Law and the Islamic World Past and Present

Papers presented to the joint seminar
at the Universities of Copenhagen and Lund,
March 26th-27th, 1993,
organized by Christopher Toll, Jan Hjärpe,
Jakob Skovgaard-Petersen and Ditlev Tamm

Edited by CHRISTOPHER TOLL
and JAKOB SKOVGAARD-PETERSEN

Historisk-filosofiske Meddelelser **68**

Det Kongelige Danske Videnskabernes Selskab
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Abstract

The contributions to this volume are based on lectures presented at a seminar on Islamic Law held in Copenhagen and Lund in March 1993. The background for this seminar was the growing importance of Islamic law in contemporary Muslim societies. Today, a number of Muslim countries are revising their constitutions, stipulating that Islamic Law be the sole source for legislation, and Muslim scholars and intellectuals are debating whether and how Islamic Law can be codified and applied. The book covers selected issues in Islamic Law, past and present, with many of the contributions focusing on the methods employed by Muslim scholars to develop and change legal concepts and rulings, while maintaining their religious identity.

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Preface

Scholarship, as art generally, is an end in itself. When some sixteen specialists in Islamic law from six countries gathered at a seminar in Copenhagen and Lund in March, 1993, it was to present new facts, new ideas and new connections within their particular field of study, thus to increase our knowledge about Islamic law. But most knowledge can also be used in one way or another, good or evil, by politicians, missionaries, technicians, doctors, business men and ordinary people. One of the best ways to use knowledge is to let it further our understanding and appreciation of the other, and of the world in which we all live. When the organizers took the initiative of inviting to this seminar it was, therefore, not only to further scholarship, which is the main task of our universities, but also to further understanding between the representatives of two different legal systems, two different cultures, and to make it easier for them to communicate and to live and work together.

For many years, the study of Islamic law was considered of little practical use or value. There was an almost general agreement among observers of the Islamic world that Islamic law was a relic of the past, soon to be completely abandoned in the Muslim countries. Today, however, we witness a widespread conviction among Muslims that Islamic law provides a highly superior system of law that should be adopted in contemporary legislation. In the eyes of many Muslims, God's Law is a fundamental component of their faith, and in case of further democratisation of the Muslim countries the issue of a "re-islamisation" of the legal systems will be on the agenda throughout the Muslim world. Currently, Muslim legal scholars and intellectuals are debating how Islamic codes may be applied more specifically. Other intellectuals in the Muslim world discuss how to avoid this.

The current debate on Islamic law may be of great consequence to future legislation in the Muslim countries, and recent Muslim immigration to Europe has accentuated its relevance even here. It involves, however, many technical questions in need of investigation and explanation, some of which have roots back to the earliest stages of Islamic jurisprudence. Historical developments within Islamic law, its susceptibility to adaption and change, the way it has been administered, used, abused, or ignored – these are all questions which will have to be addressed and which may be of importance to an estimation of the relevance and scope of Islamic law today. This is why we convened a

conference on Islamic law – past and present, and why we were delighted that the range of subjects discussed was as broad as it turned out to be.

The seminar was opened on the first day by the Vice-Chancellor of the University of Copenhagen, Professor Dr. Ove Nathan, and the proceedings of the first day were held on the premises of the Royal Danish Academy of Letters and Sciences. The first paper, by I. Edge, was read in his absence by D. Tamm. Responsible for the practical arrangements in Copenhagen were Chr. Toll, J. Skovgaard-Petersen and D. Tamm, for those in Lund J. Hjärpe.

We regret that the papers read by J. Hjärpe on Islamic constitutions, by Ch. Mallat on Islamic family law: eclecticism in the age of equality, and by R. Peters on Islamic criminal law – past and present, could not be published in this volume – that of Peters is to be found in "Welt des Islams" 34/1994:246-274.

The seminar was made possible by grants from: the Danish Humanistisk Forskningsråd and Samfundsvidenskabeligt Forskningsråd, the Swedish Royal Academy of Literature History and Antiquities, Humanistiska Forskningsrådet and Humanistiska Vetenskapssamfundet in Lund. The cost of publication has been born by the Royal Danish Academy of Sciences and Letters. To all those who have contributed to the realization of the seminar, not least to those who contributed their papers, the organizers present their sincere thanks.

Chr. Toll *Jakob Skovgaard-Petersen*

Introduction

Rudolph Peters

The present volume contains most of the papers presented at the Conference on "Law and the Islamic World", which was held at the Universities of Copenhagen and Lund in March 1993.[1] The thirteen essays included in this volume deal wich various aspects of the history and present-day application of Islamic law. Apart from the two articles offering broad surveys, six deal with the early and classical periods, and five with contemporary topics.

Ian Edge's conrtibution "Recent Trends in Islamic Law" sketches a general framework for the conference, offering a global overview of the development of Islamic law focused on its history during the last two centuries. In his conclusions, the author predicts that in practice Islamic law will be less and less important. He foresees that family law will be codified also in those countries where pure Islamic law is nowadays applied, that in civil law the trend towards harmonization between Western and Islamic law will continue and that the countries enforcing Islamic punishments will be marginalized. A similar bird's eye view is presented by Ibrahim al-Wahab in this paper "The Legal System of Iraq and the Continuity of Islamic Law", which deals which the legal history of Iraq from the time of Hammurabi to the present.

About the origins of Islamic law there remains much to be clarified. The publication in 1950 of Joseph Schacht's seminal study *The Origins of Muhammadan Jurisprudence* was a landmark in the history of critical scholarship on Islamic law. His results still represent a point of reference for further research in the field. Three articles in this volume examine aspects of the early developments of Islamic law. What they have in common is that they all agree that, in the words of the much regretted R.B. Serjeant, "the notion of a break, a line separating the Jahiliyyah from Islam is to be abandoned". The theme of continuity between

[1] The following papers are not included in this volume: Jan Hjärpe, "The Human Rights Concept in Relation to the Modern Constitutional Debate in the Muslim World", Chibli Mallat, "Family Law in Islamic Countries", and Rudolph Peters, "Islamic Criminal Law in the Modern World". This last article has been published under the title "The Islamization of Criminal Law: A Comparative Analysis", in *Die Welt des Islams* 34 (1994), pp.246-274.

pre-Islamic and Islamic times figures prominently in the contributions of Serjeant, Hjerrild and Bæk Simonsen.

By a careful analysis of the so-called Constitution of Medina and the Qur'ân, Serjeant corroborates Schacht's findings that the Prophet Muḥammad did not abolish the existing customary law, but rather considered it as a sound basis for arbitral decisions. Drawing on a great variety of sources, from the Qur'ân and *ḥadîth* to recent observations of travellers and his own expertise on contemporary South Arabia, Serjeant further shows that pre-Islamic tribal law still continues to play an important role until the present day and that in many parts of the Arabia Peninsula the *sharîʿa* was until recently only marginally enforced.

Much has already been written about the question of the influence of Hellenistic Roman law on the development of Islamic jurisprudence. Larely, Patricia Crone in her book *Roman, Provincial and Islamic Law*,[2] has again dealt with this question and argued that Islamic Jurisprudence *(fiqh)* was indebted to Byzantine Roman and Jewish law. Other scholars, however, reject the notion of such a direct influencing and hold that such similarities as may exist between provincial Roman, Jewish and Islamic law may be better explained by their common substratum of ancient Near Eastern law (and culture).[3] Many Muslim authors, on the other hand, tend to emphasize the originality of the *fiqh* and do not accept any outside influence upon its development.

The contribution by Bodil Hjerrild, "Islamc Law and Sasanian Law" looks at the problem from at new angle and poses the question whether there could have been a Sasanian influence on Islamic law. She points at certain resemblances between Sasanian and Shîʿa family law (especially the *mutʿa* marriage) and law of succession and suggests that these may be more than just coincidental and that further research in this domain might prove fruitful.

Drawing on papyri from the early Islamic period, Jørgen Bæk Simonsen argues in his essay "The Development of Doctrine and Law Schools", at least for Egypt, that Islamic law in the conquered areas was relevant only to a very small group of Arab soldiers and that it came into being as a synsthesis between Qur'ânic rules, the customs and values of the Arabs in

[2] P. Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* (Cambridge: C.U.P., 1987).

[3] See e.g. Norman Calder, *Studies in Early Muslim Jurisprudence*. Oxford: Oxford University Press, 1993, pp. 198 ff.

the armies, and the actual problems caused by the army's stay in the conquered territories. Gradually, especially as the local population was converted to Islam, the law that was enforced developed in response to day-to-day practice, rather than as a result of imposing Islamic values and concepts.

There are many ways and methods to read Islamic legal texts. The three essays dealing with Islamic law in the classical period do so from very different angles. Norman Calder uses a textual and literary approach, focusing on the formal characteristics and the function of legal texts. Osswald and Johansen read *fiqh* texts against the background of social history and show how abstract and theoretical concepts relate to social reality.

In his contribution "Exploring God's Law: Muḥammad ibn Aḥmad ibn Abî Sahl al-Sarakhsî" Norman Calder analyses two passages on *zakât* by the eleventh century Ḥanafite jurist al-Sarakhsî and observes that behind the author's obvious intention of giving practical rule of conduct, there were other messages. The play of elaborating theoretical concepts and relating them to tradition and, sometimes, to the realities of the world, often transcended practical interest. One of messages of this scholastic activity, Calder asserts, was to show commitment to tradition, represented by the School doctrine, and therefore commitment to authority. But at the same time al- Sarakhsî and his likes, also intended to show that within the framework of the Ḥanafite tradition there is much room for pluralism, as exemplified by the omnipresent differences of opinion between the three founding fathers of the School, Abû Ḥanîfa, Abû Yûsuf and al-Shaybânî. It is clear, although Calder does not say so with so many words, that contrary to conventional wisdom, the so-called "Closing of the Gates of Ijtihâd" did not result in a fossilized legal tradition. The work of the jurists continued to be part of an ongoing creative process of interpretation.

Under the *sharīʿa* not all human beings are equal before the law. Differences in legal personality are related to three concepts: religion, gender and slavery. But beyond these the law does not recognize other forms of collective legal inequality. Descent, ethnicity, social status and the like do not affect a person's legal capacity. But social reality often prevails over doctrine. Rainer Osswald's very interesting essay "Inequality in Islamic law" shows how certain abstract and theoretical legal concepts can acquire a totally novel and unforeseen meaning and function in a specific social context. The essay focuses on the notion of *istighrâq*

al-dhimma, which means that the legal claims against a person resulting from his unlawful acquisition of goods exceed his assets and that therefore all of his possessions are considered to belong not to him but to their lawful owners. If these owners cannot be identified, the possessions are regarded as *zakât* to which the poor of the community are entitled. Drawing on manuscripts of legal texts dating from the sixteenth century onwards and composed by jurists from Mauretania, Osswald shows how this concept of *istighrâq al-dhimma* was used by Mauretanian jurists to deprive one group collectively of its legal rights. Mauretanian society did not have a state organization. It consisted of two groups, the nomad warriors and trading clerics. The latter, who monopolized the interpretation of the law, declared the warriors collectively as *mustaghraq al-dhimma,* thereby depriving them of any legal right of ownership, and claimed that they themselves were poor people, entitled to *zakât.* Further it was assumed that under the prevailing conditions it was impossible to identify stolen cattle. All this meant that in their dealings with the warriors the clerics were not anymore bound to the rule of the *sharī'a,* since all the warriors' possessions were rightfully theirs anyway. Thus a collective unequality based on social status was created that normally does not exist in Islamic law.

Most Western textbooks on Islamic law clearly state that in Islamic law there are no separate domains governed by special rules. There is no clear distinction between public and private law, between substantive and procedural law, between criminal law and the law of torts. This view is contested by Baber Johansen in his essay "Commercial Exchange and Social Order in Ḥanafite law". Johansen investigates whether there exists a clear demarcation line between the norms governing commercial exchange and those controlling social relations, such as family relations, relations between neighbours, between the state and its subjects etc. In view of the fact that the market (*sûq)* occupies a special geographical as well as political position (being subject to direct public control), one could expect that the rules connected with commercial relations would be distinct from those related to social relations. Analysing classical Ḥanafite texts, Johansen concludes that although these texts have no separate chapters on commercial law, there are certainly specific rules through which this domain it set off against the other branches of the law. These rules are related to the actors on the market, which is reflected in the concept of legal capacity: in commercial relations legal capacity is merely based on the capacity of sound reasoning, and status deriving

from religion, gender or slavery is hardly of importance. Secondly they are connected with the forms of exchange. Commercial relations are embodied in synallagmatic contracts where the objects are commodities (*mâl mutaqawwim*) which makes possible the precise calculation of the value relationship between them. On these two points commercial exchange is different from social exchange.

Of the five contributions dealing with the present Muslim world, two are clearly committed to a cause: al-ᶜAshmâwî's essay to democracy and to the separation of religion from politics and Rubya al-Mehdi's paper to feminism. The other three essays are more detached and deal with Islamic banking (Kazarian), with the notions of *umma* and Islamic citizenship (Schulze), and with the *fatwas* of the present State Mufti of Egypt (Skovgaard-Petersen). I shall first introduce the latter group.

In the development of Islamic law the legal consultants, *muftîs,* have always been of crucial importance. It was they who would first offer new interpretations, which would be included in the legal textbooks after they had been generally accepted. Some muftis were directly appointed by the State and incorporated in a hierarchical organization. The head of the organization, often called *Shaykh al-Islâm,* would be the highest functionary for *sharîᶜa* affairs. Such functionaries still exist in many Muslim countries and they are called upon by the state and private individuals alike, to expound the Islamic rules on often controversial issues. Recent rescarch on Islam has very much focused on the Islamist movements and tended to neglect the study of "official" Islam. Therefore, Jakob Skovgaard-Petersen's original essay "Judicial Opinions in Comtemporary Egypt: Sayyid Ṭanṭâwî, the State Mufti of Egypt" is a most welcome contribution to Islamicist scholarship. Skovgaard-Petersen examines the opinions of the present State Mufti of Egypt, al-Ṭanṭâwî, and deals with a number of issues on which the Mufti has offically expressed his opinions, such as the ways of establishing the beginning of Ramaḍân, new medical techniques like organ transplantation and sex-change and banking practices. The author places these decisions in their political and social contexts, showing why these issues were controversial and on whose side the Mufti was. If there are certain distinctive tendencies in al-Ṭanṭawî's *fatwas* to be discerned, these can be found in his adherence to broad principles of the *fiqh* instead of the rules of detail, in a strong interest to protect the poor, and, finally, in his aversion to private enterprise and his support for state control and regulation. Because of the emergence of the Islamist movements in the 1970s and 1980s the

office of the State Mufti has increasingly become politicized. As the *fatwas* of his adversaries are also published and widely read, the controversies and debates among the leading Islamic scholars are for all to follow.

In his paper "Islamic Law and Financial Intermediaries: A Historical Inquiry and a Future Outlook" Elias G. Kazarian explores the origins and practice of Islamic financial institutions. After a long historical survey, he addresses the question of what makes a financial institution Islamic. He answers the question by referring to the official Handbook of Islamic banking (*al-Mawsûʿa al-ʿilmiyya wa-l-ʿamaliyya li-l-bunûk al-Islâmiyya),* published by the International Association of Islamic Banks. The basic principles are the following: absence of interest-based transactions (*ribâ*-transactions), avoidance of speculation, discouragement of the production of goods and services that contradict the value pattern of Islam, and, finally, the introduction of *zakât.* Some Muslims would argue that there is another aim in Islamic banking, viz. to promote the social and economic development of the Islamic countries. The author deals with the legal forms, such as *muḍâraba* (commenda) that are used nowadays to bring banking practice into confotmity with Islamic law. He concludes that Islamic banking, by the ideological restraints under which it has to operate, is probably less efficient than traditional banking and that, where Islamic banks have to compete with traditional ones, they are under a constant pressure to trade off Islamic purity to financial gains. One of the ways to prevent this is the establishment of Religious Supervisory Boards that nowadays exist in the majority of Islamic banks.

The notion of the islamic *umma* is the central issue of Reinhard Schulze's essay: "Citizens of Islam: The Institutionalization and Internationalization of Muslim Legal Debate". Schultze observes that already in the eighteenth century the concept of the *umma* had been secularized. It referred to a civilization rather than to a community of law, which it was in early Islam. This "delegalization" of this concept reached its peak in the nineteenth century, with the formation of nation states and the secularization of large domains of the law. However, at the same time a new call for political unity of Islam was raised by intellectuals and activists like Jamâl al-Dîn al-Afghânî. As one of the means to reach such unity, the re-evalution of the legal tradition was proposed, with the aim of accomodating the *sharîʿa* to the entire Islamic *umma.* This call, however, did not find much response and the issue remained very theoretical and even fictitious. Most Muslim jurists accepted the political division of the

Islamic world. Interestingly, however, the idea of the Islamic *umma* became ethnicized in certain regions. Islam then was regarded as a nationality, to which Islamic law served as a marker. Pakistan was the first state to experiment with this concept. But is was followed in Bosnia-Herzegowina and among the Black Muslims in the USA. During the 1960s a totally novel approach towards the repolitization of the *umma* was proposed by Muslim jurists who promoted the unification of the *sharīʿa* as a means to re-establish a transnational Muslim identity. Several supranational Islamic organizations debated the issue, but without any tangible result. Schulze consludes that this is to be expected as the intellectual debates on the legal character of the *umma* have only a restriced participation.

In his essay "Shariʿa in the Discussion on Secularism and Democracy" Muhammad Saʿîd al-ʿAshmâwî reaches the same conclusions as the Egyptian modernist ʿAlî ʿAbd al-Râziq had formulated some seventy years ago in this *al-Islâm wa-uṣûl al-ḥukm* (Islam and the foundations of power), viz., that Islam is originally not a political religion. His arguments, however, are somewhat different. Al-ʿAshmâwî founds his conclusion on the fact that the original meaning of *sharīʿa* is not law, but method, path towards God, consisting of worship, ethics and social intercourse. Only later did it come to mean law. The result of this was that the scholars became clergymen who had a hold on politics and created a theocracy. Al-ʿAshmawi therefore calls for a deep change in understanding the sources of Islam so as to remove the ideological obstacles to democracy.

The issue of womens's rights in Islam is the theme of Rubya Mehdi's contribution "The Legal Rights of Muslim Women: A Pluralistic Approach". Mehdi argues that there are many different interpretations of the sources of Islam, and that this undoubtedly affects women's rights. She shows how fundamentalists and modernists give entirely different explanations of the same Qur'ânic verses. However, given the fact that there are state laws regulating the position of women in society, laws that may be more or less favourable to women, there is the additional problem that the position of the majority of women is not governed by state law, but by custom. In her conclusion she calls for a period of empirical analysis for Muslim feminism so as to eleiminate the traditional stereotypes of Muslim women and to better address their problems.

Recent trends in Islamic Law

Ian Edge

I am asked to talk to you today on recent trends in Islamic Law. For this purpose I am taking a very liberal definition of the word "recent" for I do not think that genuinely contemporary events can be understood without some historical framework to work on. Therefore I will divide my talk into three parts. The first part will be a brief recap of the historical developments of Islamic Law and particularly its attitude to change and reform. The second part will be a consideration of the role of Islamic Law in the era from approximately 1800 to 1945: an era which I shall, for want of a better phrase, call the era of Colonialism in which the notion of independant Islamic states was subordinated to the political influences of dominant European powers. The third part will consider the development of Islamic Law since the end of the Second World War. This period I will categorise as the era of independant Islamic states. I will concentrate particularly on very recent trends in the role and use of Islamic Law.

First, then, to consider the historical development of Islamic Law. Islamic Law is said to be an immutable and divine law – God given through the agency of the Prophet Muhammed who lived from approximately 570–32 AD in an area of the world we now know as Saudi Arabia. The Quran, the word of God revealed to the Prophet, is the first source of Islamic Law. But it is important to realise that it is only the first and not the only source of Islamic Law. There are other sources – of necessity. The Quran is a religious text more than it is a legal text – the legal material in it is small and not by any means comprehensively or consistently dealt with. Therefore the Quran needs to be buttressed with other sources. The second source is the Sunna. These are collections of the stories *(ḥadīth)* that relate to the Prophet's life and acts. They record the minutiae and detail of how the Prophet sought to live his life in accordance with the newly promulgated religious order propounded by the Quran. Particularly important among these stories are those which relate to the Prophet being asked to arbitrate disputes or decide questions of Law. The Sunna is textually a much larger formal source of material than is the Quran, but it is also more various and disputed. The text of the Quran was finalized very soon after the Prophet's death in the reign of the third Caliph Uthman. The Sunna was not collected together for at least a century after this and many different collections of *ḥadīth*

abound. Once it had been accepted by jurists as an important source, then jurists were not averse to fabricating stories to support their particular legal point of view. How much was fabricated is very controversial. Islamic jurists claim certain collections contain only genuine *ḥadīth,* while some western scholars (especially Schacht) maintain that very few even of these can be shown convincingly to be genuine. In the end it matters little because they are treated as genuine by the vast majority of past and present Islamic jurists.

Islamic Law as it was practised in the Islamic courts of the Islamic world up until the nineteenth century, however, was not that to be found in the Quran and the Sunna. It was the law of the early medieval islamic jurists. With the Quran and the Sunna as their foundations, successive generations of Islamic jurists developed the particular principles of law. Very rarely were their juristic writings works of general principle. Like Roman and Jewish Law before it, Islamic Law writing was a mass of individual answers to specific questions collected together subject by subject which acted as the starting point in any action and which allowed the operation of juristic development by analogy *(qiyās).* This then was Islamic Law. A Jurists Law developed in the two or three centuries after the Prophet's time and was promulgated in multi-volumed juristic writings. The fissiparous nature of such a law was only prevented by the jurist Al-Shāfiʿī promulgating a theory of the sources of law *(uṣūl-al fiqh)* which most Jurists accepted and which resulted in Sunni Jurists accepting and forming themselves around four main schools of law: the Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī.

In theory Islamic law was the only law. In practice many of its rules and exhortations were for an ideal society that did not exist, therefore from an early stage other laws and other courts were accepted as existing in parallel (though in theory subordinate) to the Islamic Law system. This was particularly true of the law of commercial and trading transactions and public law and criminal law. The lack of a formal mechanism change made Islamic Law more and more out of touch with social realities and enhanced this duality of process. The dynamism of the early jurists (through the exercise of independent reasoning known as *ijtihād)* was considered exhausted. Some jurists, however, called for a renewed interpretation. Ibn Taymiyya was one great late medieval jurists who did so, but his influence was negligible on the official path of the law and the Islamic law ossified into certain well defined subjects and procedures. By the beginning of the nineteenth century when the Islamic world was

forcibly opened up to the influence of European powers Islamic Law had already probably in practice lost its central and commanding role. That tendency was to be accelerated over the next century and a half.

It is generally considered that the era of colonial influence in the Islamic world commenced with the invasion of Egypt by Napoleon Bonaparte in 1798. Although it is too simplistic to assume that a single event began the era of colonialism in the Islamic world and it also ignores the connections and relationships between the European powers and the Islamic world before 1798, it is convenient to begin at that date. For it is from that date that the Islamic world began to adopt, sometimes voluntarily but generally forcibly, western political and legal institutions in place of their own. Napoleon drew up plans for reforming the administrative and legal stucture of Egypt some of which were put into effect by Muhammad ʿAlī, the first modern ruler of Egypt. The Ottoman Empire, which held political sway over a large part of the present Middle East, was desperate to join the Club of Europe and be accepted as an equal at International Conferences and in World Affairs (just as Japan was at about the same time). The price of admission for both the Ottoman Empire and Japan was the "Europeanization" of their political and legal structures. The Ottomans turned to French precedents in the reforms known as the Tanzimat. The Japanese turned to German precedents in the reforms know as the Meiji reforms. It is interesting and instructive to consider and compare how these two experiments in Social engineering turned out but that is a topic for a further lecture!

The Ottomans adopted verbatim a number of Western codes between 1850 and 1863 mainly in commercial and criminal law matters together with a separate court system to operate them. This was met with surprisingly little reaction from the more traditionalist elements of Ottoman society: for two reasons. First, these were areas in which the Ottomans had already accepted some interference by the state already in the form of laws *(qānūn)* and separate courts and second, there was a view that it was better to preserve Islamic Law in aspic as an ideal which could be used at a time in the future when the ideal society existed rather than to alter and amend it and thereby unalterably change it.

