexibility is, nevertheless, subordinate to all basic texts and Prophetic practice. In other words, the characterization of the status of a *dhimmi* is always the *actio directa* of Islamic Law. If we keep in mind the fact that the early practice of the Prophet embraced treaty-making as well, and affected some of the charters to which non-Muslims later subscribed and thereupon were "dhimmified", it falls within the technical competence of the Islamic State to enact all the necessary regulations in the form applicable to the developed modes of naturalization, whether it be by marriage, legitimization, option, acquisition of domicile,

appointment as government official, or grant on application.[1] The same can also be said with regard to other modes of acquiring nationality, such as birth, re-integration, subjugation and cession of territory. Only one main thing has to be ruled out: the acquisition *ipso facto*, by any of these modes, of an established membership of the Islamic State—the reason being the simple fact that membership of any ideological state can only result from a bilateral pact freely entered upon. Thus, nationality by birth, for instance, can only be a *prima facie* presumption until the coming of age, whereupon the national-by-birth should be given the right to renounce or confirm such nationality.

As for the modes of losing one's nationality, we do meet with many juristic suggestions as to cases wherein "dhimmification" should come to an end. Some of these suggestions are:

(1) Rebellion
(2) Denial of the obligation of the protection tax
(3) Denial of obedience to government
(4) Fornication with a Muslim woman
(5) Espionage in favour of, and giving asylum to, enemies of the state
(6) Outraging the sanctity of God, His Messengers and His Books
(7) Causing a Muslim to apostasize
(8) Indulging in brigandage
(9) Publicly acting in contravention of cherished principles of Islam
(10) Indulging in usurious transactions

But de-nationalization because of these or similar reasons is a mere juristic suggestion without any authority from a specific text, either Quranic or Prophetic. Dr. Hamidullah, after recording these cases, said: "Regarding several of these, however, there is no unanimity among different Muslim schools of law. Those jurists who have had practical experience of holding high government offices are, as a rule, more lenient than those who theorize

[1]Oppenheim, *International Law*, pp. 654-656.

from the seclusion of their seminaries."[1] Further, the deprivation of nationality, says Oppenheim,[2] is not dictated by any vital national interest. It is rather in the actual interest of the Islamic State to have its *dhimmi* subjects brought to trial for any such act of illegality. Only upon an action that implies beyond doubt the *dhimmi's* renunciation of subjection to the Islamic State can a deprivation of nationality be enacted; and even here it is more of a renunciation than a deprivation. Says Maudoodi, a reputed scholar and leader of a big Islamic movement in Pakistan: "A Dhimmi may commit the greatest crime and yet it will not disqualify him from being treated as a Dhimmi. Even if he refuses to pay the Jizyah or kills a Muslim or abuses the Holy Prophet or attacks the honour of a Muslim woman, he will not be considered to have done anything that may break the bond or make him an outlaw. Of course, for all such acts, he will be taken to task in accordance with the Penal Code. But he will not be declared a rebel, nor can he be deprived of the privileges accorded to him as a Dhimmi. There are, however, two emergencies wherein the Dhimmis lose all claims to protection, namely: 1) when they leave the Muslim State and go over to the enemies, and 2) when they openly revolt against the State and try to sabotage it."[3]

[1]Hamidullah, *Muslim Conduct of State*, pp. 328-329.
[2]Oppenheim, *International Law*, p. 658.
[3]Maudoodi, *Islamic Law and Constitution*, p. 181.

CHAPTER VIII

FINAL OBSERVATION: NO PROBLEM OF MINORITY UNDER ISLAMIC LAW

AT the beginning of this part of this treatise, we promised to apply the internationally agreed-upon criteria of equality (e.g., the right to nationality and equality before law both *de facto* and *de jure*), so as to probe the legal impact of religion on the scope of Islamic Law. Now that we have surveyed the basic outlines of the Shari'ah as regards non-Muslims, a final observation must be made. Still in line with our international criteria, we go back to the memorandum of the Secretary-General of the United Nations on "Definition and Classification of Minorities". Speaking on "multi-national" states, he defined them as the states "formed by two or more nations, existing as different communities, each of which is aware of—and desires to retain—its own distinguishing characteristics". He then divided them into two principal categories: "a) those in which the State reflects the culture of the predominant nation, whilst the other nations are considered as minorities; and b) those which do not reflect the culture of a predominant nation, but are neutral in so far as the various nations submitted to their jurisdiction are concerned. In the case of States in the latter category, it is impossible to speak of either a national majority or a national minority except from the purely numerical standpoint; one may only speak of different national groups."[1]

The question now is: where, under such a division, should we place the Islamic State? On the one hand, it is a state that reflects a predominant culture and thereby may belong to the first

[1]United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Definition and Classification of Minorities* (memorandum submitted by the Secretary -General,Lake Success, New York. 1950), p. 7.

category. But it is also, by virtue of its culture, a state that accords full social and judicial autonomy to every community living within its territory, thus practicing a kind of neutrality in so far as other religious communities are concerned. Because of this, it definitely belongs to the second category. This can well illustrate the Secretary-General's statement that the categories, as above divided, "are not rigid, but in many cases are relatively fluid". Thus, we may say that a state of the type prescribed by Islam can be characterized as a state which, while reflecting a predominant culture, accords full autonomy to the co-existing cultures within its dominance. It follows that "neither a national majority, nor a national minority" can conceivably exist in such a state, "except from the purely numerical standpoint".

To be more explicit, we may quote Oppenheim's summarization of the protection of minorities as afforded by relevant clauses in international treaties, as follows:

(1) For the inhabitants, protection of life and liberty and free exercise of religion without distinction of birth, nationality, language, race, or religion.

(2) In general, for *certain inhabitants*, automatic acquisition, or just facilities for the acquisition of the nationality of the contracting state.

(3) For the nationals, equality before the law and as to all civil and political rights, and as to the use of any language.

(4) Freedom of organization for religious and education purposes.

(5) State provision for the elementary instruction of their children through the medium of their own language in districts where a particular minority forms a considerable proportion of the population.

But Oppenheim had to admit—in spite of the twofold method of ensuring the observance of the minority clauses: (1) the contracting state's adoption thereof in its fundamental laws, and (2) the guarantee of the League of Nations to such obligations of international concern—that the implementation of the system of protection of minorities was affected by the progressive

weakening of the political structure of the League. He further opined that "so long as the general protection of fundamental human rights, through indisputably binding obligations under the aegis of the United Nations and otherwise, has not become part of law, there seems to be a need for the protection of minorities, through special treaties."[1]

In contrast with all the above, Islam—as we have seen—preceded all international treaties with legislation for the full protection, social autonomy, liberty and integrity of all subjects of the Islamic State, Muslims and non-Muslims alike. By virtue of its basic principles, Islam not only discarded the very concepts of "majority" and "minority" as contrary to the principle of the equality of all men before Divine justice, but it further administered this justice in terms of positive law which is applicable to all citizens, except in cases where the probity of conscience demands a specific differentiation based upon reciprocal rights and duties.

Furthermore, "the general protection of fundamental human rights" which Oppenheim and others hope to have enacted as part of municipal laws conceivably "through indisputably binding obligations under the aegis of the United Nations" (after the generally admitted ineffectiveness of the League of Nations) were —more than thirteen centuries ago—both introduced and sanctioned as part of the fundamental laws of Islam.

[1]Oppenheim, *International Law*, pp. 713-716.

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