The trend to "Europeanize" however stopped short at replacing civil law and personal status law which continued to be in the jurisdiction of Islamic courts though they applied differing juristic texts, with little or no degree of uniformity, from one end of the Empire to the other. These were areas of traditional application of Islamic law rules. To promote

uniformity a solution was sought in the codification of the Islamic Law rules. There was much more oppostion to this than to outright replacement of Islamic Law by European Law. Why? Because it meant making choices of Islamic law texts; it meant accepting one juristic point of view as official and authoritative and rejecting the others. This is why the Ottoman Civil Code of 1869-1876 was so radical. It codified Ḥanafī civil law and applied it in all the Islamic courts of the Ottoman Empire. Personal status was even harder to tackle but this was done eventually in the codification of Ḥanafī Law in the Law of Family Rights of 1917. These two pieces of legislation marked a watershed in the development of Islamic Law because for the first time it was accepted that a State could make choices for the Islamic courts to abide by and they adopted Islamic law rules to a western format. This has been the main way by which Islamic Law has been adapted by modern state systems as we shall see. The remainder of this period saw a continuation of these two developments. After the collapse of the Ottoman Empire after World War One, then the British and French demarcated their areas of influence and were instrumental in continuing to export their own laws to the countries they controlled. In the heartlands of Islamic Law, however, laws codifying the Islamic rules began to be adopted. This was particularly true, in this period, of Egypt.

With the end of World War Two then independent Islamic states began to be established in the Middle East. They were eager to establish their Islamic credentials. Therefore almost all of them provided in their Constitutions for Islam to be the state religion and Islamic Law to be *a* primary or *the* primary source of law or legislation. This has in the main been mere windowdressing. States since independence have continued the trend they inherited of maintaining the duality of a secular European style legal system with its own laws and courts together with an increasingly truncated Islamic Law system. Some in fact have begun to eliminate the Islamic Law courts altogether and subsume their work into the secular system. This was done in Egypt in 1955, and more recently in Iraq and in certain emirates of the UAE. Only Saudi Arabia stands outside this framework. But even here although the Islamic courts are theoretically the only courts there exists a large network of tribunals (for labour matters, commercial matters and administrative law matters) which exist side by side with the Islamic courts and which increasingly are given *sole* jurisdiction to determine certain types of dispute.

The 1950's, 1960's and 1970's also saw an increasing number of

Islamic states adopting codes of personal status laws, beginning with the Jordanian Law of 1951. Unlike their predecessors, however, these laws sought not just to codify the law but to amend it as well. The techniques of amendment ranged from the simple (merely borrowing minor opinions within a school or opinions from another school) to the sophisticated (where states, buttressed by modern juristic opinion, chose to reinterpret provisions in the Quran and Sunna to better fit modern circumstances). This tendency had its apogee in the Tunisian law of Personal status of 1956 where Quranic provisions were reinterpreted to support a ban on polygamy and prohibition of a husbands right of unilateral repudiation of his wife *(ṭalāq)*. Later codifications have not been so bold.

These two tendencies (of secularisation and codification of Islamic Law) had become so ingrained that Professor Sir Norman Anderson in his book 'Law Reform in the Muslim World' published in 1976 felt minded to predict that:

"...the future will witness the disappearance of both Sharia and community courts and the application by unified national courts of a body of codified law which represents throughout a certain synthesis between western and Islamic concepts the former paramount in civil commercial and penal law and the latter in the field of personal and family law."

That this has not happened since Professor Anderson wrote can, I think, be linked inextricably to one event. That is the Iranian Revolution of 1979. Not that the Iranian Revolution had a direct influence on the Sunnī Islamic world as it was, and is, a very Shīʿī revolution. But it rekindled a debate which had been muffled and gave impetus (direct and indirect) to traditionalists to call for a more Islamic approach by governments. The Iranian Revolution stopped the increased secularism of states in its tracks but it has not yet so far had much influence (other than an increased debate) in producing more Islamic states. In Iran itself, although the political system was radically altered to give considerable power to Shīʿī jurists, in practice (except in areas of personal status) much of the pre-revolutionary law has been kept and is still used. The Iranian Civil Code, for example, a product of western concepts promulgated in the 1920's, was supposedly included in the blanket rejection of all legislation that was un-Islamic. In practice a handful of its provisions which are clearly and overtly contrary to Islamic Law have been removed and the Code is still used and referred to as the main Civil Law of Iran.

Other Sunnī states have had to contend with increasingly vociferous

(and violent) groups whose sole political purpose is to see Islamic Law applied as the main (or even sole) law in the state. Beyond slogans such as "Islam is the solution" and "the Quran is our Constitution", however, it is not clear how such an approach would be put into practice. In Algeria the prospect of a parliament and government dominated by Islamic fundamentalists was enough for the pro-western government with the assent of the army to declare emergency rule. In Jordan, however, where Islamic fundamentalists have been allowed to take a sizeable number of seats in Parliament no great changes to the legal system seem to have been brought about as yet, although a new Personal Status Law has been drafted and is under discussion.

Only two Sunnī states have seriously attempted to implement an Islamic State and the difficulties they have experienced exemplify the increasingly fragmented arguments as to "what is an Islamic state?" and "What must one do to apply Islamic law?" The two cases are the Sudan and Pakistan. Both are cases where leaders with quasi-dictatorial powers imposed their view of Islamic Law on the legal system almost certainly against the wishes of a majority of the population. In the Sudan, President Numeirī by the September laws of 1983 sought to gain popular support and short term political gain by enacting a number of stringent Islamic Laws and making a break with the old common law based legal system. The main laws introduced were a criminal code, a civil transactions law and a commercial law. They were applicable to all Sudanese irrespective of religion, a fact which led directly to civil strife between the Muslim North and the Christian-animist South. The laws have been applied harshly and indiscriminately. In a notorious incident a famous modern Sudanese Islamic jurist who attacked the laws as un-Islamic was executed for apostacy. No longer is Islamic Law what the jurists say; it is instead what the state says it is and to argue otherwise is the new heresy.

In Pakistan too a new Islamic Law is being forged. President Zia al-Ḥaq promulgated by decree a number of Islamic ordinances mainly pertaining to Islamic crimes (such as *zinā* and theft) but also *qiṣaṣ* (retaliation or payment of blood money for injuries) and the payment of Islamic taxes (such as *zakāt*). However, his most lasting testament has been the creation of the Federal Shariat Court with power to test and strike down legislation which contradicts the Injunctions of Islam as found in the Quran and Sunna. Although the court does indeed look at the works of the Islamic jurists it considers itself not in any way bound by them and it comes to its decisions on its own interpretation of the principles it finds

in the first two textual sources of Islamic Law. Thus, the main development of Islamic Law by the medieval jurists is replaced by the views of a small coterie of very conservative and unelected judges. The sphere of activity of the Federal Shariat Court is curiously limited however. It was prohibited from dealing with financial and economic matters until 1990 when it then heard a number of cases and in a notorious decision declared the interest provisions in a large number of Pakistani statues void for *ribā*. The decision, which caused much confusion in the money markets, has now been suspended pending an appeal to the Supreme Court. The Court is still nevertheless prohibited from hearing cases concerning Muslim personal status matters which means that the amendments of Islamic Law in Pakistan made by the Muslim Family Laws Ordinance of 1961 have so far survived its scrutiny. But one wonders for how long.

What then of the future?

All states in the Islamic world are involved in the debate of how relevant Islamic Law is, and should be, in the contemporary world. The debate involves as much as anything else a consideration of "what is Islamic Law?" For the majority of Islamic states it is my opinion that although the debate will carry on the reality will continue to be that Islamic Law will be less and less important in practice and that its expression even in areas such as family law will be codified along broadly similar lines. I think we will see in the next ten years or so family laws or codes promulgated in those remaining countries without such legislation: Qatar; the UAE; Oman; perhaps even Saudi Arabia. In Civil Law the trend towards a harmony of mainly Western with some Islamic Law input will continue. In Criminal Law those states that purport to apply Islamic punishments will be marginalized .

In summmary therefore I do not forsee a renaissance for Islamic Law except in its modern guise. The debate will certainly continue, but the reality will be at variance with it. This is not a popular opinion. But it is one based upon the expectations of ordinary people. After all to put it into an other context: the Prophet Muḥammad lived contemporaneously with St Augustine and converted the Arabs to Islam at the same time as Augustine converted the heathen English to Christianity. Islamic law was almost complete by the date of the Battle of Hastings. Islamic Law therefore accords with the flowering of Anglo-Saxon Law in England. To argue that Anglo-Saxon law has a direct relevance today and provides a complete and comprehensive code of laws would find few adherents in

England; yet this is the equivalent of what many Islamic traditionalists in an Islamic context would try to impose. I do not see the majority of forward-looking people in any modern Islamic state agreeing to this. But the debate as to the proper role of Islamic Law and its role in the modern Islamic state, will continue for a long time yet and will I am sure be a source of much future controversy.

The legal system of Iraq and the continuity of Islamic law

Ibrahim al-Wahab

In view of the vast changes and developments in the fields of law and government in the Arab-Muslim countries, the future of Islamic law (the *sharīʿa)* is of prime interest to scholars of Law and of Oriental studies. Some are of the opinion that in recent decades Islamic law has become a rigid institution or relic of the past. Others think that it is now less important in its application. Today about one billion Muslims are subject to Islamic law in one way or another. However, due to these changes and developments the question of the extent to which their socio-legal life is acually governed by it at the present time is more than academic. A detailed, comprehensive study is needed not only of the Arab countries which are linked together by common history, tradition, language and religion but of all Muslim countries. Notwithstanding that the Arab-Muslim countries have been subjected to foreign invasions, domination and colonization as well as Western influences and a modernization process, Islamic law seems to continue throughout the centuries as an essential part of the legal system. The case of Iraq may illustrate the development and the current place of Islamic law in the legal system of the country.

The legal tradition of Iraq goes back more than five thousand years. Twice in its history Iraq enjoyed a high reputation in the field of law and government. The first occasion was in Babylonian times when the country held pride of place among the nations by possessing a formal written law, namely the Code of Hammurabi, known from archaelogical evidence. The second was during the Abbasid Empire when Baghdad became the main center of Islamic jurisprudence and the capital of the largest centralized government of that time.

The famous Code of Hammurabi was not the first written law in the history of Iraq. The Sumerians around the 5th-4th millenium B.C. preceded Hammurabi in this respect. However, his Code was unique in both substance and form. The Assyrians and other dynasties which ruled Iraq during pre-Islamic times also had their own laws, customs and modes of government. Furthermore, in pre-Islamic times a considerable part of Iraq and the whole Arabian Peninsula were dominated socially,

legally and politically by a tribal system, in which the individual depended upon the protection of his tribe. The Arab customary law was a code of honor which gave him security and protection and regulated such family matters as marriage, divorce and inheritance. At a later stage the gathering of several tribes around a more powerful one created a rudimentary form of state.

The legal system of the various communities which lived in Iraq before the coming of Islam was thus a mixture of laws, customs, usages and traditional practices derived from the different existing local cultures. One of these was Arab culture.

Following the Islamic conquest of Iraq after the decisive battle with the Persians in 637 A.D. the conquerors settled down and established their own social and political system based on Islam's religious, social, ethical and legal standards. The different local cultures of the various communities gradually incorporated their laws, customs, usages and socio-legal practices in the new Arab-Muslim socio-legal and religious framework. The coming of Islam gave birth to a new law and a new system of government. Among other things it sought to overcome the differences between customs and tribes and unite the disparate communities under the new faith, invoking the well-known Qur'anic verse:

> "O mankind, we created you male and female and made you into nations and tribes, that you may know each other. Verily, the most honored of you in the sight of God is he who is the most righteous of you."[1]

Loyalty to one God and a single authority came into being. The religious tie was to replace tribal ties whereby the tribal blood bond was assimilated to a unified community or nation, the *umma*. One who adopted Islam had to abandon tribal customs and usages which were contrary to the principles of the new law and order. He must also surrender his tribal autonomy and alliances. This "theocratic" state based on the principles of unity, law and order, maintained its political authority by the idea of the sovereignty of God, head of the *umma* and the Supreme lawgiver. God's rule is absolute and His divine command was bestowed on Muhammad the Prophet who thus represented the Rule of God upon earth. This authority was then passed on to Muhammad's successors, the Caliphs, who were to be both the guardians of the Divine law and

[1] Abdullah Yusuf Ali, *The Holy Qur'an, translation and commentary*, Cambridge, Mass. 1946, vol. 1, p. 84, Sura 49:13.

directors of temporal affairs. The Caliph was therefore vested with temporal power in order to enforce the law, and his subjects were enjoined to obey him. This was expressed in the Qur'anic saying:

> "O you who believe. Obey God and obey the Messenger and those set in command amongst you!"[2]

The nature of Islamic law may best be described in the following formulation of the Arab philosopher and historian Ibn Khaldun:

> "Divine law seeks to prescribe the conduct of men in their affairs, their worship and their dealings, even those related to the state, which is natural to human society. The state, therefore, is patterned on religion, in order that the whole should come under the supervision of the Lawgiver."[3]

The development of Islamic law

On the foundation of the two sources, the Qur'an and the Hadith, the Islamic law developed into a detailed system. During the rule of the four rightly guided Caliphs, *ar-rashīdūn,* and during the Umayyad dynasty, Iraq became the base of the Muslim expansion to the east and a center of Arab-Islamic culture. It played a leading part in Islam's cultural, administrative and judicial development as well as in its political activities. In the sphere of the administration of justice the system of *arbitration* was reduced by the creation of the regular court of justice presided over by an appointed *qāḍī* (judge) – this since the reign of the Caliph Omar. Prior to that the Caliph and his representatives throughout the empire were in charge of both executive and judicial functions. The rapid development and expansion of the Islamic society and the complexity of its administration led to the separation of such functions and the creation of the different Schools of Jurisprudence. They enlarged the scope and application of man-made law based on the divine law.

During the Abbasid Empire from 750 A.D. Baghdad became the capital of the new Empire and the center of Arab-Islamic civilization. The classical schools of tradition and jurisprudence originating in Medina, Basra and Kufa moved to Baghdad, where they developed a flexible system by the method of *ijtihād,* which means personal elaboration or

[2] *The Holy Qur'an,* Sura 49:59.

[3] Ibn Khaldun, *An Arab philosophy of history,* transl. Ch. Issawi, London 1950, p. 135.

judgement. It attempts to find the suitable rule, or the true application of the Qur'an and the Traditions of the Prophet in a new situation. By *ijtihād* Islamic law could grow and develop in all of its fields: public and private, civil and criminal. Progress was made in the spheres of the administration of justice including the functions of the *qāḍī,* the administration of the central government, the activities of the provincial governors, the system of taxation, and army regulations.[4] Besides the systematization of the sources of law – how to use the Qur'an, the Sunna, the *qiyās* (analogy) and the *ijmāᶜ* (consensus) – two secondary sources gained acceptance: the first is *istiḥsān,* preference (similar to the concept of equity), and the second is *istiṣlāḥ,* interest, involving the amendments to rules relating to public policy derived from good will.

Some time during the twelfth century this development of the Arabic-Islamic society ceased. A main cause was the Mongolian invasion in 1258 A.D. Shortly thereafter disintegration and fragmentation of this once unified society began and Iraq entered upon the darkest period of its history. Various dynasties of Turkish and Persian origin ruled the country until the early part of the sixteenth century when the Ottomans occupied the country (in 1534 A.D.). It remained an Ottoman province until World War I.

Under these foreign rulers the decline of the Arabic-Islamic civilization accelerated. As far as the legal system is concerned, the door of *ijtihād* was closed and rigidity of the law prevailed. The *ijtihād* was replaced by imitation, *taqlīd.* Any change in the law was regarded as an evil innovation, *bidᶜa.* This state of affairs continued until the nineteenth century when, as a result of Westem influence, the Ottomans began to adopt a series of reforms.

The legal system under Ottoman rule

For more than four centuries Iraq was a province of the Ottoman Empire. The Empire itself was an Islamic state and its legal system was based on Islamic law. All its ruling power was vested in the absolute monarch, the Sultan, who was represented in the provinces by governors. The administration of justice was directed from Istanbul. Iraq's territory was divided into three major political divisions, *wilāyats:* the

[4] J. Schacht, Pre-Islamic background and early development of jurisprudence, ch. 2 of *Law in the Middle East,* ed. M. Khadduri and H. J. Liebesny, Washington 1955.

Mosul *wilāyat,* the Baghdad *wilāyat* and the Basra *wilāyat,* each administered by a governor whose chief task was to collect taxes and maintain law and order.

Early in the nineteenth century, as a result of Western influence and the modernization process, a number or laws, largely of Western origin, were introduced. They were in the areas of criminal, commercial, and maritime law, and of civil and criminal procedure. The majority were derived from French, German and Swiss laws. These new laws were established and developed under the Reform of 1839, called the Tanzimat, by an Imperial decree. Additional reforms along the same lines were enacted in the *khaṭṭ-i humayun* (Imperial decree) of 1856.[5] Subsequently there was a continuous increment of Western laws which led to the enactment of a mass of *ad hoc* legislation. As a result of these changes we find that in the spheres of criminal and commercial law the application of Islamic law was limited to some extent. A substantive proportion of civil law remained unchanged, as was prescribed in the Ottoman *majalla,* which was the Islamic civil law, except, however, as regards the adoption of some provisions and procedures from the above-mentioned European sources.

These changes brought both multiplicity and variation into the judicial system of Iraq. Many types of court came to be recognized, most of which still exist. There were naturally the Sharī^{c}a courts presided over by the *qāḍīs.* Their jurisdiction was now limited to family matters such as marriage, divorce, inheritance and guardianship.

The Nizamiya courts were of more recent origin and had jurisdiction in both criminal and civil cases. Their organization and procedure were largely based on French models. They were separated into two divisions: the Civil and the Criminal Divisions.[6] The Civil Division of the Nizamiya courts were known as the Courts of First Instance, the Commercial Courts and the Peace Courts. These courts had jurisdiction in civil and commercial matters. The Criminal Division of the Nizamiya courts were known as the Criminal Courts. They dealt with crimes, misdemeanours and contraventions, categories drawn along the lines of the French penal code. Then there were the Courts of Appeal: they had jurisdiction in cases already decided by lower courts. The highest level was the Court of

[5] Longrigg, S. H., *Four centuries of modern Iraq,* London 1925, pp. 280-289.

[6] Khadduri and Liebesny, *op. cit.,* pp. 284-291.

Cassation. It had jurisdiction over the decisions of the Civil and Criminal Courts and was located in Istanbul.

These were the general features of the Iraqi legal system until the onset of British rule in 1914, during the First World War. It may be recalled that during the later period of the Ottoman Empire many laws of Westem origin were introduced. Most of the changes concerned the law of procedure and criminal law, not civil law and family law.

The legal system under British rule

The general principles adopted by the British for the administration of the country evolved after much trial and error during the occupation period (1914-1920). They first tried to abrogate the Ottoman system of administration of justic and laws and to introduce their own legal system. This was embodied in a new code, called the Iraqi Occupied Territories Code, derived from Anglo-Indian civil and criminal laws. It was promulgated by the British Army Commander in August 1915.[7] This new code, however, was in force only in the Basra Wilāyat from the beginning of the occupation in 1914 and would eventually be expanded when the rest of the country was occupied.

The British encountered many difficulties in carrying out their new system of justice. In the first place, the inhabitants of the Basra Wilāyat were unfamiliar with the alien institutions and laws. They were further confused by the fact that the government administration, including trials, was conducted in English rather than in Arabic. Moreover, the people feared that this code would abrogate the already existing laws, including Islamic law, and regarded this as an indication of political change in the status of Iraq.[8] It was felt that the British intended to put Iraq under the direct control of India which was in turn under their control. As modern historians have pointed out, the Code, in its provision and the manner of its application, seems to have made little distinction between India and Iraq. It was intended to pave the way for the absorption of lower Mesopotamia into India.[9]

This created more confusion and dissatisfaction among the people.

[7] *Iraq, Iraq Occupied Territories Code, 1915,* Bombay 1915.

[8] *Iraq, Review of the Civil Administration of the Occupied Territories of al-Iraq, 1914-1918,* Baghdad 1918, pp. 52 f.

[9] Ireland, Ph., *Iraq: a study in political development,* London 1937, pp. 83 f.

To overcome the resistance, or to appease it, numerous orders, proclamations and notices were issued - all to little avail. About three years after the inception of the Code the British acknowledged their failure. They evidently realized that the people had been accustomed to the laws and courts for a considerable time, and Government officials had been trained in the existing laws and legal procedures. Therefore, the abandonment of the existing legal system would not only cause serious inconvenience to the inhabitants of the country but also deprive the courts of any effective assistance from local judges and officials, not to mention the fact that the imposition of a radically different system of government and laws in an occupied country was contrary to the principles of international law as prescribed in the Hague Conventions of 1899 and 1907. It is important to point out, in this connection, that no law, i.e. a living law, can be suppressed completely, especially when the law replacing it is foreign to the traditions and way of life of those upon whom it is imposed.

By the time the Baghdad Wilāyat was occupied in 1917, the British felt the need to change their policy. Upon entering Baghdad General Maude's proclamation made it clear to the people that the Iraqi Occupied Territories Code would not be introduced in this Wilāyat.[10] He assured them that the existing institutions and laws would remain in force unless it was necessary to have them replaced or amended. In 1918, the two wilāyats, Basra and Baghdad, were merged and the judicial system and laws of both were consolidated along the lines of the Ottoman legal system.[11] This policy was welcomed by the population since it replaced a foreign system of law and procedure by one with which they were already familiar. In the following year the Mosul Wilāyat was brought under the same system.

Between 1914 and 1920 the separation of the judicial from the executive power was hardly considered by the British authorities. All powers, judicial, executive, administrative and financial, were vested in the military or political officers who were in charge of the headquarters of the cities and towns representing the authority or the Civil Commissioner. Generally, from the establishment of the Iraqi government in 1921

[10] *Iraq, Compilations of proclamations, notices ... issued in Iraq from October 1914 up to August 1919,* Proclamation No. 9.

[11] *Iraq, Basra Court's Amalgamation Proclamation by the General Officer Commanding, Dec. 24, 1918,* Baghdad 1918.

under the British mandate, up to its termination in 1932, many of the old laws were replaced, especially those pertaining to civil, commercial and criminal matters. In their place modern legislation was enacted. The Criminal Law and the Law of Criminal Procedure were modified and the change was incorporated in the new Baghdad Penal Code and the Baghdad Criminal Procdure which became effective in 1919.[12] Many features of the Ottoman Penal Code and of the Ottoman Criminal Procedure were retained. In its final form the Constitution of 1925 recognized three classes of court: the Civil Courts dealt with civil, commercial and criminal matters; the Religious Courts dealt with personal status and matters related to the religious trusts *(awqāf)*. This system also included the councils of the Christian and Jewish communities, which dealt with all matters connected with personal status and family law. There were also Special Courts such as the High Court, intended to try ministers, members of parliament and judges of the Court of Cassation; Military Courts and Tribal Courts. The latter were to try tribesmen in accordance with the Tribal Dispute Regulations. Those courts were administered by administrative rather than judicial officials, in accordance with the Regulations, without reference to the ordinary courts of the country.

The legal system since independence

Since independence, and despite the setbacks and interruptions, Iraq has made important strides forward. Its evolution has been significant in many fields of life. In the judicial sphere its laws, legal institutions and system of courts have advanced considerably: the number of Sharī^{c}a Courts, Courts of First Instance, Magistrates' Courts, Courts of Appeal and Peace Courts has increased.[13] New laws based on modern concepts of legislation have been enacted. A new civil law was adopted in 1953, based largely on the Egyptian civil law.[14] This law superseded the Ottoman *majalla*. A large proportion of this new civil law is based on the principles of Islamic law, but without being limited to the teaching of any

[12] *Iraq, Report on the administration of justice, 1919,* Baghdad 1919, p. 4.

[13] Government of Iraq, *The Organic Law of Iraq and amendment (The Iraqi Constitution),* Baghdad 1925. For further information concerning the Court's system see articles 71-88 of the Constitution.

[14] *Iraq, The Iraqi Civil Law,* Baghdad 1953, law no. 40, 1951, became effective in 1953.

of the classical Schools of Jurisprudence. The Law of Civil Procedures was amended several times until the passage in August 1956 of a new law, which became known as the Law of Civil and Commercial Procedure. A more comprehensive Law of Civil Procedure was enacted and came into force in 1969. The Criminal Law of 1918 was amended several times and in 1969 a new law was adopted which was followed by a number of amendments. Likewise, the Law of Criminal Procedure of 1919 was amended several times until the adoption in 1971 of the new law, which is based on modern legislation. The Labor Law was amended several times and superseded by a new one in 1971. In 1959 a new law of personal status was enacted. It was drawn from the previous Islamic law and the different classical schools.[15] Shortly thereafter a Court of Personal Status was established side by side with the Sharīᶜa Courts. These courts have jurisdiction in matters of family relations for the non-Muslim communities and for foreigners whether Muslims or non-Muslims.

Generally, during this period until the present time, new laws and regulations were passed, based on modern legislation. At the same time many of the old ones, which were no longer adequate to the current stage of the country's development, were replaced. Briefly, Iraq has been able since its independence, and particularly during the republican regime from 1958, to develop its legal system and administrative structure to a higher level than it has known for centuries.[16]

As it appears, and by virtue of the development of the Iraqi legal system, many sources of law were incorporated and merged with Islamic law. These sources are: French, German and Swiss, Anglo-Indian and Egyptian laws. They became the historical sources of Iraqi laws. Beside these there are formal and informal sources from which the judiciary derives its authority and coercive force. Article 1 of the Civil Law classified these sources into two categories: the formal and the informal sources. The formal sources are the legislation, customs, Islamic law (the Sharīᶜa) and equity. The informal sources are the judicial decisions or precedents and the juristic opinions. Thus, when an Iraqi judge decides upon a case, he first applies the statute, i.e. the enacted law. If there is no provision in the statute which governs the case he has to apply the custom, and if there is no custom, he follows the principle of Islamic law. If there is no rule applicable to the case he then makes his decision in

[15] Zidān, ᶜAbdalkarīm, *Introduction to Islamic Law*, Baghdad 1966 (in Arabic).

[16] Government of Iraq, the Iraqi Official Gazettes, 1958-1993.

accordance with principles of natural law or the rules of equity. He may also base his decision on previous juducial decisions (precedents) or on juristic opinions.

In conclusion, we can state that for many centuries Islamic law was the general law of Iraq as well as of other Muslim countries. In modem times it is still considered so in some Muslim states such as Saudi Arabia, Sudan, Pakistan, Iran and Libya whereas in Iraq and other Muslim countries such as Egypt, Syria, Tunisia, Morocco etc. Islamic law in some instances became a *source* of legislation but remained to a high degree the substantive civil law and the principal family law. However, it should be pointed out in this connection that, since the beginning of Islam, the general rule was that all new laws, customs, social and legal norms that were created, incorporated or adopted from other sources should conform to the Islamic legal, ethical and religious rules. This rule still prevails in the Arab-Muslim countries. Practically all their constitutions, including that of Iraq, prescribe that Islam is the religion of the state. Article 4 of the Constitution of Iraq of 1970 laid down that "Islam is the religion of the State" which clearly implies that no law shall be enacted contrary to the principles of Islam. Islamic law has a tendency to absorb and incorporate new laws, changes resulting from the modernization and development processes which have taken place. It may be recalled that the period of *ijtihād* which contributed to the growth and development of Islamic law produced a flexible legal system. This tendency still exists. The legislation has taken over the role of the classical Schools of Jurisprudence in the sense that the *ijtihād* became the function of modern legislation. New laws, Amendments and changes should not be contradictory to the principles of Islamic law. Islam is regarded as "a religion and state", thus religious rules and legal rules are not separated but complementary to each other. Accordingly, wherever there is a Muslim community there is also Islamic law governing it to a greater or lesser degree.

Sunnah, Qur'ān, ᶜUrf

R. B. Serjeant

In this paper I shall treat of the so-called "Constitution of Medina" and certain Qur'ān passages related to it, ᶜUmar's supposed letter to Abū Mūsā al-Ashᶜarī[1] on the office of *qāḍī,* Yemeni customary law codes on *manᶜah,* Bā Ṣabrayn al-Ḥaḍramī's *al-Manāhī al-rabbāniyyah* and other studies, drawing upon my researches completed and not yet completed. The two last named works have not yet been published[2] but I have been working on them for a numbers of years. I shall also refer to Aḥmad Oweidi al-ᶜAbbādī's Cambridge thesis *Bedouin law in Jordan* which Edinburgh University Press has agreed to publish. With Muslim theories on how *sharīᶜah* was formulated I am not directly concerned, but with the history of Arabian law that preceded the *sharīᶜah* and which, termed *ᶜurf* or *ᶜādah,* persists till today, apparently little changed in principle or practice since the pagan Jāhiliyyah age. From this ancient Arabian law branches off the Islamic *sharīᶜah* as a divergent, modifying and adding to it. The theory that Islamic law derives from the Qur'ān supplemented by the Sunnah, then *ijmāᶜ* consensus, and analogical reasoning *(qiyās),* does not reflect the initial historical circumstances of Islam.

First of all the notion of a break, a line separating the Jāhiliyyah from Islam is to be abandoned. Contemporary researches on the south Arabian inscriptions and indeed in Arabic literature itself show ever more clearly how unacceptable it is, and nowhere is this more evident than in the Sunnah. For the purposes of this paper a sunnah in its legal context may be defined as a legal decision taken by an arbiter in a case brought

[1] See my The 'Constitution of Medina', *Islamic Quarterly,* London, 1964, VIII, pp. 3-16; 'The *Sunnah Jāmiᶜah,* Pacts with the Yathrib Jews and the *taḥrīm* of Yathrib: Analysis and translation of the documents comprised in the so-called Constitution of Medina', *BSOAS,* London, 1978, XLI, pp. 1-42 (& Variorum reprint, 1981). 'The Caliph ᶜUmar's letters to Abū Mūsā al-Ashᶜarī and Muᶜāwiya' *JSS,* Manchester, 1984, XXIX, pp. 65-79 (& Variorum reprint, 1991). *Cambridge History of Arabic Literature* 'Early Arabic Prose', 1983, pp. 122-151. 'Materials for South Arabian history', *BSOAS,* 1950, XIII, part 2, pp. 589-93.

[2] The *manᶜah* codes are in the corpus of Yemenite material collected by the late Ettore Rossi and the Tarīm *Kitāb al-Ādāb wa-'l-lawāzim fī aḥkām al-manᶜah* upon which I am working. Bā Ṣabrayn's *al-Manāhī* in transcript I have begun to translate and annotate. See also E. Rossi, 'Il diritto consuetudinario delle tribù arabe del Yemen', *RSO,* Rome, 1948, XXIII, pp. 1-26.

before him that has become a precedent, a custom. One has to envisage a long series of arbiters before Islam, such an office being hereditary in certain noble houses, as noted in the literature.[3] The Prophet Muḥammad was an arbiter in this continuity of tradition and the theocracy he founded succeeded many others; it has been followed by numerous Islamic sub-theocracies if one may use such a term, within and without the Arabian Peninsula. In fact, so far from regarding Muḥammad as bent upon a policy of innovation, one has to conceive of him as born into a society regulated by a continuous series of sunnahs stretching from a remote past into the Islam of his day, and even beyond his supreme lordship of that theocracy.

A virtue of this system of case law is that a new sunnah may be established to replace an existing sunnah and in a sense the Prophet may be regarded as ratifying some sunnahs and replacing others – the changes were probably relatively few, but of course they are of premier importance. It may be a survival of the possibility of the modification or repeal of an earlier ruling in the practice continuing and inherited from the pagan age that al-Dārimī can cite a Tradition remounting to al-Awzāʿī[4] (88-157 H.): *Al-sunnah qāḍiyah ʿala 'l-Qur'ān wa-laysa 'l-Qur'ān qāḍiyah ʿala 'l-sunnah,* which I understand to mean that in the event of a conflict of law between the Qur'ān and the Sunnah, the latter is decisive. It is to be remarked that the two oldest *madhhabs* (regarded by the Sunnīs as heretical), the Ibāḍī and the Zaydī, make the Sunnah overrule the Qur'ān where there is conflict. Parallel to this, in Jordan of this century tribal law precedents are susceptible to modification, even replacement, by a properly qualified hereditary judge.

The *Fihrist*[5] notes that Hishām b. Muḥammad al-Kalbī (ob.206/821-2) composed a writing/book *(kitāb)* on what the pagan age (al-Jāhiliyyah) used to do and which accords with the judgement *(ḥukm)* of Islam. A

[3] Ibn ʿAbd Rabbi-hi, *al-ʿIqd al-farīd,* Cairo, 1359-72/1940-53, I, p.30 states that ʿAbdullah b. ʿAbbās wrote to al-Ḥasan b. ʿAlī when the people made him their ruler after ʿAlī: *Walli ahl al-buyūtāt tastaṣliḥ bi-him ʿashā'ira-hum,* Put men of noble houses in charge and through them you will make their tribes well affected (to you).

[4] *Sunan,* Dār Iḥyā' al-Sunnah al-Nabawiyyah, n.d., I, p.144. Al-Awzaʿī was the Imām of the Syrians especially.

[5] Ibn al-Nadīm, *al-Fihrist,* Cairo, n.d., p.147. Cf.Ibn Ḥabīb, *al-Muḥabbar,* Ḥaydarābād, 1361/1942, p.236.

pre-Islamic poet cited by Ibn Durayd's *Ishtiqāq*[6] as judging in the age of paganism, a judgement consistent with the Sunnah of Islam, is probably quoted from Ibn al-Kalbī's *Kitāb,* not now extant, but drawing no doubt on his father's data. It is of course the other way round – the Islamic Sunnah is inherited from the pre-Islamic era.

The Prophet Muḥammad was the scion of an honourable house, exercising a sort of theocratic control of the Ḥaram of Mecca, but himself of small political consequence. Falling out with his tribe, Quraysh, he found protection with the tribes of Yathrib/Medīnah who sought a neutral arbiter-leader to put an end to their quarrels. At Yathrib he built up a politico-religious ascendancy and in the course of his first year there he arranged two pacts that form part of the document inaptly known in Europe as the "Constitution of Medina". This is the first Islamic document that survives, elements of the Qur'ān apart.

My analysis of it lies before you, and I shall henceforth refer to it as the EIGHT DOCUMENTS of which it consists. The first two of the documents I identify as *al-Sunnah al-Jāmiᶜah,* the two first pacts of Year I which form a united Muslim community, *ummah,* the nucleus around which that community developed. The first document establishes a tribal confederation, basically security arrangements, the second adds supplementary clauses to it. The signatories to them have not been preserved, but since the *mu'minūn* and *muslimūn* of Quraysh and Yathrib are cited in the preamble it can be assumed that they were the Prophet's Quraysh followers from Mecca who had taken protection in Yathrib, and the chiefs, *naqībs* and *sayyids* og the Arab tribes of Yathrib. Even certain Jewish notables may have been included, but the Jews may have been represented by the Arab chiefs to whom they were allied in a secondary capacity as *tābiᶜūn.*

These two documents, the *Sunnah Jāmiᶜah,* are so sophisticated and well drafted that the existence of earlier models may be postulated, and it

[6] *Al-Ishtiqāq,* ed. ᶜAbd al-Salām Hārūn, Cairo, 1378/1958, pp. 389, 393. A case in point of a pre-Islamic *sunnah* reported by al-Bukhārī on the authority of ᶜĀ'ishah, is *nikāḥ al-istibḍāᶜ,* a form of marriage which Beeston identifies with a piece in the Sabaic text C. 581, where a surrogate father is involved. This also gives a different aspect to the maxim *al-walad li-'l-firāsh.* The institution of *istibḍāᶜ* by the third Islamic century, would doubtless be condemned by the *fuqahā',* whatever might in practice exist, as inconsistent with the *sunnah* of Islam. See my *'Zinā',* some forms of marriage and allied topics in Western Arabia' in the forthcoming Walter Dostal Festschrift.

so happens that Christian Robin and J.-François Breton[7] have discovered a Sabaic inscription at Jabal al-Lawdh in north-east Yemen which they describe as "le pacte de fédération des tribus". While there are uncertainties about the exact rendering of the inscription there can be little doubt about its general import. An approximate rendering into Arabic might be: *"Yawm aqāma kull qawm dh(u/a) Ilah wa-shaym wa dh(u/a) ḥabl wa-ḥumrah"*. When he (the *mukarrib*) organized (?)/joined together(?) every community group (Sabaic *gw*^{m}) of 'Il (God) and (possessed) of honour, and which has a pact and a writing in red. *Shaym* in colloquial Yemeni Arabic means "honour", *wafā, sharaf*[8] etc., and the Zaydī Imāms sprinkle red powder on documents, and the Prophet wrote on the red leather of Khawlān.

While the sense of the inscription is still speculative, the *ḥabl Allāh* (pact of God) of the Qur'ān, iii,103, in the verse *wa-'taṣimū bi-ḥabli 'llāhi jamīʿan wa-lā tafarraqū wa-'dhkurū niʿmata 'llāhiʿalay-kum idh kuntum aʿdā' wa-allafa bayna qulūbi-kum* is obviously the pact, the *Sunnah Jāmiʿah,* which put an end to tribal squabbles at Yathrib and founded the *Ummah.* No actual *ḥabl* on the lines of the *Sunnah Jāmiʿah* has yet come to light from pre-Islamic Arabia but one yet may – just as the rules for the pilgrimage at Itwat have been shown by Maḥmūd al-Ghūl[9] to resemble the *manāsik al-ḥajj.* But the establishment by Muḥammad of a confederation – the *Sunnah Jāmiʿah,* under theocratic rule was clearly an Arabian practice, well established.

The *Sunnah Jāmiʿah,* A, rules that each tribal group will deal with the major issue in tribal law, that of the responsibility for blood money (to which it adds ransom) according to *al-maʿrūf,* recognized custom. In this area of law the Prophet hereby gave positive sanction to *ʿurf* – indeed his general policy appears to follow existing custom. But the most significant proviso is in B,4. "In whatever thing you are at variance, its reference back is to Allāh, Great and Glorious, and to Muḥammad, Allāh bless and honour him". It is this clause that sets up the theocratic confederation headed by Muḥammad.

Following the Qur'ān verse quoted above, *sūrah* iii, 104, runs: "And let

[7] 'Le Sanctuaire préislamique du Gabal al-Lawḏ (Nord-Yemen)', *Comptes-rendus, Académie des Inscriptions et Belles-Lettres,* Paris, 1982, pp. 590-629, especially pp. 616-7.

[8] *Shaym* was thus defined to me by Sayyid Aḥmad al-Shāmī.

[9] 'The Pilgrimage at Itwat', *Proceedings of the Seminar for Arabian Studies,* London, 1984, XIV, pp. 33-41.

there be of you an *Ummah* (confederation) inviting to good and ordering what is customary/recognized *(al-maʿrūf)* and prohibiting what is unrecognized *(munkar)*". The question at once arises – with regard to both verses – did the Qur'ānic injunctions to "have recourse for protection to the pact *(ḥabl)* of Allāh as a collective group" and "let there be of you an *Ummah*" follow or precade the Prophet's concluding of the two pacts which are the *Sunnah Jāmiʿah?* It may be argued either way, but I think the *Sunnah Jāmiʿah,* A, preceded the Qur'ān verses, because the *ḥabl Allāh* as quoted in them appears to be something already in existence and they are giving it sanction.

The injunction to appeal in disputes to the Prophet as ultimate arbiter occur several times in the Qur'ān, but to the passage containing one of these injunctions that figures in *sūrah* iv,58-60, I did not give full consideration in my original study. This looks to reflect a development following, perhaps quite soon, the conclusion of *Sunnah Jāmiʿah,* B, to which it is related. Ommitting redundant phrases perhaps inserted at the Prophet's redaction, the passage runs: "Allāh commands you (plur.) to give back the pledges *(amānāt)*[10] to their owners, and when you judge between the people to judge with justice . . . O those who have trusted/believed *(āmanū),* obey Allāh and obey the Apostle and those of you in command, and if you dispute over something refer it back to Allāh and the Apostle". The Qur'ān then rebukes those maintaining they have trusted/believed in what was revealed to the Prophet but yet wish to take one another to the *Ṭāghūt* though ordered to disbelieve in him. The *Ṭāghūt,* called *al-kāhin al-Ṭaghūt* by Ibn Ḥabīb[11] is the pagan soothsayer-judge. "Those of you in command" will be the *naqībs* and sayyids of the Aws and Khazraj tribes.

I must digress a little to discuss this passage on pledges on which I hope to write a paper. In the legal procedure known as *munāfarah* or *nifār* the two contending parties each deposited an article with a judge. The loser also lost his plegde to the winner of the case. *Munāfarah* cases as reported

[10] Muhammad's Farewell Speech at the Ḥajjat al-Wadāʿ, repeats the injunction of Qur'ān, IV, 58-60: 'With whomsoever there is an *amānah* let him pay it back to him who entrusted him with it'. I regard the Speech as a dramatisation with a chorus, drawing largely on the Qur'ān. This injunction is given a general application, but cf. Qur'ān, ii, 283 which relates to a different situation.

[11] Ibn Ḥabīb *al-Munammaq,* Ḥaydarābād, 1384/1964, p. 111.

by Ibn Ḥabīb[12] appear to have an air of fantasy about them till it is realised that they are honour *(sharaf)* cases. Infringement of, or challenge to a tribesman's honour is a serious matter then and now and might even lead to a murder. So a *munāfarah* means much the same as a *muḥākamah*.[13] In Jordan[14] and Beersheba this century the loser's pledge went as a fee to the arbiter. A Yemeni Ms. on tribal law of not later than circa 500 H. which I am editing states: "When two litigants plegde a pledge with a trust worthy party *(thiqah)* and the case *(al-ḥaqq)* goes against one of them, the trustworthy party is allowed to retain the pledge until the party against whom the case has been decided acquits himself of his liability". My *Kitāb al-Ādāb wa-'l-lawāzim fī aḥkām al-manᶜah* (circa 1300 A.D.), of which more below, expatiates on this theme in the same vein. Al-Qurṭubī in *al-Jāmiᶜ li-aḥkām al-Qur'ān*[15] is only authority consulted by me who seems to interpret the passage correctly. He says the *amānāt* are articles deposited *(wadīᶜah)*, pledges *(rahn)*, etc. with governors *(wulāh)* and they are returned to their owners, the innocent and the guilty.[16]

[12] Ibid., p.94 passim. Cf. my 'The White Dune at Abyan: an ancient place of pilgrimage in Southern Arabia', *JSS*, XIV, 1971, pp. 74-83, a case over an accusation of bastardy.

[13] The Caliph ᶜUmar uses *muḥākamah* for Zuhayr's *munāfarah*.

[14] Ahmad ᶜUwaiḍi/Oweidi al-ᶜAbbādī, *Bedouin justice in Jordan*, Cambridge Ph.D. thesis 1982 (in press) & ᶜĀrif al-ᶜĀrid, *al-Qaḍā' bayn al-badw*, Jerusalem, 1933.

[15] Cairo, 1377/1958, V, p.256.

[16] I recall hearing in South Arabia that judges with whom litigants have placed a deposit are sometimes reluctant to return them to their owners after the case has been settled. It may have been to avoid this that the Qur'ān, IV, 68-60 was revealed or alternatively it was to abolish an existing custom of the judge taking the loser's pledge as a fee. In an honour case in *al-Munammaq*, p.107, a pledge is deposited with a third party not the *kāhin*-jugde. I found a pledge-holder *(ᶜadalī)* might be a person different from the arbiters ('Two tribal law cases' II, *JRAS*;London, 1951, p.161). *ᶜAdl*, meaning a deposit occurs in Qur'ān, II, 47, 123, the former quoting the *Sunnah Jāmiᶜah*, Doc.B, 3a, the latter also linked with it, as is Qur'ān, VI, 70. These passages might be dated to year 1 og 2. Weapons were used as a pledge in the Prophet's time (Ibn Hishām, *Sīrah*, ed. Saqqā et alii, Cairo, 1375/1955, II, p.55. I have noted, 'The White Dune at Abyan', *JSS*, Manchester, XVI, 1971, in an honour case, 15 muskets and 100 camels pledged before a sort of trial by ordeal. Perhaps honour cases come into Islam as *qadhf* cases. After the trial *lawm* money is paid over.

In an honour case immediately preceding Islam between the Bajīlah and Kalb tribes 'they made arbiter *(ḥakkamū)* al-Aqraᶜ b. Ḥābis and placed pledges *(ruhūn)* in the hands of ᶜUqbah b. Rabīᶜah b. ᶜAbd Shams al-Qurashī among the nobles *(ashrāf)* of Quraysh'. Each party when asked for a guarantor *(kafīl)* of fulfilment (*wafā*, of the judgement?) nominated several pagan gods where recent Ḥaḍramī documents in my hands nomi-

To return to the EIGHT DOCUMENTS – three shorter pacts deal with the client-ally relationships of the Jewish, and probably one Christian, tribes to the Arab Aws and Khazraj. With their disappearance from Yathrib-Medīnah these pacts have only historic interest and are unrelated to subsequent Islamic legislation on the status of the Jews in the Muslum community. Document G of the EIGHT is the treaty of mutual protection concluded before the so called battle of the Trench by the Muslim groups in Yathrib to which the Jews of Aws subscribed. Two documents that define the regulations for creating and regulating the sacred enclave, the Ḥaram, of Yathrib now named *Madīnat al-Nabiyy,* are important and valid, in principle, today.

To sum up, the *Sunnah Jāmiᶜah,* i.e. the EIGHT DOCUMENTS, A and B, are the basis, the founding charter, of the Muslim community, the *Ahl al-Sunnah wa-'l-Jamāᶜah,* laying down the principles for its unity and making it possible for others to join the *Ummah – man tabiᶜa fa-laḥiqa bi-him.* Muhammad is in this the *mujammiᶜ,* the uniter, probably like the *mukarribs* and others in Arabia before him.

It is astonishing that the ulema of the 2nd hijrah century onwards should have relatively neglected it – yet there are two clear quotations from it in the Qur'ān. I think other passages in the Qur'ān, if studied carefully, would be seen to reflect the *Sunnah Jāmiᶜah* and possibly others of the EIGHT DOCUMENTS. For instance *sūrah* II,40-48 I hold as adressed to the Jewish Banū Qurayẓah at the confrontation at al-Khandaq, the Trench, the last verse clearly couched in terms of the *Sunnah Jāmiᶜah* B & A. Phrases from the EIGHT occur in the great Tradition collections. If collected and studied the alterations or accretions to them in the course of transmission would emerge, and what is undeniably genuine would be established. (The EIGHT are patently genuine in themselves and, in contrast to the Qur'ān, show no sign of redaction). This might prove a corrective to what is over-destructive in the work of Goldziher and Schacht.

The *Sunnah Jāmiᶜah* remains a reference of central importance for at least a century and a half. The Prophet's death left the Medinan tribes in

nate Allāh as *kafīl. The Naḳā'iḍ of Jarīr and AlFarazdaḳ,* ed.A.A. Bevan, Leiden, 1905, I, p.140.

I noted from the late Sayyid Ṣāliḥ b. ᶜAlī al-Ḥāmid in Ḥaḍramawt: *Ṭaraḥū ᶜadā'il bayna-hum fī mā jarā,* They put down pledges between them over what had taken place. I.e. over an incident.

a quandary over his successor. A piece missing from the published text of Ibn Aʿtham's *Futūḥ,* but discovered by Miklos Muranyi,[17] provides valuable new information about the eventful meeting at the Saqīfah of the Banū Sāʿidah at which the problem was discussed. Ibn Aʿtham reports that Thābit b. Qays, orator of the Anṣār before and during the Prophet's time, stated that the Prophet "has gone out of the world without designating a particular man as successor and he entrusted the people to only such of the Qur'ān and the *Sunnah Jāmiʿah* as Allāh made (His) agent/trustee/guardian *(wakīl)* and Allāh will not unite *(yajmaʿ)* this *Ummah* on (the basis of) error". One has to consider the possibilities either that this statement was invented to refute the Shīʿah doctrine that the Prophet made a *naṣṣ* designating ʿAlī b. Abī Ṭālib as his successor, or that the Shīʿah historians such as al-Yaʿqūbī[18] deliberately excised it from their account of the Saqīfah. My own view is that the fundamental position of the *Sunnah Jāmiʿah* with regard to the *Ummah* meant that it would be in the minds of all present at the Saqīfah meeting. I regard the statement as authentic, and the Prophet's inaction on the issue of succession to himself as deliberate and for good reason – I hope to develop this theme in another paper.

The first major crisis in Islam came with the murder of the third Caliph, ʿUthmān, the conflict between ʿAlī b. Abī Ṭālib and Muʿāwiyah, the relation of ʿUthmān, their confrontation at Ṣiffīn[19] and the treaty of arbitration concluded between them in 36/656-57. This treaty consists of three brief and distinct agreements concluded at different times. The first rules that the arbitration will be made in accordance with the *Qur'ān alone.* The second adds *"wa-'l-sunnah al-ʿādilah al-jāmiʿah ghayr al-mufarriqah",* the just uniting sunnah, not the dividing sunnah, thus contradicting the first agreement. Why? My solution would be that the political leaders on either side would be more directly acquainted with the *Sunnah Jāmiʿah* with its clear cut provisos, than they would be with the Qur-ān – anyway the *Sunnah Jāmiʿah* is essentially a tribal confederal agreement though concluded under the aegis of Allāh. Again, following

[17] 'Ein neuer Bericht über die Wahl des ersten Kalifen Abū Bakr', *Arabica,* Leiden, 1978, XXV, pp. 233-60. A slight emendation has to be made (p.239, line 17). The second *inna-mā* should read *ilā mā.*

[18] Al-Yaʿqūbī, *Tārīkh,* Beirut, 1379/1960, II, p.123, alludes to Thābit b. Qays, the orator but states only that he mentioned the *faḍl* of the Ansār.
Ṭabarī, *Tārīkh,* II, I, p.508, Year 65, Qur'ān, III, 103, & *Sunnah Jāmiʿah* B, 2a.

[19] For my discussion of the Ṣiffīn arbitration documents see *CHAL,* I, pp. 142 seq.

the slaying of Ḥusayn, son of ᶜAlī b. Abī Ṭālib, at Karbalā', it is to the *Kitāb Allāh* and the Sunnah of His Prophet that al-Murrī appeals to avenge his death. This can only be the *Sunnah Jāmiᶜah,* not just a vague body of sunnahs. So the *Sunnah Jāmiᶜah* seems to be known variously as the *Sunnat Rasūl Allāh, Sunnat Nabiyyi-hi,* sometimes as the *Ḥabl Allāh.* The poet al-Farazdaq[20] says of the Umayyad Caliph Hishām: *"Ḥabl Allāh ḥablu-ka,* The pact bond of Allāh is your pact bond". By this is to be understood the protection afforded by Allāh's pact, i.e. the *Sunnah Jāmiᶜah.*

The *Sunnah Jāmiᶜah* continued important in Shīᶜah eyes and the Imām Jaᶜfar al-Ṣādiq defines it as consisting of 30 clauses – this exactly fits the length of the first three documents of the EIGHT, but includes document C which establishes the client-ally relation of the Jewish to the Arab tribes of Yathrib.

In the historical writing of the first Islamic century and a half it should be attempted to distinguish when the *sunnat al-Nabiyy/Rasūl* means the *Sunnah Jāmiᶜah,* the sunnah par excellence of the Prophet, and when it comes to mean, early no doubt, Muḥammad's sunnahs in general. In this connection I would draw attention to a study that has not received the attention it merits, M. M. Bravmann's *The Spiritual background of early Islam* (1972), notably the chapter "Sunnah and related concepts"; I concur in his refutation af Schacht's theory on the "Sunnah of the Prophet". Bravmann's discussion of the phrase *sunnat Rasūl Allāh wa-sīratu-hu* suggests to me a possible distinction between the *Sunnah Jāmiᶜah* and decisions made by the Prophet in a relatively routine way – but this requires further study.

It is strange that in the nine major works on Tradition covered by the Wensinck *Concordance et Indices* the term *Sunnah Jāmiᶜah* does not appear at all, although Muslim *(zakāt* 139) does quote: *A-lam ajid-kum ḍullāl-an . . . wa-mutafarriqīna fa-jamaᶜa-kum Allāh bī?* Dit I not find you in error . . . and split apart, then Allāh brought you together through me? Cf. Qur'ān,iii,103,supra. How could the Traditionists ignore so important a document?

The massive contingents of Arab tribesmen that moved into Syria and the cantonment cities of southern Iraq can hardly have had recourse to other than their existing arbiters and chiefs in legal matters and the

[20] A.A. Bevan, *The Naḳā'iḍ of Jarīr and AlFarazdaḳ,* Leiden, 1905-08, II, 1013. The verses are an important indication of the attitude of the time to the sunnah.

inherited tradition of the pagan age. The *Waqʿat Ṣiffīn*[21] indeed says that at the time of the *fitnah* between ʿAlī and Muʿāwiyah: "they were Arabians *(ʿurb)* . . . and in them were the vestiges of (tribal) honour *(ḥamiyyah)*". This looks like an understatement! *ʿUrf* administered by the chiefs no doubt varied from tribe to tribe but it is likely to have been *ʿurf* law, given in time an Islamic tag, that formed the basis of Islamic *sunan*. This is not, of course, to deny that certain sunnahs do remount to the Prophet.

An example of how little Islam might affect tribal customary law even towards the close of the 3rd century appears when the first Zaydī Imām, al-Hādī,[22], arrived in the Jawf of north-east Yemen to find "immoral women" at the Sultan's gate. One of them had received money from a soldier (i.e. a tribesman) with others present, but when she failed to go to him the soldier took the case to the Sultan who punished her and compelled her to go to him.

Let me now turn to the celebrated letter which the Caliph ʿUmar is credited to have sent to Abū Mūsā al-Ashʿarī, his governor in Iraq, which I have examined in detail in the *JSS*, 1984. When reading it with undergraduates I had doubt about its authenticity like earlier scholars. Eventually I happened upon a letter in Ibn Abī Ḥadīd's commentary to the *Nahj al-balāghah* which ʿUmar is stated to have written to Abū Mūsā. Stripped of its obviously much later preamble, it is identical both in content and diction, given minor variations not materially affecting the sense, with a letter ʿUmar sent to Muʿāwiyah, his governor of Syria. Of the genuineness of the letters I am in no doubt. Let me quote the letter to Muʿāwiyah:

> Stick to four practices and your conduct *(dīn)* will be sound and you will attain your most abounding fortune.
>
> 1. When two opposing parties present themselves, you are responsible (for seeing to the production of) proofs, witnesses of probity and decisive oaths.
> 2. Then admit the man of inferior satus *(daʿīf)* so that his tongue may be loosened and his heart emboldened.
> 3. Look after the stranger, for when he is long detained he will abandon his suit and go back to his people.
> 4. Take pains to arrive at conciliation *(ṣulḥ)* so long as judgement is not clear.
>
> Peace be upon you.

[21] Al-Minqarī, *Waqʿat Ṣiffīn*, Cairo, 1382 (ed. ʿAbd al-Salām Hārūn).

[22] See my 'The Interplay between tribal affinities and religious (Zaydī) authority in the Yemen', *al-Abḥāth*, Beirut, 1982, XXX, pp. 11-50 quoting the *Sīrat al-Hādī*, Beirut, 1392/1972, p.94.

The virtually identical letter to Abū Mūsā al-Ashᶜarī I believe to be the basis of the famous letter ascribed to ᶜUmar, expanded and "improved" by Abū Mūsā's descendants from the simple concise message neglected by early Islamic scholars. Such evidence as there is would make the "improved" letter not later than the first two decades of the second century of the hijrah. But it was not accepted by all early scholars and the Spanish Ibn Ḥazm rejected the letter as not genuine. I favour Bilāl b. Abī Burdah, Abū Mūsā's grandson, as the likely "improver". The "improved" version inserts instruction for which there is no basis in the original letters and it alters the general purpose of certain clauses in the genuine letter. It opens with the assertion that "Pronouncing judgement *(qaḍā')* is an established practice", which from the scant evidence available seems contrary to ᶜUmar's commendation of Zuhayr's statement that the three methods of deciding a case, are oath taking, summoning before a judge *(nifār)* or proof. But the most significant principle fathered on ᶜUmar reads: "Pay attention to comprehending what . . . has no Qur'ān or practice *(sunnah)* applicable to it, and become acquainted with similarities and analogies. Then after that compare matters. Then have recourse to that which is most preferable to Allāh and most in conformity of them to justice/right *(ḥaqq)* as you see it". Though not ᶜUmar's letter and not to be regarded as reflecting actual practice in the first century, it is a sound basis for an Islamic theory of law.

The formulation of Islamic law as we know it took place in Iraq, the Holy Cities, even Ṣanᶜā'. A sampling of the eleven volume *Muṣannaf* however, written by the 2nd century ᶜAbd al-Razzāq al-Ṣanᶜānī, does not seem to reveal material divergencies from the Iraqīs and Ḥijāzīs. The *fuqahā'* of those countries display a prejudice against a number of aspects of tribal custom. The "improved" letter of ᶜUmar very significantly relegates conciliation *(ṣulḥ)* to a secondary place – a subtle change from ᶜUmar's ruling. At this point I should like to quote *in extenso* from Colonel Aḥmad Oweidi's interpretation of the bedouin – I would say "tribal" – attitude in Jordan to law. It seems to me to embody the principles lying behind the customary law known as *manᶜah* to which I shall come later in this paper, but I think it would also reflect the tribal outlook in 6th and 7th century Arabia. The importance of *ṣulḥ*, conciliation, in the scheme of tribal society, to which in a sense *qaḍā'* emerges as secondary, is plain to see.

"Justice cannot prevail until any imbalance caused by a violation of the limit of acceptability (Oweidi means by this, the tribal moral feeling) is resolved in such a way as to bring all the parties back within it. Hence the verdicts of a Bedouin judge must satisfy all parties concerned, and restore them to the recognized limit of acceptability – *kull min-hum yarjaᶜ li-ḥadd-uh* – everyone should return to his position within the limit of acceptability. This is so because the most important link binding Bedouin communities together is that of extended kinship and the concept of the limit of acceptability. Conciliation, *ṣulḥ,* and the satisfaction of all parties concerned, is essential to preserve balance and equilibrium. Since the limit of acceptability is flexible, differing according to time, place and the individual community, Bedouin justice varies likewise. A sentence is gradually implemented and modified until the line of equilibrium is once again reached to the satisfaction of all, and only then is it considered that justice has been achieved. A Bedouin judge would sentence a culprit to the most severe punishment. Then mediators beg the injured party for forgiveness – in a series of mediations the judge, the head of the community and the injured party, all gradually mitigate the sentence until the punishment becomes minimal. The process restores both the culprit and the injured party to their previous positions with the limit of acceptability and each *rijaᶜ li-ḥadd-uh.*"

Let me just say that in 1947 a tribesman who had been inciting his son to fire at me, was brought before the Wāḥidī Sultan and the Arab political assistant advised me to plead for mitigation of his sentence, and others did likewise. Though threatening with arms is a serious offence in tribal law the man was let off with perhaps a day's imprisonment.

The *fuqahā'* clearly dislike *qasāmah,* the oath taken by 50 men of the kin of the accused, but which I have shown is standard procedure among the south Arabian tribes today.[23] Yet another issue on which the *fuqahā'* have acted, modifying the milder attitude taken by the Prophet, is the question of *zinā,* fornication – on which I have written a paper (in press). Ṭabarī[24] quotes Ibn ᶜAbbās as saying of the Arabs of the Jāhiliyyah: 'They used to forbid such adultery *(zinā')* as appeared, but to allow what was hidden, saying, 'concerning what appears it is disgrace *(lu'm)* but as for what is hidden, that does not matter'. The entirely different attitude of tribes from what became *sharīᶜah* law on *zinā'* has been discussed in Walter Dostal's excellent paper on *'Sexual hospitality' and the problem of matrilinearity in Southern Arabia.*[25]

[23] 'Dawlah, tribal shaykhs, the Manṣab of the Waliyyah Saᶜīdah, *qasamah* in the Fạdlī Sultanate, South Arabian Federation', *Arabian studies in honour of Mahmoud Ghul,* Wiesbaden, 1989, p.147.

[24] *Tafsīr,* Cairo, 1321, V.14.

[25] *Proceedings of the Seminar for Arabian Studies,* London, 1990, pp. 17-30.

Ibn al-Mujāwir[26] (7th/13th century) reveals the actual law prevailing in western Arabia of his day in a most important statement. "All the ᶜArab of these provinces, the mountains along with the Tihāmahs up to the borders *(ḥudūd)* of the Ḥijāz – not one accepts the judgement *(ḥukm)* of the *sharᶜ* – and they only assent to the *ḥukm al-manᶜah*. There is no doubt that it is the judgement of the Jāhiliyyah to which they used to go with one another to court *(yataḥākamūn)* at the *kāhins*". To judge by Colonel Oweidi's study this is likely to have been the case also in the rest of western Arabia as far, at least, as Jordan.

Manaᶜa[27] means – to defend from injustice, tyranny, attack, transgression, and *manᶜah* is the verbal noun derived from it. The Prophet was *fī sharaf/ᶜizz wa-manᶜah,* honoured and protected – i.e. as a member of an arms-bearing tribal house. *Manᶜah* is that body of customary law which governs the maintenance of security. It covers a multitude of sides of tribal life but not business or market law, and non-arms-bearers only in their relation as protected persons to tribesmen. There is emphasis on anything touching on tribal honour. *Ṣulḥ* is stated to come before all other judgements *(aḥkām)*.

One of the Mss. I have edited but not yet published is attributed to Ibn Zinbāᶜ whose name, but little else, is known to Yemenis. Much of the Ms. is derived from what the illustrious qāḍī al-Ḥusayn b. ᶜImrān b. al-Fāḍil (correctly al-Faḍl) al-Yāmī wrote of the book of *al-Manᶜ,* comprising all the categories of it and the arbiters of *manᶜ* before it. Sayyid Aḥmad al-Shāmī pointed out to me that ᶜImrān b. al-Faḍl was a well known supporter of the Ṣulayḥids. The Yāmīs supported the Ḥāfiẓī Daᶜwah of the later Fāṭimids, as ᶜAbbās al-Hamdānī informs me. Al-Ḥusayn would have composed his treatise ca. 500 H. but drew on earlier arbiters, perhaps, indeed probably, remounting to the age of paganism.[28] *Manᶜ* at any rate was followed by al-Ḥusayn and probably his father in Ṣanᶜā', where he was governor, but it is not connected with Ismāᶜīlism.

Al-Ḥusayn's dictum maintains that 'the judge must judge by the *sharᶜ* in its relation to *(min)* the *sharᶜ,* and by *manᶜ* in that to which *manᶜ* pertains. He should also judge by *siyāsah* (shrewdness, diplomacy?) in

[26] *Tārīkh al-mustabṣir,* ed. O. Löfgren, Leiden, 1951-54, p.99.

[27] *Tāj al-ᶜarūs,* Kuwait, 1405/1985, XXII, pp. 218-9, *manᶜ* is *al-haylūlah bayna* and *al-ḥimāyah; manaᶜa-hu nāsun . . . yamnaᶜūna-hu min al-ḍaym wa-'l-taᶜaddīᶜalayh* and *wa-maᶜa-hu man yamnaᶜa-hu min ᶜashīrati-hi.*

[28] The tribal *sijills,* may have contained Manᶜah law. Hamdānī alludes to a pre-islamic *sijill.*

accordance with his ability to make an independent judgement *ʿalā qadr ijtihādi-hi)*'. Like the later Shāfiʿī author of *al-Ādāb . . . fī aḥkām al-manʿah* (supra) he sees no inconsistency between *manʿ* and *sharʿ*. I do not indeed think there is a conflict in principle between the *Sunnah Jāmiʿah* of the Prophet which federates the Yathrib-Medīnah tribes, and *manʿ*, yet I was told that when Imam Yaḥyā came on treatises such as these he would destroy them and execute the possessor.

It will be appreciated that *manʿah* law has only limited applications to urban communities which in any case would fall within the category of protected persons of tribes resident and dominating in a city. Tarīm for example during last century was ruled by three separate groups of Yāfiʿī tribesmen who domineered over the town's artisans and others, whom they despised. ʿAlawī b. Ṭāhir[29] tells of the ʿAmūdī Mashāyikh of his native Dawʿan that Allāh has empowered the tribes over them and they have become *raʿiyyah* to the extent they cannot marry any of their daughters without their permission. They had other humiliating rights *(ḥuqūq)* also.

In tribal customary law, *manʿah* apart, practices diametrically opposed to *sharīʿah* obtain – I do not deny of course that some *manʿ* customs may not conform to Islam. The most commonly cited is that women may not inherit land, etc. In Tarīm I even came across a treatise which allowed a woman to make over to a male relative by *nadhr* the share she should inherit under Islamic law – compliance being thus made with *sharīʿah* while tribal custom was preserved.

Certain of these customs[30] were severely censured by the late 19th century Ḥaḍramī writer Bā Ṣabrayn. 'One of the most horrible things', he says, 'is what is well known of the *bādiyah* (tribesfolk of Dawʿan

[29] *Kitāb al-Shāmil fī tārīkh Ḥaḍramawt,* printed in Singapore in 1940 but not published, p.182.

[30] Many un-Islamic practices existed up to modern times in other parts of Arabia, but the Saʿudis have followed a deliberate policy of suppressing them; other Arab states seem to have followed suit. H.R.P. Dickson reports (1920): 'Ibn Saud assured me that so ignorant had the Bedouin of Nejd been in the past that, until the new revival ninety per cent of them had never heard of religion, marriage had never been solemnized and circumcision had been unknown'. *The Arab Bulletin,* Cairo, 1919, IV, p.110, reprint with notes by Robin Bidwell, Gerrards Cross, 1986. An attack on un-Islamic customs in the Yemeni Tihāmah was made by ʿAbdullah b. Sulaymān b. Ḥamīd al-Najdī, *Naṣīḥat al-Muslimīn ʿan al-bidaʿ* . . . ed. Muḥammad Sālim al-Bayḥānī, fifth printing, Fatāt al-Jazīrah Press, Aden, 1372/1935.

province), that the fornicator *(zānī)* comes to the wife of another man, and such as the husband happens upon the two of them, but does not kill them both, or does not kill him. On the contrary he says to him: *'Artabiṭ ʿinda-hā fī miyah wa-ʿishrīn riyāl'*, the sense being I shall not release you until you undertake to pay me that amount (120 *riyāls*) and I shall divorce her, for example – and he does so'. The adulterer, called *al-marbūṭ*, has to pay the injured husband double the *daf* marriage present, but not the *mahr* dower (which a man does not normally pay over unless he divorces) and double all the marriage expenses, two thirds going to the injured husband and a third to the woman's family *(ahl al-ḥurmah)*.

The *Ādāb wa-lawāzim al-manʿah* interestingly enough also details regulations governing marriage by capture.

Bā Ṣabrayn attacks many other practise current in Ḥaḍramawt in his day, notably those relating to agriculture and the *zakāt* on crops. He categorically condemns the compromise between customary law and the *sharʿ* which, I think, had evolved centuries before. 'One of the most disgraceful of forbidden things,' he says, 'is belief that judgement by reason, deriving from the means of cultivation *(asbāb al-ḥirāthah)*, commerce *(tijārah)*, tribalism *(qabwalah)* and the handicrafts *(ḥiraf)*, contrary to the judgement/law of the *sharʿ*, branches out from *(mufarriʿ ʿalā)* the judgement of the *sharʿ*. What accords with the judgement of the *sharʿ* is called *ḥukm sharʿī* or *sharʿī*, and what conflicts with it is called *ḥukm farʿī* or *farʿī* and is recognized because of its being branching out, according to belief about it (?), from *sharʿī*. The truth and rightness (of the matter) is that what accords with the judgement of Allāh, the Almighty Ruler, is the judgement of the *sharʿ;* anything contrary to that is the judgement of the false *Ṭāghūt*. Calling falsity truth is forbidden like calling truth falsity. So take heed!' *Ḥukm* is to be understood as 'law', and the *ḥukm farʿī* is not the Islamic *furūʿ*. In Jordan Aḥmad ʿUwayḍī (thesis, 219) has described the *quḍāt al-furūʿ*, dealing with cases related to particular crafts, trades and professions, e.g. land, cattle, horses. These obviously had no training in *sharīʿah* law and no doubt followed the custom pervading their bedouin ambience.

So Bā Ṣabrayn condemns 'the *Ṭāghūt* judges *(ḥukkām)* of the Dayyin (federation), the Bā Ḥanḥan', specialising in agricultural disputes, running tribal law courts as they were doing in 1967 and probably do today. The Marāqishah of the Faḍlī sultanate told me in 1964 that 'their own procedure was preferable (to the *sharīʿ-ah* courts) because it was plea and counter-plea in one day and judgement in one day and payment settle-

ment in one day' because of the interminable delays, etc. of *sharīʿah*.[31] For this and other reasons I think tribesfolk everywhere prefer customary lawcourts or individual judges. Nevertheless I do not think *sharīʿah* law is entirely disregarded in tribal districts and *ṣulḥ* is certainly common procedure in towns – but then as the ancient proverb says: *Al-Ṣulḥ khayr/sayyid al-aḥkām,* Conciliation is the best/lord of judgements.

[31] 'Dawlah, tribal shaykhs . . .', p.142.

Islamic law and Sasanian law

Bodil Hjerrild

A comparison between Sasanian law and Islamic law is a venture wherein there is a need to be aware of the impossibility of finding evidential proof of any connection, only probable indications. On the other hand it is a remarkable fact that precisely where Shīʿī law and Sunnī law differ a similarity may be discerned between Shīʿī and Sasanian law. The special Shīʿī creed also contains traits which seem to be influenced by Zoroastrian religion, just as Islamic ideas about government and administration of an empire owe much to Sasanian thinkers and officials.[1]

Sasanian law proper is known solely from one source, *Mātiyān i hazār Dātistān,* "The Lawbook of 1000 decisions".[2] Unhappily, this important manuscript is incomplete, and the arrangement of the subjects is somewhat arbitrary. These facts, combined with the very difficult language, make the study troublesome, but it is nevertheless an invaluable source of Zoroastrian law. The lawbook is a compilation of court decisions and jurists' opinions on complicated issues, which span different areas of law. One of the difficulties is that many subjects are treated in a way which presupposes knowledge of general terms and their implications. Thus, one has to conclude backwards from a special problem to the general rules. As the law is a compilation of rules from different ages, we are also presented with the divergent opinions and interpretations of later generations of jurists, which give us an interesting insight in the development of the law.

The law was not revealed by God as in Islam; it was made, and the court was presided over, by the clergy, and the highest authority was the *Magupatān Magupat;* the Avestan hymns may include some material which could be transformed into law, but not actual decrees. On the other hand, the law was an expression of the rules which had to be obeyed in order to maintain a pious society, and tradition has, from Sasanian times to this day, played a major role in the prescriptions to be

[1] Lambton, A. K. S., *Theory and practice in Medieval Persian government,* London 1980, ch. 1–4, 6, 10.

[2] Part 1 ed. by J. J. Modi, *Mādigān–i–Hazār Dādistān. A photozincographed facsimile with an introduction,* Poona 1901. Part 2 ed. by T. D. Anklesaria, *The Social code of the Parsis in Sassanian times or Mādigān i Hazār Dādistān,* Bombay 1913. (*MHD* refers to part 1, *MHDA* to part 2.)

followed. The secular and clerical powers cooperated closely for most of the Sasanian period, and this cooperation was also very evident in the reign of Khosroe II (591–628), who is the last Emperor mentioned in the *MHD*. This suggests that the compilation was made during his lifetime.

The Zoroastrian view of life is discemible in the law, not least in the field of family law. The succession law is expressly designed to fulfil the Zoroastrian principle of perpetuating the family line until the end of time, and to procreate sons to perform the obligatory soul services and maintain the family altar. There was, however, also a very strong worldly desire to keep possessions in the family. After the Arab Conquest these issues became even more vital in the Zoroastrian minority communities who fought a fierce, but losing, battle against the islamization of the Iranians. The law codices of these communities, the *Rivāyat*s, of which there are a few extant, were concerned with family law and religious prescriptions, whereas of course criminal law, for instance, was drafted by the Arab rulers. In the main these *Rivāyat*s reveal the same attitudes in the field of family law, but there are certain changes due to the difficult circumstances under which the Zoroastrians conducted their lives; therefore we are thrown upon the *MHD,* if we wish to concern ourselves with Sasanian law in its pure form.

As an example of the similarity between Shīʿī and Sasanian law the law of succession is very interesting. As mentioned above the Zoroastrians attached great importance to the succession. In fact, it was of such paramount importance to procure an heir to the family possessions, that the laws were so designed that it was impossible for a family to die out, if a fortune, even a small one, was involved. The following method was used to this end: the straightforward mode of inheritance was through a son by the principal wife *(pātixšāy)*. If this failed there were other possibilities. The principal wife might marry another man according to a special contract *(cakar)* and his and her children were then legally the offspring of her principal husband *(pātixšāy)*. If the wife could not perform this duty, and the couple had daughters, one of these could marry under a special contract which meant that her children were her father's legitimate heirs. She was then called an *ayōkēn*. A sister of a childless man could do the same. If there were no women of the nearest family available to perform the duty of providing an heir, another means was used. A member of the family, a friend, or a complete stranger, male or female, *(stūr)* could be called upon to enter a marriage where the children would belong to the childless testator. In such a case a pecuniary advantage was

necessary to induce the person concerned whose son, in his turn, would inherit the possessions of, and the obligations towards, the testator. If the testator was dead, the woman *(cakar* wife or *ayōkēn* daughter) or the *stūr* administered the property, until the heir came of age in his fifteenth year.

The remarkable feature in this very complicated scheme of succession is that only heirs in a direct line are legal heirs. This is why the law has to provide the testator with a son, even if he is son only legally, but not biologically. The women played an important role in this whole complicated business; theoretically, several generations of women might succeed one another[3] and administer the property, until a son finally came into the real possession thereof.

If we consider the respective succession laws of the Sunnites and the Shīᶜites, there is a striking and important difference. The traditional Sunnī succession is based on two systems: 1. The traditional tribal law where only male agnates could inherit; e.g., a brother would inherit the whole of a testator's fortune, if there were no sons, while a wife and daughters were left without a share. 2. The prescriptions of the Qur'an by which the tribal laws were mitigated and a new group of heirs by marriage instituted. The Qur'anic prescriptions did not form a fully developed system of rights to inheritance; support from the Hadith is not sufficient, and this has given the Sunnites the chance to supplement the system with their traditional rules. Thus, by the fusion of these two systems agnatic relatives enjoyed priority, insofar as this was not contrary to the Qur'anic rules. In Sunnī law the Qur'anic heirs could not exclude male agnates, which meant, e.g., that if a testator had a brother, a female grandchild was excluded from inheritance. The Qur'an has even been interpreted in such a way that the rules fit the old system: the Qur'an provides that a brother will only inherit, provided that the testator dies without having a child *(walad)*. Sunnī law interprets child as son, whereas Shīᶜī law interprets child as son or daughter or their issue in a direct line.

Shīᶜī succession law includes all relatives in the same priority system where the guiding principle is the degree of relationship, and does not bestow special advantages on agnatic relatives; therefore a female grandchild would inherit in preference to a paternal uncle.

It has been commonly acknowledged that the Sunnī succession laws

[3] Hjerrild, B., Ayōkēn: Woman between father and husband in the Sasanian era, *Orientalia Lovanensia Analecta* 48/1993, pp. 79–86.

were a combination of the Qur'anic prescriptions and the pre–Islamic tribal traditions; but it has been maintained that the Shīᶜī succession was only dependent on the Qur'an[4], and owed nothing to the jurisprudence and legal systems which prevailed in the areas where the Shīᶜī spread. This conception is possibly based on the fact that the Shīᶜites themselves adhere to this view.

The Shīᶜites gained their strongest foothold where the Sasanids had ruled in Iran and present day Iraq. Therefore it is natural to ask whether the Shīᶜī succession law continues a trend which can be distinguished in Sasanian law, especially in the points where it differs from Sunnī law. If this is so, the development of Shīᶜī law is analogous to that of the Sunnī with regard to the assimilation of existing rules.

To return to the Sasanian succession we can ignore the intricate ways of securing heirs for the moment and focus upon the main principles: there was no right of primogeniture, every son inherited an equal share, the principal wife the same as a son, and daughters half of this share. There is no evidence of other relatives inheriting. This is naturally a spur to fulfil the religious duty of continuing the family line by some of the means I have decribed above; moreover these means were necessary, if the family possessions were to remain in the family. The notion of inheritance in a direct line only is a remarkable feature of Sasanian law.

The Qur'anic rules about wives' and daughters' right to inherit were on Arabic soil a new phenomenon which gave the women advantages which they had not known hitherto. In Iran, however, it was a matter of course that women inherited, and that succession might be carried on through them; thus the Sunnī version of Islamic law meant a step backwards for the Iranian women.

The question of the succession of Muḥammad caused discord and the eventual rupture between the Sunnites and the Shīᶜites. The Sunnites maintained that the successor should be found amongst the agnatic relatives, while the Shīᶜites asserted that the succession had to go through Muḥammad's daughter Fāṭimah and her husband to their sons and their descendants. The Sunni point of view reflects the patriarchal, patrilinear system which aimed at keeping the possessions and power within the tribe by its emphasis on the male agnatic heirs. The Shīᶜites were not so much concerned with tribes as with families. In their view the direct descendants of Muḥammad through Fāṭimah were the legitimate succes-

[4] Coulson, N. J., *Conflicts and tensions in Islamic jurisprudence,* Chicago 1969.

sors of the Prophet, and yn Sasanian terminology she would have been *ayōkēn,* daughter, ᶜAlī *stūr,* i.e. intermediary successor. I propose that their viewpoint reflects the traditional succession law which they had followed for centuries. Thus, the Shīᶜites did not form their succession law on the basis of the example they set by choosing ᶜAlī and his sons as successors; on the contrary: they chose ᶜAlī and his sons as successors and interpreted the Qur'anic inheritance laws according to their former traditions.

The second point on which I want to compare Sasanian and Islamic law is, like the first, one where Shīᶜī and Sunnī jurisdictions differ, namely the question of the temporary marriage contract, *mutᶜa*[5]. Sasanian law included marriage contracted for a specified length of time, which was agreed when the parties married. This type of marriage was used in general as one means to procure heirs for a man lacking an heir. For instance, a daughter could enter a 10 year's marriage contract. If her father died without male heirs in this period, no intermediary successor would be installed, but his daughter would fulfil the duty of providing him with a son after the ten years had elapsed. This means that her progeny during the 10–year period belonged to her husband, and thereafter she had to enter another type of marriage either with him or with another man to procure an heir for her father.[6]

Another type of temporary marriage occurred, if a daughter took a husband of her own choice without her father's sanction; in this case she might choose to keep her husband forever, and in consequence lose her right to a share of the patrimony, or she might choose to let her marriage be temporary and retain her right of inheritance.[7] In the first case her father would lose his daughter's income, in the second he would keep it. The daughter thus had the choice of having economy and right of inheritance in common with either her husband or her father. This meant, in fact, that she had the right to choose her own guardian *(sardār).* In a temporary marriage the husband and wife did not have

[5] Hjerrild, B., En sammenhæng mellem sasanidisk og shī'itisk familieret, *Islam: familie og samfund,* Århus 1984.
Macuch, M., Die Zeitehe im sasanidischen Recht – ein Vorläufer der shiᶜitischen mutᶜa–Ehe in Iran?, *Archaeologische Mitteilungen aus Iran,* 18, Berlin 1985, pp. 187–203.

[6] *MHD* 23.1–4.

[7] *MHD* 24.7– 10. See also Hjerrild, B., The *Cakar* marriage contract and the *cakar* children's status in *Mātiyān i hazār Dātistān and Rivāyat i Ēmēt i Ašvahistān, Orientalia Lovanensia Analecta,* 16, Leuven 1984, pp. 103–114.

economic relations, at least by law, nor did they inherit each other. But as far as can be inferred from the scanty material, the economic relations depended on which kind of temporary marriage it was. In the case where the marriage is based on levirate, there is certainly separate economy. Opinions among jurists differ as to whether or not the bride's dowry belongs to her intermediate husband in the case where the marriage is not based on levirate.[8]

As we have seen from this short discussion there were several ways of concluding a marriage contract; actually, it seems to me that it was possible to agree on exactly *the* contract which would fit any given situation, the only condition being that one accepted the economic results of one's choice. The *cakar* marriage whereby a wife bears children who would legally belong to her first husband was probably also of the sort which might be concluded for a specific period, but we have no evidence for this; yet this type of marriage was very similar to the type by which a daughter bears children for her father, so it would be rather peculiar, if it had to be for life. Children born in these temporary marriages were all legitimate. Their father could be their biological father, but if the marriage was of the levirate kind, their father was not the biological father but the man to whom their mother owed a duty to bear heirs.

The *mutʿa* marriage exists now only among the Shīʿites, whereas the Sunnites abolished this type of marriage contract (except sometimes in Mecca), although it was in use in Arabia in pre-Islamic times. The common features in the Sasanian and the Shīʿī temporary marriage are that in *mutʿa* there is no joint economy, at least not necessarily, and the parties have no mutual right of inheritance. Likewise, the children are the legitimate progeny of their father, whereas in the Arabic temporary marriage in pre-Islamic times they were considered solely the offspring of their mother. This might indeed be the very reason why the custom continued in Shīʿī areas but not in Sunnī. The Shīʿī temporary marriage, constructed in accordance with a Sasanian model, produced legitimate children, but if the Sunnites allowed a temporary marriage based on their traditional temporary marriage contract, the children would be illegitimate, and thus according to the Islamic code they would be born as a result of adultery. Furthermore, in Iran this type of marriage was such an integral part of the family pattern, that it would have seemed

[8] *MHDA* 2.7–11.

strange to condemn it, especially when in many instances it was extremely practical.

I am convinced that it will be possible to uncover other examples of a similar kind, but a systematic comparative legal study between Sasanian and Shīʿī law ought to be done by a team of scholars.

Exploring God's law: Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī on *zakāt*

Norman Calder

I

Literary works within the genre of *furūᶜ al-fiqh* are characterised by two major hermeneutical constraints. The primary constraint is that of loyalty to tradition *(madhhab)*. Of jurists who produced lasting works, the vast bulk were consciously allied to a school tradition and wrote in submission to it. They were not alone before revelation (in a position of interpretative freedom or licence), but heirs to, guardians of and interpreters of a tradition of interpretation. The second constraint is that of justification by reference to revelation. The school tradition as it was understood or presented by individual jurists had to be defensible by reference (primarily) to Qur'ān and hadith. Most of the literature of the law and many of its formal elements can be characterised by reference to this dual hermeneutical activity. The formal structures of commentary, gloss, supercommentary, multiple citation of authority, and jigsaw puzzle composition (where new works were created by the juxtaposition of phrases, sentences and paragraphs derived from earlier authorities, as in the *Al-Baḥr al-Rā'iq* of Ibn Nujaym[1] or in the *Fatāwā Hindiyya*[2]) are all symbolic of the school-based hermeneutical engagement that gripped and inspired the Muslim jurists.

The individuality of particular works – their thinness or density of texture, their vitality, complexity, capacity to engage the intellect or the imagination etc. depended on a number of other tendencies which were differentially exploited by different writers at different times and places, and are much less easy to define or quantify. Language for example (at

[1] Ibn Nujaym, Zayn al-Dīn b. Ibrāhīm al-Miṣrī (d. 970/1563), author of *Al-Baḥr al-Rā'iq*, a commentary on the *Kanz al-Daqā'iq* of ᶜAbdallāh b. Aḥmad Ḥāfiẓ al-Din al-Nasafī (d. 710/1310).

[2] The *Fatāwā Hindiyya* or the *Fatāwā ᶜĀlamgīrī*, a work of Ḥanafī *fiqh* compiled under the patronage of Aurangzēb in the years 1664 - 72, its chief author being Shaykh Niẓām Burhānpūrī.

the level of word or sentence) or presentational elegance and coherence (at the level of paragraph) might be foregrounded to the point of virtuosity. There were infinite gradations of interest between a practical sense of the real consequences of the law and an imaginative exploration of its logical (or analogical) possibilities. Some jurists were at ease with a dialectical and exploratory presentation of the law; others tended towards a static monovalency. Unsurprisingly, since the world of literature is not identical with the world of everyday problems (the teaching *faqīh* is not at the same time a *muftī*) the works that have been promoted by the tradition as valuable tend to display qualities of virtuosity (of language, structure, content) that elicit reader responses that are literary (intellectual, imaginative, playful) and not merely practical. It is an evidently inadequate reader-response to treat the linguistic virtuosity of the Mālikī jurist Khalīl b. Isḥāq[3], or the densely textured argument of the Ḥanafī jurist Sarakhsī, as if these writers intended to produce simply a list of instructions.

The Ḥanafī jurist Muḥammad b. Aḥmad b. Abī Sahl Abū Bakr al-Sarakhsī (d. ca. 490/1097[4]) has long been perceived by Western scholars as, in some way, a distinctive writer, though little has been done in the way of characterising his distinction.[5] His method, approach and achievement will hardly be illustrated by one brief sondage, such as is attempted here, but without some beginning he will not be appreciated at all. Merely to cite Sarakhsī's preferred opinions about the law – which has been done often enough – will not uncover his peculiar genius. Something appropriately complex (and correspondingly revealing) is required. The passages translated below illustrate the play of thought and argument in that part of Sarakhsī's discussion of *zakāt* where he perceives certain tensions arising between the demands of God and the rights and

[3] Khalīl b. Isḥāq (d.776/1374), author of the famous *Mukhtaṣar*, frequently published.

[4] The *Kitāb al-Jawāhir al-Muḍiyya* (Ḥaydarābād, 1332/1912) by ʿAbd al-Qādir b. Abī al-Wafā' Muḥammad al-Qurashī (d. 775/1373) gives his date of death at ca. 490/1097; vol. 2, 29 (no. 85). The *Fawa'id al-Bahiyya* (Beirut? 1323) of Muhammad ʿAbd al-Hayy al-Laknawī repeats this and adds the alternative *(wa-qīla)* of ca. 500/1107; p. 158. This is probably derived from Ibn Qutlubughā, *Tāj al-tarājim*, (ed. Flügel, Leipzig, 1862), no. 157. F Sezgin gives 483/1090 *(Geschichte des Arabischen Schrifttums*, Leiden, 1967, vol. 1, p. 443), possibly following Heffening in EI[1], ad Sarakhsī. Se now "Sarakhsī" in EI[2].

[5] See Heffening in EI[1] ad Sarakhsī. Baber Johansen is probably the best of those who frequently cite Sarakhsī, but he too tends to use this work as a source of rules, rather than to discover his (Sarakhsī's) literary aims. See e.g. *The Islamic law on land tax and rent* (Croom Helm, London, 1988) passim.

duties of the *zakāt* donors, *zakāt* recipients, tax-collectors and governor. In relation to the wide span of interests represented in a work of *fiqh,* or even in those parts of it which deal with *zakāt,* that is a small topic. It has however the merit of being fairly easily defined and separated from other issues, and its problems are less intractable to 20th century analysis than some.

Sarakhsī's *Mabsūṭ* is a commentary on the work known as *Al-Kāfī* by Muḥammad ibn Muḥammad al-Ḥākim al-Marwazī[6]. That work dictates the organisational structure of Sarakhsi's work and provides a framework of basic rules. These are expanded by Sarakhsī, often by pointing to acknowledged dispute *(ikhtilāf)* within the Ḥanafī tradition or across the major schools, and by the provision of justificatory or explanatory argument. The chapter headings for discussion of *zakāt* relate to property which can be the subject of ownership: camels, sheep and goats, cattle, gold and silver, trade goods, minerals, agricultural produce. The quality of Sarakhsī's discussion might be described as ritualistic: it involves an intense and unsparing focus on detail, on typologies of goods, on nomenclature, on modes of ownership, timing of payments, expressions of intention etc., much of which is impractical, and inimical to the social end of *zakāt* (if indeed it is conceded to have one, other than accidentally). The mode of discussion is juristic but its quality is ritualistic and religious and can perhaps be accounted for by the unarticulated but pervasive sense that this is God's law, deserving of unsparing effort and constantly sharpened focus.

The nexus of responsibilities as between donor, recipient, tax-collector and governor first becomes an issue in the section on camels. The arguments there are understood to cover all pastoral animals, and not to cover gold, silver and trade goods as long as these are kept at home. If gold, silver and trade goods are carried from city to city or in any other way through the customs barriers set up by governors, they are legitimately subject to a tax conventionally termed *ʿushr,* though not necessarily realised as a tithe.[7] In this case the rules that have been stated for camels come into effect again, for it is understood that, in some way or another – and it is a matter of considerable complexity – the private religious duty of *zakāt* takes on some aspects of a public duty in so far as the governor

[6] Died 334/945, or, possibly, 344/955. Both dates are given in Laknawī, *Fawā'id,* 185.

[7] Sarakhsī, *Mabsūṭ,* vol. 2, 199. The *ʿushr* for Muslim traders is here specified as one fortieth.

plays his role in providing the property owner with protection (or in so far as the governor is a deputy of God etc.)[8]. (The distinction is formally between *ẓāhir* or apparent goods, and *bāṭin* or hidden goods. Curiously, this terminology, though certainly current in some juristic discussions at this time, is not alluded to by Sarakhsī.) The following discussion is based on two citations from Sarakhsī. The first, taken from the section on camels, represents an exploratory and idealistic statement of the potential rights and duties of donors, recipients, tax-collectors and governor. The second, from a later part of the same section, shows Sarakhsī coming to a narrower focus on the actual governors of his day and on the way their activities affect the actual and current fulfillment of this ritual duty. A full analysis of Sarakhsī's views, even on this limited topic, would require this analysis to be extended in order to cover also customs duties and agricultural produce, but this will not be attempted here.

II

In the following passage Sarakhsī conceives of (in fact inherits from Marwazī[9]) three situations in which the owner of camels (or other pastoral animals), faced with a demand from a tax-collector, may refuse to pay.

> 1.1. The collector arrives. The owner says, I have not had these animals for a whole year, or, I owe a debt which is greater than their value, or, These animals are not mine. He then swears that this is so. He is believed in all cases.
>
> 1.2. This is because he is responsible *(amīn)* for *zakāt* duties that are obligatory on him. *Zakāt* is an act of worship purely for the sake of God *(ʿibāda khāliṣa li-llāh)*, and the word of a responsible person is always acceptable in regard to acts of worship that are obligatory [solely] as

[8] Ibid., 199-200.

[9] The printed text of Sarakhsī's *Mabsūṭ* does not indicate the limits of the text inherited from Marwazī. It can be guessed at, and sometimes fairly securely recovered. I have not however tried to impose my guesses here on the reader. Punctuation, paragraph structure, and the provision of numbers for ease of reference have been added to the translated passages and are part of an effort at interpretative understanding.

being due to God. Hence if the owner denies that *zakāt* is obligatory, for any of the reasons just given, the collector must believe him. He is however required to swear.

1.3. The requirement to swear is not specified in one tradition from Abū Yūsuf. He said, No oath is required because oaths are irrelevant in regard to acts of worship *(ʿibādāt)*. It is like one who says, I have fasted, or, I have prayed; he is believed without an oath. But according to the main tradition *(ẓāhir al-riwāya)*, Abū Yūsuf said, Required is the affirmation of a responsible person, together with an oath *(al-qawl qawl al-amīn maʿa 'l-yamīn)*. In other acts of worship oaths are not relevant because there is no-one who might be deemed to be calling the worshipper a liar. But here the collector is [implicitly] denying the claim put forward by the donor. Hence he is required to swear.

2.1. The owner says, Another collector has already taken my *zakāt;* and he swears that this is so. If there has not been another collector in that year his word is not accepted.

2.2. This is because a responsible man is believed if he affirms what is probable; but if he affirms what is improbable, he is not believed. In this case, the owner affirms what is improbable. If there has been another collector that year, his word stands.

2.3. This is true whether or not the owner brings forward a certificate of payment. So, in the *Mukhtaṣar* [i.e. of Marwazī]. This is the tradition as derived from the *Kitāb al-Jāmiʿ al-ṣaghīr* [of Shaybānī].

2.4. In the *Kitāb al-zakāt* however Shaybānī says, If he brings forward a certificate of payment. This implies that showing a certificate of payment is a condition for believing the owner in this case. This is the tradition from Ḥasan b. Ziyād from Abu Ḥanīfa. The reason for this is that the owner has affirmed something and brought evidence of its being true. The custom is that when a collector takes *ṣadaqa,* he gives a certificate of payment. Hence the owner's affirmation is accepted if accompanied by this evidence. Otherwise it is rejected. It is like the case of a woman who affirms that she has given birth: if the midwife also bears witness to it, her word is accepted, otherwise not.

2.5. The other view [that a certificate is not required] – which is the more valid view – rests on the fact that a certificate is in writing, and all writing is similar. Also the owner may inadvertently neglect to take the certificate, or may lose it subsequently. So it should not be made decisive in this matter. The rule is that the owner's word is accepted if accompanied by an oath.

3.1. The owner says, I have paid my *zakāt* directly to the poor. He is not believed and, according to our tradition, *zakāt* is taken from him [i.e. a second payment].

3.2. According to Shāfiʿī, he is believed. This is because *zakāt* is obligatory only for the sake of the poor, as proved by (Q9.60), *Ṣadaqāt* are only for the poor, the miserable etc. Furthermore God says (Q51.19), On their wealth is a claim for the beggar and the deprived. Hence, if the due sum is transferred to the rightful recipient, and the rightful recipient has the capacity to receive that due sum, the duty of the donor is fulfilled *(bari'at dhimmatu-hu)*. It is like the case of one who buys something from an agent, and then transfers the price directly to the one who appointed the agent. In this case, the collector receives the *zakāt* in order to pass it to the poor, and the donor has relieved him of this burden by placing it directly where it belongs. So there can be no claim against him [by the collector].

3.3. The argument for our view is as follows. *Zakāt* is a financial duty implemented in full by the imam by virtue of legitimate *(sharʿī)* authority. The person subject to the duty does not have the capacity to deprive the imam of his right to implement it. It is like the case of one subject to *jizya* [the poll tax, deemed to be specified for purposes of defence] who decides to pay it directly to the soldiers; [this is not permitted].

This argument may be explained in two ways

3.3.1. *Zakāt* is due solely for God's sake *(maḥḍ ḥaqq Allāh)*. So it can be implemented only by one who is appointed as deputy for the implementation of what is due to God *(man yuʿayyan nā'iban fī istīfā' ḥuqūq Allāh)*. This is the imam. Accordingly, the duty of the donor is not fulfilled *(lā tabra'u dhimmatu-hu)* except by transfer of his *zakāt* to the imam. On the basis of this argument we affirm that even if the donor is

known to be telling the truth when he states that he paid the *zakāt* directly to the poor, it is taken from him a second time. His duty, as between him and God, is not fulfilled by direct payment to the poor. This is the preferred view of one/some of our shaykhs, namely, that the imam has the right of choice in deciding where to distribute the *zakāt,* and the donor may not deprive the imam of this right of choice.

3.3.2. The collector is deemed agent *(ʿāmil)* to the poor. What is collected is due to the poor. But the right of collection has been transferred to the collector so that the poor do not retain the right of demand on their own behalf. Nor is it obligatory to pay them, if they request it. It is like the case of a debt due to a minor: if the debtor pays it to the minor and not to the minor's guardian [it is not valid]. According to this analysis, we affirm that a man is deemed to have fulfilled his duty as between himself and God if he pays directly to the poor.

3.3.3. The plain meaning of the phrase "he is not believed" [as used by Marwazī, author of the text which Sarakhsī is commenting on] is an indication of this position. It means that if the donor is known to be telling the truth the collector should not interfere with him. This is because the poor have the capacity to receive what is their due; though it is not obligatory to pay them on their demand. Deeming the collector to be a representative of the poor is to give him a capacity of supervision under the law. Accordingly, if the donor pays directly to the poor, when the latter make no demand on the former, the aim of the duty of *zakāt* has been achieved. It is different from the case of the minor, for he does not have the capacity to receive what is due to him, so the duty is not fulfilled by paying him directly.[10]

Each of these three paragraphs contains a rule, some kind of defence of the rule, and an item of *ikhtilāf* which, also provided with a justificatory defence, permits further exploration of the rule. The first result of this format, in relation to the base text of Marwazī, is that a relatively simple statement of the Ḥanafī code (Marwazī) is brought back into the sphere of argument and discovery - where it is assumed to have come from. The *ikhtilāf* items which are the primary generator of this phenomenon may

[10] Id. *Mabsūṭ,* vol. 2, 161-2.

be derived from inside the Ḥanafī tradition (paras. 1 and 2) or from outside it (para. 3) – a fact which has implications both for the Ḥanafī code and for the global concept of Islamic law (or *sharīʿa*). The concise statement of the law is presumed to be distilled from a matrix of argument (Ḥanafī and Islamic) which, rediscovered and reasserted, engages the reader in the process of creative discovery – but does not offer him the licence of choice, since loyalty to the tradition is presupposed.

A second result of the commentary, in this passage, is that rules are measured against a causal nexus which, at least potentially, explains them. All three rules here are to a degree measured against the idea that *zakāt* is a pure act of worship, for the sake of God, and consequently a private responsibility (1.2). That idea is however discovered to be not sufficient to explain the rules. The duty of *zakāt*, which is ideally pure and for the sake of God, necessarily, by the internal logic of its nature, creates rights which accrue to the poor, or the tax-collector, or the imam, and so derogate from the expected rights of the donor. Since neither the rules nor the concomitant possible structures of rights are definitive, the message that can be recovered from all this is, to say the least, complex.

Para. 1 is based on a set of logical possibilities that derives directly from the rules governing the individual's liability to *zakāt*. Here, at first, responsibility is left entirely with the individual, and is justified by reference to *zakāt* as an act of worship solely for the sake of God. The need for an oath however is deemed to be a matter of *ikhtilāf*, permitting *zakāt* to be seen as precisely like other private acts of worship (prayer, fasting), or as significantly different – based on a functional right accruing to the tax-collector and so derogating from the potential full rights of the donor. Sarakhsī prefers the latter rule.

Para. 2 is also based on a logical possibility, arising out of the nature of tax-collecting on camels. Here, initially, the factual improbability of a claim is made to derogate from the private rights of the donor (2.2). In the end however Sarakhsī restates this rule so as to bring it into line with para. 1: the owner's word is accepted if accompanied by an oath (2.5). The *ikhtilāf* item focuses on a certificate of payment. The rejected view acknowledges that this can be a relevant support to a claim of this kind. The preferred view (based on grounds that would be as unsatisfactory to a medieval as to a modern administrator, 2.5) tends to bolster the idea of *zakāt* as a private responsibility and a religious one rather than merely (!) an administrative and social obligation.

Para. 3 is the most complex. In the end Sarakhsī here almost reverses

the law that he inherited. As he inherited it, the donor who claimed to have paid the poor directly, was not to be believed, and would be forced to pay a second time (3.1). In his final résumé however, the donor's act will be effective "if he is known to be telling the truth"(3.3.3) . That leaves a considerable and unexplored stress on "knowing". In order to reach that conclusion, Sarakhsī first introduced an *ikhtilāf* item from Shāfiʿī (3.2). He then stated the Ḥanafī position as he understood it (3.3). He then offered two explanations of the Ḥanafī position, implying that even if not compatible with one another (as they are not) they were both compatible with the overall Ḥanafī position. This is not obvious in the case of the second explanation which makes no overt link to the crucial concept of the imam and his legitimate authority. Sarakhsī may be assumed to be forcing the tradition more than a little when he uses the second of these explanations as a means to understand his base text. The result of course is to minimise the role of the governor/imam, in relation to what it might have been (had Sarakhsī for example chosen to use 3.3.1 instead of 3.3.2 in order to understand the base text). In the final preferred position, the donor, paying by himself, is secure as between himself and God, absolutely (3.3.2) and secure, as between himself and the tax-collector, if known to be telling the truth (3.3.3). It is not an accident that, in this paragraph, Sarakhsī introduces the Shāfiʿī view prior to providing a defensive analysis of the Ḥanafī tradition. For the concepts which he eventually prefers as an explanation of the Ḥanafī view (at 3 3.2 and 3.3.3) are, in part, derived from the Shāfiʿī analysis.[11]

Throughout this passage Sarakhsī is quite clearly partisan; in favour of a concept of *zakāt* which makes it a highly personal duty, between

[11] When, in the context of customs duties *(ʿushur)*, Sarakhsī recapitulates this problem, he follows the mood of this passage at least to the extent of giving full rights of personal distribution to the donor, thereby, in this context, depriving the Imam of any.

> If a Muslim says, I have paid the *ṣadaqa* (on trade goods) direct to the poor, he is believed, as long as he swears an oath to that effect. This is different from the situation with regard to pastoral animals because on trade goods the right of payment is delegated to the owner prior to his passing through any customs barrier. [I.e. since the owner of trade goods has the general right of personal distribution it is perfectly reasonable for him to have executed that right prior to his passing through the customs barrier, and so, making that claim, he is believed – if he accompanies the claim with an oath.] But in pastoral animals the right of collection belongs to the Imam *(kāna ḥaqq al-akhdh li-l-imām. Mabsūṭ,* vol 2, p. 200.)

Just how little and how much that right of collection could mean depends on the different analyses of 3.3.1 and 3.3.2-3.

individual worshippers and God. Its social functions are, in the preferred readings, accidental (though acknowledged to be primary in a view attributed to Shāfiʿī and therefore within the possibilities of Muslim juristic argument). The emergence of rights in others (the poor, the tax-collector) and the consequent derogation of rights in the donor is also accidental, and deemed to have no implications that *zakāt* is for the sake of the poor (a view attributed to Shāfiʿī) or for the sake of the imam (as deputy to God, a Ḥanafī view acknowledged, but displaced in favour of an alternative, which is less obviously in line with the Ḥanafī tradition as presented at 3.3). By embedding his preferred views in a reticulation which contains also rejected positions, Sarakhsī gives expression to a concept of law which is dialectical, exploratory, suggestive and intellectually stimulating. The exploratory approach to *zakāt* requires the reader, more or less simultaneously, to see and consider varied possibilities. Perspective however is achieved by insisting on a dominant approach, that which is asserted to be the Ḥanafī tradition (which is nonetheless quite obviously developed/changed both at para. 2 and at para. 3). The complexity of Sarakhsī's discourse is ensured by the number of structures he brings into correlation. First, the rules of the base-text (Marwazī); then the items of *ikhtilāf;* then the explanatory framework. In addition to all this there is a trailing set of analogies (at 2.4; 3.2; 3.3; 3.3.2; 3.3.3) which compares the relationships set up in a context of *zakāt* to the relationships set up in a number of other legal situations.

This type of discussion is obviously not (directly) practical. These rules and the discussion around them do not conform to the tax-collecting situation as it existed in Sarakhsī's time, and probably could not be brought into line with any realistic social approach to tax-collecting. The passage as a whole points to ways of thinking about *zakāt,* and urges a suitable complexity of approach(es). It does not tell anyone what to do. Even the rules which initiated the commentary were not practical (a point acknowledged by Sarakhsī; see Section III, below). They were derived through logical (though not exhaustive or inevitable) processes of thought about the implications of certain hypothetical eventualities, and they gave rise to abstract thinking about the nature of *zakāt* and its capacity (whether essentially or accidentally) to engender a network of rights and duties.

III

Reflection on rules and on their implications for the nature (or natures) of *zakāt* (and for the nature or natures of political authority in respect of *zakāt*) etc. might of course serve immediate practical ends and generate a simple rule of conduct. In the following passage, Sarakhsī eventually focuses on the situation of *zakāt* donors in his own time and place. The rule he discovers however is significantly not provided by the tradition, but drawn by him out of the conceptual possibilities of the law, with evident and considerable ingenuity.

1.1 Outlaws *(khawārij)* conquer one of the lands of the People of Justice and collect the alms *(ṣadaqa)* due on their property. Subsequently the imam re-conquers the land. He may not collect these dues a second time. This is because he has failed to provide protection and "collection depends on protection" – *al-jibāya takūn bi-sabab al-ḥimāya.*

1.2 This ruling is different from that of the merchant who passes the customs officer *(ʿāshir)* of a rebel people *(ahl al-baghy)* and is taxed. If he subsequently passes the customs officer of the People of Justice he may be taxed a second time. This is because the owner exposed his own property to the rebels when he took it through their land. So he is not excused. In the former situation however the owner of property did nothing. Rather, the imam failed in his duty of protection, so he may not collect a second time.

1.3 However the ruling is issued that the owner of property in case of conquest by outlaws should pay, as between himself and God, a second time. This is because they do not collect our wealth as *ṣadaqa,* but through mere lawlessness. They do not distribute it as *zakāt* should be distributed. Hence the owner should pay what is incumbent on him for the sake of God. Whatever they took from him was mere injustice.

1.4 Likewise with respect to the Dhimmi community: if the outlaws take their poll tax, the imam may not extract from them further taxation, because he has failed to provide protection.

2. As to the collections made by the sultans of our time, these tyrants *(hā'ulā'i al-ẓalama),* whether alms, tithes, *kharāj* or *jizya,* Marwazī

[author of the work Sarakhsī is commenting on] did not deal with them. Many of the religious leaders of Balkh promulgate the ruling that payment is required a second time, as between the owner of goods and God, as in the case of land conquered by rebels. This is because we know that they do not distribute the collected wealth as it should be distributed.

2.2 Abū Bakr al-Aʿmash used to say that on *ṣadaqāt* they rule that repetition is required but on *kharāj* this is not so. This is because the rightful recipients of *kharāj* are the military, and these are the military: if an enemy appeared they would defend *Dār al-islām*. *Ṣadaqāt* however are for the poor and the needy, and they do not give it to the poor and the needy.

2.3 The more valid view is that these illegitimate collections fulfill for the owners of wealth the duty of *zakāt* – as long as they formulate at the time of payment the intention of giving alms to them [i.e. to the unjust sultans]. This is because the wealth that they possess is the property of the Muslims, and the debts they owe to Muslims are greater than their own wealth. If they returned to the Muslims what they owe them, they would possess nothing. Accordingly they have the status of the poor [and are therefore legitimate recipients of *zakāt*]! Muḥammad b. Salama said of ʿAlī b. ʿĪsā b. Yūnus b. Māhān, the Governor of Khurasan, that it was permissible for him to receive alms. He was a prince in Balkh who needed to perform atonement for an oath he had sworn (and failed to keep). He asked the *fuqahā'* how he should perform atonement. They issued the ruling that he should fast for three days [which is the mode of atonement due from a poor man; a rich person would normally be expected to feed a certain number of the poor or to free a certain number of slaves.] He wept and complained to his retinue, They say that my debts are greater than my wealth and my oath-atonement is that due from one who owns nothing. The same considerations are valid in the case of exactions collected today, as long as the donor formulates the intention at the time of payment that this is his tithe or his *zakāt*. This is permissible along the lines we have just enunciated.[12]

[12] Id., vol. 2, 180

Here too a set of rules is inherited and embedded in a causal nexus wherein the primary element is that collection depends on protection - a rule provided in a satisfyingly apophthegmatic and rhyming form (1.1). (A similar apophthegmatic form was given to the assertion, attributed to Abū Yūsuf, that, Required is the affirmation of a responsible person together with an oath – *al-qawl qawl al-amīn maʿa al-yamīn.)* Throughout para. 1 (1.1 – 1.4) the conceptual structure offers distinctions between legitimate rulers (imams) and outlaws or rebels *(khawārij, ahl al-baghy),* between pastoral peoples (who are overtaken by outlaws) and itinerant traders (who voluntarily submit themselves to the power of rebels), and between the imam's right to collect (lost if he fails to provide protection) and the donor's duty to pay (not in fact fulfilled through payment to rebels). The rules related to *zakāt* are extended also to *jizya,* the poll tax paid by non-Muslims. The whole is an abstract structure which does not describe the reality of any particular system, and provides no clues as to how to distinguish legitimate and illegitimate rulers in the real world. It does however provide an initial set of concepts for thinking about the real world, specifically in relation to *zakāt* payments (and with subsidiary reference to Dhimmis).

The principle that provision of protection is a means whereby the imam gains rights of collection is obviously of some importance. Curious then that it was not specified in the context of the previous section. There the most explicit legitimating theory in relation to the imam was that he functioned as deputy of God in the context of a duty that was owed to God (3.3.1). The activities of the tax-collectors were justified also by the contrasting assumption that they were agents to the poor (3.3.2). It is just possible that the most general statement of the imam's rights as understood within the Ḥanafi tradition (that *zakāt* is a financial duty implemented by the imam through *sharʿī* authority – *ḥaqq mālī yastawfī-hi al-imām bi-wilāya sharʿiyya,* 3.3 above) is compatible with any one of those (as indeed Sarakhsī claims) and with the further notion that collection depends on protection. It is precisely the search for compatibility between rules (potentially varied) and explanation (delicately balanced) that provides a significant part of the intellectual dynamic of Sarakhsī's text. It is not absolutely clear that generalising statements which work for one set of rules are intended to be recalled when a different set of rules is at issue. Though, no doubt, obvious contradiction would be felt to be unsatisfactory.

Para. 2 exemplifies the way in which inherited concepts may serve the

need to describe and assess the real world. At 2.1, Sarakhsī states his personal conviction that the governors of his time were tyrants, belonging therefore neither to the category of legitimate imams nor to the category of rebels and outlaws. He has effectively opened up a third category which was not given him by the tradition. Tradition, represented by "many of the religious leaders of Balkh", had in fact assimilated the local rulers to outlaws and rebels (2.1). Abū Bakr al Aʿmash had distinguished between *ṣadaqa* and *kharāj* (2.2), implying a fragmented concept of legitimacy: the rulers were legitimate recipients of *kharāj*, illegitimate recipients of *zakāt*. Sarakhsī's own view depends on a juristic device, a *ḥīla*, whereby the tyrants could be perceived, juristically, as poor – because their wealth was stolen and could not be counted as legitimate property – and therefore potentially legitimate recipients of *zakāt*. This was not a new device, Sarakhsī had found it prefigured in a ruling by Muḥammad b. Salamah, but, applied in this context, it proved both amusing and effective. The tyrants were recognised as thieves and robbers, neither their legitimacy nor their capacity to protect (hardly evidenced in a context where they were robbers) being conceded. But the exactions forced upon a subject people could be recognised as a legitimate fulfillment of a personal duty to God.

Here we see a remarkable example of the way in which the transformation of rules into a pattern of sophisticated and subtly discriminating concepts makes possible a number of different readings of the world. Sarakhsī has a preferred reading and a preferred set of consequences but the major alternative possibilities offered by the tradition remain explicitly present and Sarakhsī's own effort may be thought an incentive to further conceptual distinctions which might lead to different consequences. As so often with this writer, the reader is left not with a sense of the law as a determinative structure, but with a sense of the law as a structure for thinking with, a structure that encourages sharply focused and conceptually sophisticated thinking.

IV

A survey of conclusions that might be gleaned from this study prompts the initial observation that Sarakhsī is not merely making a list of practical rules. It may be possible to elicit such from his work, and he demonstrates, on occasion, how this might be done. That is, by measuring the world against the conceptual possibilities implicit within the

Ḥanafī juristic tradition. This is not the same as taking a rule and obeying it; what seems to be required is to take a set of logically related rules and to understand them in relation to the tradition, each other, variant rules, and one or several conceptual explanations of their form. This may give rise to a practical rule of conduct. But it may not. Once this process of intellectual exploration is started, the discovery of a rule ceases to be an adequate end: the process offers such obvious rewards, of intellectual stimulation and literary pleasure, that it cannot be adequately explained in terms of a practical interest – which is frequently, in any case, not in evidence. Many passages of this work and of other works of *fiqh* do not result in any obvious rule of conduct. Does the process point perhaps to some other end or set of ends?

What is most obviously demonstrated in a work of *fiqh* I have already stated in the first paragraph of this study: it is loyalty to a particular tradition. It is reasonable to assume that this is not simply a fact but a message, or part of a message. Thinking Muslims, those who study *fiqh*, are being urged, or even compelled, to see themselves as committed to the past of a particular tradition, that is to the efforts of that tradition to understand God's law. By virtue of this commitment they are deprived of two freedoms: the freedom to interpret revelation for themselves as an *ab initio* activity, and the freedom simply to choose amongst variant possibilities. At least in medieval times, a Ḥanafī (whether so by virtue of birth, geography or education) did not simply set aside the teachings of the past in favour of his own study and interpretation of revelation, nor did he abandon a Ḥanafī ruling in favour of a Mālikī ruling simply because it might be convenient or desirable to do so. The positive message here is of course about authority: authority lies with tradition (represented by the scholars of a particular school) and not with the texts of revelation (important though these undoubtedly were)

Somewhat qualifying this message of particularity is the message of plurality. Sarakhsī's responses to Marwazī's more or less monovalent text include, as a primary act, the provision of a pluralist matrix for these rules. The pluralism covers both the Ḥanafī tradition, where dispute is articulated by reference to the founding fathers (Abū Ḥanīfa, Abū Yūsuf, Shaybānī and other authorities), and the non-Ḥanafī traditions of juristic thinking (Shāfiʿī, Mālikī etc.). The message thus becomes more complex. For we are required to note that the interpretative possibilities of revelation are (and have historically been) many; and of that many, some (those governed by a tradition of authority similar to that of the

Hanafī school, i.e. Shāfiʿīs, Mālikīs etc.) offer valid, effective, and justified systems of rules which are recognised as challenging the Ḥanafī system. Within the context of Sarakhsī's work (and of all other Ḥanafī works of *fiqh)* the superiority of the Ḥanafī tradition is assumed. (And within the Ḥanafī system, it is assumed also that the major tradition is superior to minor traditions.) These things are known in advance and only require demonstration. This is the function of revelation: to be organised and interpreted in such a way that it defends and justifies a pattern of rules whose superiority was never in doubt, and was guaranteed within an ongoing school tradition.

The demand for loyalty to a particular school is then not dogmatic, in the sense of excluding others; though it is real, in the sense of being, precisely, a demand for loyalty. The relationship between the schools (and between variant traditions within a school) is dialectical. It rests on their common acknowledgement of revelation and on a common system of argument. Or so it is implied by Sarakhsī, whose systematic presentation of the views of his own school and of others is embedded in a context of explicit argument.

In many contexts of course the argument takes the form of reference to Qur'an and hadith. In the passages I have cited however the arguments are predominantly conceptual and reflect on the possibilities of relating inherited rules to the discovery of coherence within a conceptual structure. This is the loosest and most inventive part of Sarakhsī's thinking. The processes involved are at times almost uncontrolled and arbitrary. The provision of analogies of relationship between different topics of the law for example (3.2; 3.3; 3.3.2; 3.3.3) is controlled by nothing but the convenience of the writer and his ability to perceive and articulate similarities. At other times the process is controlled by a clearly desired and more or less explicit practical end (so in Section III above). At still other times, the play between inherited rules, generalising abstractions, and conceptual patterning is loose and exploratory, leading to a plurality of structures for understanding the law and/or the world (so, perhaps in Section II above). Loyalty to the tradition clearly does not mean blind loyalty, but rather thinking loyalty, or interpretative loyalty; and it does not exclude deliberate and conscious manipulation of the tradition for particular ends. (This is of course conceded in the literature of *ḥīlas,* devices for, legally, getting round the law.)

That complex of messages suggests an overarching framework (maybe a theology?) within which, topic by topic, bundle by bundle, the in-

herited rules of law are, on the one hand, drawn back to revelation and, on the other, drawn out into conceptual structures whose function is (apparently) to be used for thinking with. Those structures are explicitly pluralist. In so far as the problems of the law are moral (the word might be legitimately used for the problems discussed in this paper, though much of the subject matter of juristic discourse cannot possibly be brought under this heading) this has the interesting consequence that though a final moral position may be available to a juristic thinker, it will be final primarily because it is sanctioned by authority and not because it is (incontrovertibly) the right answer. It is as if only the essentially arbitrary fact of loyalty to a tradition can decide between the various interpretative possibilities that are the products of human ingenuity. The forms and structures of Sarakhsī's literary style enable his readers to play – at least in appearance – with all the inherited possibilities of the Muslim tradition, while finding some comfort in the stasis (but only relative stasis, for the interpretative process is ongoing) of the Ḥanafī tradition.

The development of doctrine and law schools

Jørgen Bæk Simonsen

Since the publication in the early 1950's of Joseph Schacht's *The Origins of Muhammadan Jurisprudence* the study of Islamic law has followed the same path. Other scholars contributed to a further elaboration of the ideas presented therein, but only a few have until now questioned his thesis.

Among those who criticised Schacht's thesis are David S. Powers in his work *Studies in Qur'ân and Hadith: The Formation of the Islamic Law of Inheritance* edited in 1986, and Patricia Crone in her work *Roman, Provincial and Islamic Law* published in 1987. Powers rightly comments that acceptance of Schacht's thesis does not promote a deeper understanding of how Islamic law as a coherent system of practical regulations and rulings developed during the first century after the creation of the Caliphate. Crone for her part tries to give a number of examples of how the Romano-Byzantine system of clients was incorporated in the later Islamic rules on clients, i.e. *mawâlî*.

Already N.J. Coulson reiterated that Muslims, who had helped Muhammad to create the *umma* could not have been unaware of the impact of some of the rules contained in the Qur'ân, and therefore must have discussed both practically and theoretically how these regulations could best be applied to the real world. In his work *History of Islamic Law* from 1964 he said:

> "The Qur'an itself posed problems which must have been of immediate concern to the Muslim community, and with which the Prophet himself, in his role of supreme political and legal authority in Medina, must have been forced to deal. When, therefore, the thesis of Schacht is systematically developed to the extent of holding that 'the evidence of legal traditions carries us back to about the year A.H. 100 only', and when the authenticity of practically every alleged ruling of the Prophet is denied, a void is assumed, or rather created, in the picture of the development of law in early Muslim society".

In Schacht's view it was the various geographical lawschools which emerged in the *amṣâr* created after the Conquest in the newly conquered provinces and of course in Mekka and Medina. Schacht for his part is however unable to trace the specific content of the various geographical

lawschools, but constantly refers to them in order to create a link backwards.

The practical implications of Islamic law have always been the object of intense discussion also among Muslims themselves. This was the case in the seventh and eighth centuries and is so even today throughout the Islamic world. There have been theoretical discussions and practical discussions of what to do and how to behave. We are however still in need of further clarification on two points:

a) what rules and regulations did the different geographical law-schools actually formulate and
b) how were these rules and regulations later incorporated in the teachings of the classical *madhhabs*.

With this in mind I think we must begin with a kind of deconstruction, if we wish to comment on the way Islamic law developed during the first century after the Conquest.

First of all: Islam was not yet a system, when the so-called rightly guided Caliphs after the death of Muhammad decided to launch the conquests, thereby creating the Caliphate as a new political structure in the Middle East.

It is therefore meaningless to label the conquests Islamic as is still often done, cf. Fred McGraw Donner in *The Early Islamic Conquests* published in 1981 and Walter Kaegi in his new book *Byzantium and the Early Islamic Conquests* edited in 1992. It was not until the conversion of the conquered peoples who inhabited the conquered provinces forced the Muslim-Arab upper class to participate in the formulation of an Islamic ideology where new Muslims were placed on a par with the old Arab-Muslims that the need for a more coherent Islamic system was formulated.

Needless to say this happened only after immense pressure from various groups which gradually converted to Islam and thus forced the Arab-Muslim upper class and the political structure they had created, i.e. the Caliphate, to formulate a practical system of laws and regulations which were identical for all Muslims at least in principle. There was no overall effort by the Caliphate to convert the conquered peoples to Islam – and therefore we have but a few examples of Christian martyrs resisting the Muslims. The Christians of Syria, Palestine and Egypt for their part did not regard the new masters as Muslims. In their sources dating from the seventh, eighth and ninth centuries they always refer to their new

political masters as Arabs, Hagareens or Saracens – never as Muslims[1]!

In the real world there were only a very few Muslims – and these for their part never referred to themselves as Muslims, as can be documented from the papyri we have from Egypt dating back to the second half of the seventh and the first half of the eighth century. To cite only one of numerous possible examples, listen to what the Governor of Egypt, Qurra ibn Sharîq, wrote in a letter to the local pagarch in Aphrodito, when it was time for him to pay to the Caliph various taxes in money and kind:

> "In the name of God, Qurra ibn Sharîq, governor, to Basil, administrator of the village of Aphrodito. We have apportioned to your administrative district 166 2/3 solidi for the price of the underwritten articles for the maintenance of us and the officials who are with us, both Arabs and Christians.."[2].

In my doctoral thesis from 1988 on the genesis and early development of the caliphal taxation system[3], I argued for a methodological approach to the history of the early Caliphate which abandons the notion of either the conquests or the Caliphate having anything to do with Islam as such. As a reference Islam had meaning only to the relatively few Muslims resident in the conquered provinces, namely the Muslim Arabs who were sent to the *amṣâr* by the Caliph, or who migrated to the new military cities of their own free will, seeking new posibilities for themselves. They did not bring along any fully developed Islamic solution – but of course helped create one, or rather several, wherever they settled, giving thereby a lasting contribution to the gradual establishment of the geografical schools or, should we say, of geographical ways of applying the few rules contained in the Qur'ân to the complicated reality they found in the newly conquered provinces.

Thus having de-constructed the traditional view of the Conquest as being in any way Islamic, we must formulate an alternative in order to analyse the sources at our disposal. The Conquest was a military conquest

[1] Cf. S.P. Brock: Syriac Views of Emergent Islam in G.H.A. Juynboll (ed.) *Studies on the First Century of Islamic Society,* Papers on Islamic History, Vol. 5, Southern Illinois University Press, 1982.

[2] H.I. Bell: *Greek Papyri in the British Museum.* Vol. IV, The Aphrodito Papyri, London 1910 no. 1375.

[3] Jørgen Bæk Simonsen: *Studies in the Genesis and early Development of the Caliphal Taxation System,* Copenhagen 1988.

– and was followed by a military occupation by the Arab Muslims deployed in the various *amṣâr* in the occupied provinces. This is clearly documented by the sources we have from Egypt. The Caliphate in the beginning never interfered in local administration as long as the various local communities and cities paid what was demanded as taxes in cash or kind.

At the same time the Arab-Muslim army had to be administered – and here we have the historical genesis for the later Islamic *qâḍî* – the Muslim judge. Anyone familiar with the Arabic sources can quote at least a dozen *ḥadîth* telling how Muhammad named this or that person *qâḍî* in parts of the Arab Peninsula. We know for sure that he placed persons in various parts of the peninsula to help him and his supporters to administer the areas which linked themselves with the *umma* in Medina, but I think we have to differentiate between developments in the Arab peninsula and in the newly conquered provinces.

If we turn to Egypt we have at our disposal various types of sources through which we may be able to re-construct the gradual, slow growth of the Caliphal administration, thereby allowing a more profound understanding of the gradual growth of practical Islamic law as it developed here.

Al-Kindî's book on governors and judges in Egypt contains a long list of persons, who acted as *qâḍî* during the first century after the Conquest. The information given in al-Kindi's work is of course coloured by later Muslim efforts to adjust historical tradition to ideological assertions. This, however, does not alter the fact, that in al-Kindi we find several indications of the scope of the first *qâḍîs*' actual work: it concerned only the Arab-Muslim army stationed in al-Fusṭât and Alexandria.

Thus their job in the decades after the Conquest had nothing to do with formulating rules for civil life as such. Several of the first *quḍât* were individuals known to be well informed about traditional Arab rules and customs – a fact of the utmost importance for the understanding of the ways in which Islamic rules and regulations were formulated in the various provinces. They can only be understood as a synthesis between three formal positions:

a) the however insufficient Islamic rules known in the Qur'ân.
b) the traditional values of the Arabs in the caliphal army in Egypt and
c) the actual problems caused by the army's stay in the conquered province of Egypt.

Here we have to search for one of the sources of the practical Islamic law

as it developed in Egypt. No doubt the same situation prevailed in the other central parts of the Caliphate, i.e. the *amṣar* in Syria and Iraq.

However, the caliphal administration also had to administer the population of Egypt in general. For this the conquerors established a close co-operation with the local Egyptian upper class. During the first century after the Conquest all administration in principle was delegated to the local pagarks (in arabic *ṣâḥib al-kûrâ,* in Greek *pagarkhos*). They alone, without any interference at all from the Arab-Muslim governor, ran the local administration throughout Egypt.

The rich source material from Egypt preserved in the many papyri clearly indicates a growing concern for the way the local administration worked. By analyzing the preserved papyri we have a good, albeit limited, knowledge of how the Arab-Muslim Governors acting on behalf of the Caliph in Damascus during the first half of the eight century slowly but to an ever increasing degree interfered with the local administration.

This is important, because it proves how the Caliphate as a whole developed – not by implanting a certain Islamic concept of administration in the conquered provinces – quite the contrary: by deriving rules and regulations from the daily administration. Thus the caliphal administration had to secure for itself an ever growing understanding of daily life in the occupied provinces.

This development was reinforced by the fact, that part of the conquered population turned Muslim after the Conquest. Moreover the original Arab-Muslim army was integrated in the local society as time went by. They intermarried, they took over or bought land, they invested money and time in local production and so forth. This is documented too in the work of al-Kindl on the *quḍât* in Egypt. As a result they had to formulate points of view on new questions and thus the various geographical schools of practical Islamic law were created.

In this connection it is important to notice how little a role the various *qâḍîs* played in the formulation of theoretical jurisprudence. They are hardly known to have been active in the transmission of *ḥadîth.* This does not mean, that they played no part in the actual formulation of practical Islamic law. Indeed they devised many of the rules, which were later formulated in the various *madhhabs* – but due to the fact that they formulated rules and gave regulations that had to do with the caliphal administration as a military occupation they were disqualified in the eyes of later Muslims as being conquerors or conqueror's assistants.

If we seek a deeper understanding of the historical genesis of Islamic jurisprudence we must analyse the available Arabic sources and the preserved papyri from Egypt dating back to the seventh and eighth centuries. By so doing we may have a better chance of documenting the growth of practical Islamic jurisprudence during the first century after the Conquest, thereby contributing to a more comprehensive understanding of the genesis of Islamic law in its first creative period.

Inequality in Islamic law

Rainer Oßwald

Islamic law has many methods of adapting itself to the changing demands of social reality. Many are recognized and have appropriate names.[1] Others appear to be unspoken and are thus more difficult to determine. One of these less spectacular methods consists of extensively interpreting an existing concept and broadening its field of application. Here I should like to discuss one such case.

Traditional Islamic law allows slavery. In addition, there can be no discussion of the equality of the sexes. Finally, many privileges of the Arabs from early times, although in practice insignificant, still haunt the later law books.[2] Apart from that, however, there is no institutionalized inequality in the Islamic community, i.e., no legally differentiated castes or classes: All male, free muslims are equal, not only before God, as in former times the Christians of the West, but also in their legal relations in this world. How this principle was eluded among the so-called Moors of the western Sahara, not only *de facto* but also *de iure,* will be shown in the following outline. This will be based mainly on opinions as they are expressed in the legal decisions – *Fatwās* – of the Mālikī legal school.

The starting point here is the problem of illegal ownership. This area is more extensive in Islam than elsewhere. For it is here not only a question of crimes such as robbery, theft and fraud, which can be found in a comparable form in all societies where more developed ideas of property have evolved and become established.[3] Rather, large parts of the population were involved here, either directly or indirectly, due to the legal regulations. Two groups were especially affected:

1) All those who became guilty of *ribā.* By *ribā* not only the taking of interest is meant. But rather, this concept comprises all unlawful trading

[1] Especially worth mentioning here are the highler principles of public welfare *(maṣlaḥa)* and of emergency *(ḍarūra),* also the role of common law *(ʿurf, ʿamal, ʿāda)* and of legal tricks *(ḥiyal).*

[2] For example, in connection with marriage equal birth *(kafāʾa)* is required and a distinction made between Quraiš, other Arabs, and *mawālī,* or the idea that the office of the caliph is only open to a Qurašī.

[3] Cf. Uwe Wesel, *Frühformen des Rechts in vorstaatlichen Gesellschaften.* Frankfurt 1985, passim.

practices. Among these are also practices which even under purely moral aspects hardly seem offensive to an outsider.[4]

2) All functionaries and soldiers, who were paid by the state, as no state can do without the many sources of income which Islamic law, properly considered, forbids. In addition there were perhaps others who were paid in the course of dealings with the state, for example architects, or those who supplied goods to the army.

Thus, in both cases we are dealing with a kind of structural criminality, if one can speak of criminality at all. For those who came under this heading were often thoroughly respected members of society, in no way common criminals. Business life was hardly imaginable without *ribā*. Admittedly, the state did often convey the impression of being a tyrannical arbitrary ruler. However, this was not the only aspect involved. Then those who were affected were not only the people who illegally collected taxes or became guilty of bribery, embezzlement and open violence, but also the civil servants of irreproachable character: It was enough to be paid from the public treasury. Strictly speaking, these people's property was illegal. However, they were not generally prosecuted by worldly justice, although the fine line between them and the common criminal was not clearly drawn.

In the 10th century the Mālikī legal school coined the term *mustaġraq aḍ-ḍimma* for this type of person.[5] This denotes a person whose legal property shows a certain deficit, either because legal property as such does not exist at all, since everything has flowed from muddy springs, or because the legally acquired parts would be consumed by the injured party's claims, should the case ever come to trial. Thus the *mustaġraq aḍ-ḍimma* is someone whose *ḍimma,* i.e. in this connection whose legal property or assets, is consumed.[6]

[4] For example, the regulation that foodstuffs of the same category but of differing quality may only be exchanged in the same amount, whereby the exchange also had to take place immediately.

[5] The first mention known to me is found in Ibn Abī Zaid al-Qairawānī (died 386/996). See Wanšarīsī, *Al-Miʿyār al-muʿrib wal-ǧāmiʿ al-muġrib ʿan fatāwā ʿulamā' Ifrīqiya wal-Andalus wal-Maġrib.* Ed. M. Haǧǧī. Bairūt 1401/1981, IX 564 and X 419. In addition to *mustaġraq, muġtaraq* is also in common use, especially in the earlier period.

[6] The best and most extensive definition I know of stems from Ibn al-Aʿmaš al-ʿAlawī (died 1107/1695-96) from the city of Šinqīt in modern-day Mauretania: "A *mustaġraq aḍ-ḍimma* is one whose entire property has been consumed by the claims (made against him), it being of no importance whether these claims stem from God's demands, such as *zakāt,* penalties and vows, or whether they originate from the demands of men such as

The term *istiġrāq aḏ-ḏimma* is to be sure not a universal one, but rather the state of affairs outlined here is often described in different words in other places.

What legal consequences resulted from this? As is well known, Islamic law consists of opinions and I know of no treatise in which all aspects of this subject have been systematically and interdependently treated.[7] Nevertheless all were inclined to believe that he who was labelled *mustaġraq aḏ-ḏimma* possessed no legal property. All he holds does not in reality belong to him and thus he may not dispose of it.[8] However, he does indeed do so, since we are not normally dealing here with criminals in the usual sense of the word, but rather with people who were integrated into social and economic life. The question then arises: How should one behave towards such people? May one accept their gifts, be paid by them for services rendered or have other business transactions with them?

The opinions on this subject varied greatly; hence the countless anecdotes about pious scholars who, for example, refused to become a *qāḍī* in the service of the state. According to the more liberal views it sufficed if, in order to remain clean, one merely avoided accepting goods which could be identified as being unlawfully obtained. This is not the case, for example, with coins, due to their very nature, as one coin does not differ from another of the same value.

This view also plays a role in the solution of the problem of how the condition of the *istiġrāq aḏ-ḏimma* can be overcome. Here it is not important whether the person in question has already been called to

are the consequence of robbery, theft, unlawful trading practices *(ribā)* and breach of faith. He thus becomes one whose *ḏimma* is consumed and who in principle no longer has any property, but rather everything which he holds is the property of others". Ibn al-Aᶜmaš al-ᶜAlawī, MS 69 *Nawāzil* 164. The upposite concept is also found in the writings of the same author, e.g. MS 373, p. 17: *qā'im al-waǧh nāfiḏ at-taṣarruf ṣaḥīḥ al-milk.* For these and other Mauretanian manuscripts quoted here, see Ulrich Rebstock, *Sammlung arabischer Handschriften aus Mauretanien.* Wiesbaden 1989.

7 Longer summaries can be found in the writings of Ibn Rušd (died 520/1126), *Fatāwā.* Ed. al-Muḫtār aṭ-Ṭāhir at-Talīlī. Bairūt 1407/1987, pp. 631-49, of Rāšid (died 675/1276) quoted by Ibn al-Aᶜmaš al-ᶜAlawī, MS 373, pp. 4-5 and of Qabbāb (died 778/1376) in *Miᶜyār* XII 63-66, all of which may be compared with Ġazālī's comments in his *Iḥyā' ᶜulūm ad-dīn.* See Hans Bauer, *Erlaubtes und verbotenes Gut. Das 14. Buch von Ġazālīs Hauptwerk.* Halle 1922.

8 Here the analogy is often made to a highly indebted bankrupt man who may also not dispose of anything he holds without the consent of his creditors. See for example Ibn Rušd, *Fatāwā* 636-37.

account by worldly justice, or whether he wishes to repent of his own free will. The answer reads: Identifiable objects must be returned to their rightful owner, and the rest given to the needy as alms.[9] The delinquent or the penitent keeps nothing.

At an early date, i.e. not later than the 10th century, the question had also arisen whether or not the poor may help themselves.[10] In other words: May one who is needy – using whatever methods – seize the belongings of a *mustaġraq aḏ-ḏimma*? I shall return once again to this question, which has been answered in the affirmative by many jurists.

Tendencies collectively to degrade certain groups of the population can be shown at an early date as far as our subject is concerned[11], but the consequences of the idea that servants of the state and merchants disposed of no legal property must remain limited in the urbano-agricultural and state-organized societies of the Mediterranean world. The state had the power. And if one did occasionally confiscate the wealth of its fallen servants or of unpopular merchants, the official bodies did not see any reason collectively to assign themselves to a lower legal status. The same also held true for the merchants.

The situation was different further South, in the Sahara. There conditions favoured some kind of practical application of the concept of *istiġrāq aḏ-ḏimma*.

First the state, which would hardly be interested in a collective condemnation with its practical consequences, and which in addition was

[9] These alms are donated in the name ol the unknown owners, who are rewarded at the latest in the next world for their involuntary gifts, if they do not already profit in this life from the prayers of those who receive them. The unidentifiable property of a *mustaġraq aḏ-ḏimma* is often also designated as *fai'* or *bait al-māl*. This is based on the idea that goods without an owner are the common property of all Muslims. Although concepts are involved here which were originally different, no clear line is drawn later between *ṣadaqa fai'* and *bait al-māl*.

[10] Ibn Abī Zaid al-Qairawānī is supposed to have already stated that "with the help of disguising pretexts and even through theft" *(bit-tasatturi was-sariqa)* one may acquire what is rightfully his. See Ṭālib al-Bašīr (died 1197/1783, from the city of Walāta in modern-day Mauretania), MS 382 *Nawāzil* 170.

[11] In addition to the two groups of merchants and servants of the state, the camel nomads of the Ṣanhāǧa in the western Sahara and the Arabian Bedouins of the Hilāl invasion can also be added in North Africa, beginning with the 11th century. See for example Māzarī (died 536/1141) in *Miʿyār* X 422, Ibn ʿAbd as-Salām at-Tūnisī (died 749/1348) in *Miʿyār* VI 142-43 and Ibn Rušd, *Fatāwā* 1017-20. These nomads, however, remained to a large exent outside the urban-agricultural society.

itself responsible for the administration of justice, was lacking here. Secondly, we find almost everywhere in the Sahara a peculiar division of society into two parts. On the one side were the tribes, who manifested the thievish character of the camel nomads. Peaceful business life was not the main issue here but rather the exaction of tribute, highway-robbery and other warlike actions. This way of life was adequately expressed in a pronounced warrior-ethic of an aristocratic style.

The other section of society pursued a peaceful livelihood: trade, cattle-breeding and farming. The renunciation of armed force was able to assume characteristics of a true pacifism which is rare in the Islamic world. Religion was highly esteemed and made a deep impression on daily life. The fine line to bigotry was often crossed thereby. The ideal here was not one of the fearless warrior or highwayman, skilled in the use of weapons, who places his honour above all else, but rather of a holy man and scholar. It goes without saying that these people were responsible for the religious services of the entire society and, as far as their function is concerned, can certainly be considered clerics.

This dichotomy of a society divided into one of clerics and warriors was aspecially crass in the western parts of the Sahara among the so-called Moors.[12] In addition, the sources of information are particularly rich, as the local clerics have produced an abundant literature on the subject of law since the 16th century.

First, the state is lacking here. Secondly, we have two clearly defined classes. The one, namely that of the clerics, not only had a monopoly on religious services, but also on all matters connected with law. Finally, despite its high esteem this class suffered considerably from the exaction of tribute and the robbery of the warriors. In principle there was no evasion of this endemic evil, but there was another way of recouping. In so doing the concept of *istiġrāq aḍ-ḍimma* was used in the following way:

First – and this is crucial – all members of the class of warriors were collectively declared to be *mustaġraq aḍ-ḍimma,* explicitly and without considering individual cases. In other words, they were declared to be

[12] This probably goes back to the arrival of the Arabian Banū Ḥassān, who began their immigration in the 14th century and who subjugated large parts of the autochthonous population. In the process the term Banū Ḥassān, completely independent of its genealogical meaning, became a synonym for "warriors". On the other hand, the most commonly used local term for clerics was Zawāyā.

people who possessed no lawful property.[13] The next step consisted of complementarily, and just as collectively, declaring all members of the clergy as needy and thereby entitled to receive alms.[14] This seems strange to us in that, despite all losses due to theft and the exaction of tribute, it was precisely among the clerics that the richest members of this society were to be found.

What is the consequence of this constellation? According to the opinion already mentioned, which maintained that the needy were entitled to help themselves, the following principle was postulated: a member of the clergy may, or rather must, seize the property of the warriors "on any imaginable pretext, even by theft", as the rule reads.[15] It goes without saying that goods the lawful owners of which could be identified were excepted from this rule. However, as one of the most renowned Moorish jurists at least once claimed, such identifiable stolen goods could not possibly exist under the conditions which prevailed in the Sahara.[16] Thus the way was open for seizing the entire property of warriors without further ado.

This view of the situation had many consequences, the novelty and uniqueness of which however lay almost exclusively in the fact that it only affected one specific class. The judge[17], who of course was always a member of the clergy, was allowed, or rather expected, to take sides in trials between clerics and warriors.[18] But it should be noted especially at this point that there was no executive power behind the judge. Rather, his authority was based solely on his reputation, his influence and the pressure of public opinion, which his verdict could mobilize.

[13] See e.g. Ibn al-Aᶜmaš al-ᶜAlawī, MS 373, p. 2. This treatise of 20 pages, which was often quoted later, exemplarily summarizes almost all essential positions concerning *istiġrāq aḍ-ḍimma* as they can be established since the 16th century among the Moors and they represented the local *communis opinio* until the colonial period. Ibn al-Aᶜmaš addressed this treatise to his pupil, Muḥammad b. Abī Bakr b. al-Hāšim al-Ġallāwī from Walāta, who died in 1098/1687. The latter had attacked the common views on *istiġrāq aḍ-ḍimma* but without succes.

[14] MS 373, p. 9.

[15] Ibid. p. 6, 12, 16: *ᶜalā waǧhi t-tasatturi bi-aiyi waǧhin kāna, ᶜalā waǧhi t-tasatturi bi-aiyi waǧhin mina l-wuǧūh.* Cf. also above, Note 10.

[16] MS 373, p. 13.

[17] Especially in the oasis and trading cities often a regular Qāḍī, otherwise an arbiter *(muḥakkam)* whom both disputing parties approved.

[18] MS 373, p. 16.

Ribā with warriors was allowed.[19] The two most important export items of these regions were gum arabic and salt. Both were legally counted as foodstuffs. The restrictions connected with this could, if taken seriously, make this vital trade impossible, especially if the goods were exchanged for grain.[20] Gifts and also contributions, which were known under all sorts of name, e.g. *zakāt,* could be readily accepted from warriors.[21] Indeed a cleric could appropriate money which had been entrusted to him by a warrior[22], and even theft was allowed. Whether or not a cleric actually did act in such a way naturally depended upon the circumstances. But nevertheless: he could.

Theft, particularly of cattle, was a commonplace event in the Sahara, and so was the attempt to recover all or at least most of the stolen goods. Such missions were performed by the clerics. They were either commissioned so to do by third parties or employed on behalf of their own small farmers. In any case, this service was not performed free of charge, but rather, large commissions were customary which amounted to one- third or one-half of the recovered goods. In order to justify this payment, which was not always in proportion to the amount of work done, it was argued: whatever a member of the warrior- class pays is basically alms, to which all poor people are equally entitled. In other words, he who has been robbed has no more right to this than all other members of the clergy.[22] At any rate, this was the case when compensation was paid. This was always true when recourse was made to the somewhat odd axiom that there can be no identifiable stolen goods under the conditions prevailing in the Sahara.

The situation was similar with the payments of blood-money. In this event too members of the clergy were employed on commission and it

[19] See MS 373, p. 19; Muḥammad b. Abī Bakr aṣ-Ṣiddīq al-Burtulī al-Walātī, *Fatḥ aš-šakūr fī maᶜrifat aᶜyān ᶜulamā' at-Takrūr.* Ed. M. Ibrāhīm al-Kattānī et Muḥammad Haǧǧī. Bairūt 1401/1981, p. 114, Biography No. 98.

[20] Accordingly there is no shortage of treatises on the problem of whether or not salt and gum should be considered as foodstuffs. See for example MS 36 *Risālat al-milḥ,* Maḥanḍ Bābah ad-Daimānī (died 1277/1860-61), MS 985, pp. 1-4 and of the opposite opinion Ḥāriṯ b. Maḥanḍ al-Ḥasanī b. Sīdī ᶜAbdallāh, MS 2154 *Nuqla fī r-radd ᶜalā Maḥanḍ Bābah al -qā'il bi-ṭaᶜamīyat al-ᶜilk.*

[21] Ibn al-Aᶜmaš al-ᶜAlawī, MS 373, p. 7; aš-Šarīf Ḥimāllāh at-Tīšītī (died 1169/1755-56, from the city of Tīšīt in modern-day Mauretania) MS 558 *Nawāzil* 35.

[22] Ibn al-Aᶜmaš al-ᶜAlawī, MS 373, p. 7. Muḥammad b. Abī Bakr aṣ-Ṣiddīq, *Fatḥ aš-šakūr* 48.

[23] Ibn al-Aᶜmaš al-ᶜAlawī, MS 69 *Nawāzil* 165; aš-Šarīf Ḥimāllāh at-Tīšītī, MS 558 *Nawāzil* 19-20.

was also said here: Warriors, who dispose of no legal property, cannot pay blood-money. All poor people, by no means only the relatives of the injured or deceased, had an equal claim to the payment received for the offence. Thus, not only could the commissions be justified, but free regulations of all sorts were possible. The legal specifications, which are normally valid for blood-money payments, and which determine exactly their amounts, could be ignored with a clear conscience.[24] One mav assume here that common law became the official legal custom.

As a last example I should like to mention here the so-called repentance, in Arabic *tauba*. This repentance led to a process similar to the early Mediaeval *commendatio* in Europe, which is considered one of the roots of the feudal system: A socially weak person places himself under the protection of a stronger individual, hands over to him his property and finally receives either all or part of it back as feudal tenure. Protection is exchanged for a relationship of dependence. In our context: If someone no longer felt capable of leading the life of a warrior, he could place himself under the protection of a cleric. In the terminology of the area one would say: he repented. I have already mentioned this process of repentance. In the process of purification the penitent must return all goods he has acquired, either to the lawful owners or, where this is not possible, he must donate them as alms.

Now, this process only affects the two people involved. The poor person, to whom the penitent donates his belongings, is the chosen protector. The penitent, who after this proccss owns absolutely nothing, can now receive back a part of the property he has handed over in the form of alms or on loan. He is thus provided by his new patron with the means of livelihood and possibly of making contributions.[25] He is now a dependent small farmer, whose status also presents many legal problems, which however cannot be dealt with here.

[24] Ṭālib al-Bašīr, MS 382 Nawāzil 247-49.

[25] Ibn al-Aᶜmaš al-ᶜAlawī, MS 373, p. 6, MS 69 *Nawāzil* 154-55.

The legal rights of Muslim women A pluralistic approach

Rubya Mehdi

This article seeks to draw attention to the fact that the subject of the status of women in Islam has so many different aspects. Thus it is very important to adopt a pluralistic approach to the legal rights of Muslim women, which involves anthropological, sociological, and psychological dimensions, i.e. an interdisciplinary approach. This article does not intend to offer any single interpretation but only to show the vast possibilities of the contradictory theories concerning the status of Muslim women.

This article adopts a pluralistic approach at different levels: a) vis-à-vis formal Islamic law (i.e. different interpretations of the *Qur'ān* and the *sharīʿah),* b) geographical and cultural considerations etc., and c) on the normative level of the "semi-autonomous social field" (Moore 1978).

"The subject of women's status in Islam is complex and multifaceted, fraught with stereotypes and misconceptions" (Esposito 1976). The stereotype of the Muslim woman is that she is veiled, illiterate, helpless, meek, oppressed and passive. It is difficult in practice for Muslim women at large to identify themselves with this picture of the "Muslim woman", widely presented by the media. Muslim women living in Western Europe now and then protest against this image, but they are taken as exceptions and the stereotype persists. Women of Pakistan, Afghanistan, Iran and other Muslim countries, who have migrated to join their husbands, or come as refugees to Western Europe, become the victims of this image. Women living in the Muslim countries also do not fit the picture presented by the fundamentalist media in Muslim countries and Western media. Notwithstanding that women in the Muslim countries are going through a difficult period of struggle for their existence, this static stereotypical out-look fails to appreciate their plight. The people responsible for this stereotype are journalists and researchers travelling in the Muslim countries who return with a biased picture. Moreover, this tendency is strengthened in the West by increasing prejudice against immigrants from third world countries to Western Europe.

Before proceeding further, let us examine the effect of this on the situation of the Muslim women themselves. For women living in the

multi-cultural societies of Western Europe, one could say that in many ways their needs are neglected, their existence belittled and their rights minmized. If in some situations a considerate attitude is shown, it is paternalistic. Furthermore the Muslim women's needs are judged in the light of the needs and requirements of Western women. Social workers tend to put women from Muslim countries in a particular framework, not knowing the environment and background from which they come (Mortensen, Schmidt, Benzon 1985). The worst effect for the women living in Muslim countries is that their development and struggle is underestimated; moreover, because they are based on stereotypes, almost all the programmes directed towards the development of women fail to achieve their aims.

Our information about women in Muslim societies is very limited. The conditions and status of women in urban and rural areas, respectively, are very different. Women belonging to different classes have not the same status. Indeed regions, groups, culture, and the role of tradition also determine the status of women. So, too, do politicians and governments. As Sadaawi rightly says:

> "If we study Islam scientifically, look at its origins, compare it with other religions – Judaism, Christianity and other Asian religions – we find that almost all these religions have similar attitudes to women. Indeed, sometimes we find attitudes to women much more tolerant or progressive in Islam. So it is not Islam, it is not religion even, that oppresses women. And Islam is not one Islam. There is the Islam of Saudi Arabia, the Islam of Tunisia, the Islam of Lebanon. What you do find is that governments and politicians invariably pick from religion what suits them and use it to justify their position" (Sadaawi 1980:175).

The situation of women as prescribed in the *Qur'ān* is interpreted differently. The same is true of *sharīʿah* schools of law which provide women with different legal rights (Waines, 1982).

In various periods of history the status of women changed. In early Islam women had a better status compared with their pre-Islamic situation. "However, both later historical events and assimilated cultural influences unfortunately again compromised those rights" (Esposito 1976; 1975; Lokhandwalla 1987).

Therefore we should beware of making sweeping generalizations about Muslim women. A great deal of work remains to be done in the study of status of the women in Muslim societies.

For the purpose of this article, the formal *sharīʿah* attitude towards women has been roughly divided into two (i.e., fundamentalist and

modernist), to show a vast difference in attitudes. The sole aim of this simplification is break the sterotypical presentation of a static view of Muslim women.

Fundamentalist and modernist attitudes can be discerned on all levels: when interpreting the *Qur'ān,* in the *sharī'a,* on the social level, on the government level, etc. The fundamentalist view gives women a secondary status. On the other hand, acording to the modernist opinons, the *Qur'ān* guarantees an equal status for women. They quote, for example, the verse from the *Qur'ān* that says: "You have rights over your wives and your wives have rights over you."

It should be stressed that there are variations; the presentation of attitudes towards women in such crude, black and white terms is not truly accurate. However, this rough separation of fundamentalist and modernist positions serves to demonstrate the wide range of attitudes between the two extremes of the spectrum.

To conclude, there is no one homogeneous Muslim attitude towards women. Just as the notion of a uniform Muslim world is a misconception, so too is the notion of a uniform attitude towards women.

The following examples illustrate the different interpretations of the rights of women in the *Qur'ān* (there are many other examples of such controversial verses). The same or different verses are used by the fundamentalist or the modernist to explain the status of women in their own ways.

On equality of women and the *Qur'ān:*

> "Verily the Muslim men and Muslim women, the believing men and believing women, the devout men and devout women, the men of veracity and the women of veracity, the patient men and patient women, the humble men and humble women, the alms-giving men and the alms-giving women, the men who fast and the women who fast, the chaste men and the chaste women, and those of men and women who remember God frequently: for them hath God prepared forgiveness and great reward" (35:33).

The intention of this verse is interpreted as equality between the sexes (Lokhandwalla 1987:15). Further, the *Qur'ān* says:

> "They are garments for you while you are garments for them" (2:187).

This is interpreted as meaning that just as a garment gives warmth, protection and decency, so do a husband and wife offer each other

intimacy, comfort and protection from committing adultery and other offences (Lemu 1978). Another verse in support of equality is:

> "Whoever performs good deeds, whether male or female, and is a believer, we shall surely make him live a good life, and we will certainly reward them for the best of what they did (16:97).

On the other hand, fundamentalists argue:

> "Men are in charge of women because Allah hath made one of them excel the other" (Sura 4:34).

The verse is interpreted as meaning that the *Qur'ān* postulates men's superiority over women.

On *purdah* (veil):
Qur'ān sura 24, verse 31 says:

> "Tell believers to avert their glances and to guard their private parts; that is purer for them. God is informed about anything they do"

Qur'ān sura 24, verse 32 says:

> "And tell the believing women to lower their gaze and be modest, and to display of their adornment only that which is apparent, and to draw their veil over their bosoms, and not to reveal their adornment save to their own husband or fathers or husband's fathers, or their sons or their husbands' sons, or their brothers or their brothers' sons or sisters's sons, or their women, or their slaves, or male attendants who lack vigour, or children who know naught of women's nakedness. And let them not stamp their feet so as to reveal what they hid of their adornment. And turn unto Allah together, O believers, in order that ye may succeed".

This verse is often supplemented with sura 33, verse 59:

> "O prophet, tell thy wives and thy daughters and the women of the believers to draw their cloaks close around them (when they go abroad) that will be better, that so they may be recognised and not annoyed. Allah is ever forgiving and merciful".

The first two verses ask the believers to lower their gaze and be modest, and (for women) to display only those parts of their adornments that are necessary, to draw their veils over their bosoms. In verses 33:32 the wives of the Prophet are addressed and reminded that they are not like any other women, and therefore should stay at home and not display finery as in the pagan custom. The position of the modernists concerning these

verses is that no specific Islamic dress is being prescribed for women. Literally these verses address only the wives of the Prophet and applies only to them. Moreover Muslim men are asked to lower their gaze in the presence of women and be modest (Pal, 1990); while some authorities maintain that it pertains to all Muslim women. The practical implication is that women stay at home, stay within the four walls, etc.

Domestication of women is related to the above-mentioned *purdah* and segregation of women. According to the fundamentalists, women should be confined to the house and devote their energy to the preservation of family life. According to the modernists, seclusion of women came into Islam in the middle of the third century, whereas at the time of the Prophet women participated in all fields of life (e.g., their special role in business). Further, domestication is only an urban phenomenon. In rural areas, for economic and other reasons, women are not secluded and domesticated.

With the concept of segregation, the virtues of chastity, modesty and obedience are promoted. The argument presented is that absence of *purdah* leads to sexual anarchy (Seif Al-Hatimy 1979). What *purdah* and segregation mean to women is a matter interpreted differently by different writers (Webster 1984).

The above-mentioned examples show that the *Qur'ān* can be interpreted in different ways. The realisation that different interpretations were possible spread with the implementation of laws discriminating against women in Pakistan; women started reading the *Qur'ān* and sharī^{c}ah to find another interpretation of women's rights than the one presented by fundamentalists.

Sharī^{c}ah:

The *sharī^{c}ah* evolved over several generations following the Prophet Muḥammed's death in 632 AD. Four schools of law (the Ḥanafī, the Ḥanbalī, the Mālikī and the Shāf^{c}ī) emerged within the predominantly Sunnī Muslim community. These schools differed in their definition of the rights of Muslim women. One of them would exel the others in assigning rights to women in one aspect while another school of law would be better in some other aspect. For example Ḥanafī law absolutely withholds from women the right to divorce, no matter how ill-treated they are by their husband, whereas Mālikī principles are liberal in this regard.

One of the basic issues in Islamic *sharī^{c}ah* is that either the door of

ijtihād (interpretation of Islamic principles according to the requirements of the time) is open or closed. Fundamentalists preach *taqlīd*[1] while modernists stand for the possibility of interpreting *sharīʿah* according to the needs and requirements of the changing ages. In Muslim countries one of the ways women have chosen to fight for their rights is within Islamic law. There is an interesting example of this in Pakistan where women appealed for *ijtihād,* protesting and resisting the islamization of laws, which seriously discriminated against women, and struggled to preserve the Muslim Family Laws Ordinance of 1961, which gave them more rights than the fundamentalists think they should enjoy.

When briefly presenting the variations in their legal status, it should also be mentioned that women have different legal rights in different Muslim countries. It is important to look at this issue in the context of a particular country, as well as at the varying details in these rights (Zia 1980).

On legal inequality – the position of the witness:

According to one interpretation, the evidence of a single woman is not acceptable, and in some cases the evidence of a women is absolutely excluded. Fundamentalists argue that by their very nature women are unable to act as independent adults and are so overcome by their emotions as to render their evidence invalid (Afshar 1988). Fundamentalists base their argument on the verse in the *Qur'ān* saying: *"Call in two male witnesses among you, but if two men cannot be found, then one man and two women, whom you judge fit to act as witnesses"* (2:282).

According to the modernists, the two women formula was intended as a safety device, *"so that if one (of the women) erreth the other will remember"*, but this became the basis for curtailing to a minimum women's rights to give evidence in criminal and civil cases (Lokhandwalla 1987). The modernists' argument goes further: that, if it is possible to have learnt two-thirds of the faith from ʿĀ'isha (wife of the Prophet), how could she possibly be half a witness; keeping in mind that ʿĀ'isha is considered to be one of the most reliable sources of *ḥadīth* by virtue of her intelligence and outstanding memory. More than a thousand hadith are reported by her and she is regarded as one of the great teachers of *ḥadīth.*

[1] *Taqlīd:* Imitation, uncritical adherence to the past precedent and law as expounded by the law schools.

On polygamy:

> If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them) then only one. (*Qur'ān:* 4:3).

The *Qur'ān* futher says:

> Ye are never able to be fair and just between women even if that were your ardent desire (*Qur'ān* 4: 129).

According to the modernist view, the apparent contradiction between these verses in fact shows the undesirability of polygamy. Thus polygamy is allowed only under special circumstances; otherwise it is forbidden in Islam.

Fundamentalists stand for man's absolute right of polygamy. A common argument used in favour of polygamy is that in the West "the man casts off the mistress when he is weary of her. It is better for a woman to live in Islamic polygamy – with a legitimate child in her arms – than to be reduced, cast out on the street with an illegitimate child" (Afza, Nazhat 1982:22; Ahmed, Khurshid 1982).

On divorce:

In Islamic law a woman can divorce as *khul'*[2] or she has the delegated power of divorce. Her situation is not equal to that of a man. But the *Qur'ān* says:

> "...then keep them in all decency or part from them decently. It is not lawful for you to take anything you have given them" (*Qur'an* 2:229).

Again Mālikī principles grant women more grounds for divorce than do Ḥanafī. The 1939 Dissolution of Muslim Marriage Act in Pakistan definitely improved the situation of women but all grounds of divorce cited by women are subject to proof via judicial scrutiny, whereas a man need not state any reason for divorcing his wife. This is far from an equality of the sexes (Puri, Balraj 1987).

[2] *Khul'*: Agreement entered into to allow the dissolution of a marriage, if the woman seeks the divorce by paying an amount of money in compensation or a consideration to her husband.

On *qiṣāṣ*[3] and *diyah:*[4]
Diyah (blood money) of a woman is fixed at half of that of a man. One scholar queries that if *qiṣāṣ* (the death sentence) as a punishment is equal, why is *diyah* not gender-neutral? Hussain says:

> "If for the purpose of Qissas the blood of men and women is equal there is no rational principle which may permit discrimination in the price, compensation, indemnity of what represents blood" (Hussain 1987:315).

These are just some examples to show various tendencies in the *sharīʿah,* and there are other variables which should be taken into consideration for determining the legal rights of Muslim women.

Social, Political and Economic Systems

Under different governments, women enjoy different legal status depending on the policy of the regime. In some countries like Sudan, Pakistan and Iran, the situation of women has been exploited mostly to make them scapegoats, as this was both the easiest and the most effective way of showing progress in islamization.

Fundamentalists argue that a woman cannot be head of the state and different traditions from the holy Prophet are cited. They base their argument on the saying of the Prophet "that the government of a woman does not render her people happy", and women's intellectual capabilities are also said to be inferior to those of men.

Muslim women in a class and urbano-rural perspective

Different social classes of women do not enjoy the same rights. For example, working-class women do not wear the veil in Pakistan. It is mostly used by the middle class in the cities. In the same way a woman from an upper class family has more power, authority and status than others (Asad 1978). Education, which is not equally available to women of all classes, also plays an important role. Women in urban and rural areas also differ in their respective rights and status in Islamic societies. Thus, instead of generalizing about women in any one Muslim area, it is crucial to analyze their legal rights in the light of the above-mentioned variables.

[3] *Qiṣāṣ:* Punishment by causing similar hurt to the same part of the body of the offender as he has caused to the victim or by causing his death if he has committed murder.

[4] *Diyah:* Blood money, indemnity or compensation for injury or death.

A pluralistic approach towards women's legal rights

The second level of the pluralistic approach towards the rights of Muslim women is that the subject matter should be analyzed in the framework of legal pluralism and informal law (Griffiths 1986). Muslim state laws are largely biased in the men's favour. They totally neglect the real situation of women. To understand the legal position of women, it is necessary to deal with their actual living situations: *"Empirical knowledge about how women organize their lives, plus a comparison and combination of that knowledge with the make up and function of the legal system are necessary for an understanding of the real legal situation of women"* (Petersen 1992). There is a failure to recognize the real situation of women in Muslim countries when official statistics tend to underestimate the labour performed by women. The majority of Muslim women in the world live in poverty and their illiteratcy rate is high; in such situations there is a tendency to underestimate the participation of women in economic activity. They are invisible workers, not protected by labour laws (Khan, Nighat Said 1989).

'Ulamā' (religious scholars) and elites in the Muslim countries make interpretations about the rights of women. These never reach the majority of women, whose lives are governed by local traditions and customs, i.e., the semi-autonomous social field (Moore 1978). Not only do the laws of the peripheral capitalist states not correspond to the real situation of women and the norms regulating their lives, but these states are also guilty of corruption when laws are used by men to exploit women (Hoebel 1965; Mehdi 1990).

In the Third World setting, as in peripheral capitalist states, the character of the formal laws is such that they have lost their credibility (see the analyzis of instable and inconsistent legal systems in my forthcoming book on islamization of laws). In one situation, state laws could be oppressive while in other instances they could also be progressive for women. For example, the Muslim Family Laws Ordinance of 1961 in Pakistan, promulgated at the insistance of progressive women, imposed restrictions on polygamy and introduced other reforms in family laws.

On the whole the lives of women are regulated in the semi-autonomous social field, i.e., by traditions and customs which are relatively independent of state laws (Moore 1978). The norms of the semi-autonomous social field can be equally oppressive for women, but take more account of their real situation. The question of how much power women have in this sphere is discussed under the next heading.

It should be remembered that state laws, in the context of which the rights of the Muslim women are judged, are not very effective in the Muslim world. There is a wide gap between state laws and the traditional and customary laws relevant to the majority of the Muslim women living in rural areas (Mehdi 1993; Pearl 1971; Kurin 1986). A forthcoming article of mine shows that women in the villages and small towns are totally unaware of the existence of the rights which they enjoy in Pakistani state laws, and that these state laws are widely disregarded in practice. This occurs despite the fact that the sanctions are very severe in the formal state laws. The same has been observed with regard to women in Turkey and in Morocco (Cosar 1978; Maher 1978).

The perspective presented by Hanne Petersen on the postmodern situation of women in the West is important for the understanding of the relationship between formal and informal laws and what impact it has on the lives of women (Petersen 1992). When she speaks of the normative understanding and norms of consideration in the semi-autonomous social field, she focuses on the informal norms enjoyed by women for their benefit, outside the formal law. In the situation of Muslim women another important aspect is the oppressive nature of customs and traditions, but of course the norms of consideration are there, too. Her conclusion, that informal laws do not satisfy the needs of all women but only the powerful, is yet to be tested in the Muslim women's situation.

The discussion brings us to the question of human rights and Muslim women: there is no doubt that Western women, through struggle, have achieved human rights for themselves. Mayer argues that in (formal) Muslim state laws there is generally a reluctance to condemn the principle of equality, in order to avoid international embarrassment, but in practice there is an absence of any willingness to recognize women as full, equal human beings who deserve the same rights and freedom as men (Mayer 1991). Formal Islamic law argues that Islam is the best in granting women rights but when it comes to details it is said that a woman's place is in the home, caring for the family and doing her household duties, etc. On the other hand, one also notices the progress of modernism and the achievement of Muslim women's rights in formal Islamic law. Informal legal norms, governing the lives of women, are as oppressive as formal Islamic laws, but here is found the real situation of women, attached to their concrete needs (for example, the practice of child marriage, polygamy etc). Thus on the one hand these norms are oppressive (formal *sharī'ah* makes reforms there of), but on the other

they fulfill practical needs (by e.g. arranging marriages securing land in the family, and polygamy becomes a solution for divorced women who have no other means of security). Is polygamy beneficial? Yes; when the woman has the possibility of being left alone, it is good for her to be a secondary wife instead of being left alone without a roof. This is a far different perspective from the one-sided picture of polygamy as oppression of women Briefly stated, international standards of human rights can only be applied to women when their basic needs are fulfilled and they are in a position to choose. This is a crucial question when the demand is made for the same human rights as women have in the West. Fundamental human rights are only meaningfull bearing in mind the real situation of women – if their material conditions are changed o accordingly. Therefore recognition of women's labour and education and elimination of their poverty are necessary if they are to enjoy human rights.

Hence a closer examination of Muslim societies shows that the *sharīʿah* of the Muslim state laws does not represent the real situation of women. It is important to look at Muslim women's rights under the norms which regulate their lives in the semi-autonomous social field. And the relationship and dynamics of these two would determine their real legal situation. What is needed then is a period of empirical analysis for Muslim feminism.

Feminist movements in Muslim Countries

There exist different progressive movements among Muslim women. Their development has been different from that of Western feminism as it is derived from their own conditions and requirements. These feminists have interpreted *sharīʿah* from women's perspective (Patel 1986; Jahangir and Jilani 1990).

Feminist movements in Muslim countries are mainly concentrated to the cities. When fighting for their rights women take it for granted that their lives are regulated by state laws, and the feminists take advantage of the reforms in the formal laws. When it comes to state laws, which discriminate against women, it is more likely that, in practice the women in the villages or the lower classes will suffer and be victimized by them (Mehdi 1990). One example of this from Pakistan is that the official requirements for the registration of marriages and divorces are often ignored. In special cases, at the instigation of men, these laws have actually been used against women without resources. On the one hand,

women struggle to challenge gender-biased interpretation of *sharī'ah*; on the other they seek to preserve the rights won in the formal law and spread them among women at large, to make women aware of their rights, and to make alternative interpretations in those spheres, where their rights are curbed.

Work needs to be done in the sphere of the semi-autonomous social field, to comprehend the real situation of women in which their lives are regulated, and to struggle for changes in their material conditions – those conditions where women's rights are meaningful to them.

It is important for feminists in Muslim countries to struggle for rights in the formal state laws as these are relatively oppressive, even if they only affect the lives of the small group of educated upper-class Muslim women. However, the greatest need is to investigate the informal legal norms which govern the lives of the majority of women.

The semi-autonomous social field and the exercise of power by women

It is relevant to note that some of the studies conducted by sociologists and anthropologists investigating the power enjoyed by women in the semi-autonomous social field – that arena outside the state legal structure – help us understand the dynamics of the formal state laws and the informal laws, their relationship and hence the real legal situation of women. It is significant to recognize the actual gender-power position, as this is highly relevant to the legal norms concerning women in Muslim societies.

Some writers have attempted to find the sphere of power and exercise of power by women in the Muslim societies from within and beyond their domain (Webster 1984 Lawrence 1985). Altorki has shown that female control and manipulation of information have far-reaching economic and political consequences in Saudi Arabian society where kinship alliances dominate both local and national politics, Lawrence observed in Morocco how women effectively control men from the so-called private sphere by the arrangement of various social pressures within the household or family. As they are not in a position, like men, to impose decisions from above, women must work with the primary resources available to them (i.e., the relations among members of the family) in order to influence situations and decisions to their own advantage (Lawrence 1985).

In this regard, Cynthia Nelson's argument is relevant,. She says:

> "By reversing the usual perspective, the segregation of women can be seen also as an exclusion of men from a range of contacts women have among themselves, forming exclusive solidarity groups which are able to employ considerable social influence and control"

Nelson's argument is that social power is a particular kind of relationship, the central feature of which is a reciprocity of influence where men and women "negotiate" the rules which define and circumscribe that relationship. So then the question is to investigate how women act in this reciprocal, negotiated order. A re-evaluation of the metaphors of private and public life in terms of the domestic and political dynamics is necessary. Nelson says that ethnographic material clearly suggests that women do approach public affairs, but they do so from a private position (Nelson 1974; Altorki 1977). Aswad's findings in a Turkish village show that, because of their exchange network, women could not be labelled domestics just because they are held at home (Aswad 1978).

Religious or supernatural ritual provides avenues of influence as well. Fatima Mernissi has analysed women-saint relationships. She mentions women-saints who specialize in solving problems of sexuality and reproduction, saying that: *"These women in the supernatural realm do not respect the traditional Muslim sexual division of labor which excludes women from power in religion and politics. In the supernatural realm, women may refuse to assume domestic roles and play an active role in both religion and politics"* Mernissi 1987).

Some research has been done on this in Pakistan. An example from Pakistan is *Choki* (Meeting): where women organize a singing session and a trance is achieved whereby they are able to analyse their problems with the help of supernatural powers. The sessions are led by women. Where male family-members are allowed to participate, they are dependent on their women to enter into trance and analysis of their problems.

In the patriarchal and feudal setting, in which the majority of Muslim women live, domestic or home life diverges from the Western model. In this setting, the family is in the centre, with women playing a very influential role. During my visits to villages in Pakistan in 1992, I noticed that during the season after the harvest people spent much time arranging marriages. The matter is discussed in the family. Usually it is the mother who finds a match for her son. Women play an active part in arranging marriages, which perform a social and economic function,

determining the distribution of land. Small acts can be very significant. For instance, if the girl returns to her parental home after her marriage, the length of her stay can be considered so important that it becomes a serious point of grievance and dispute, spoiling the relationship between the families. Therefore it should not be forgotten that women play an integral role in the society where the family is central. In this sphere women exercise a great deal of control.

Considering women and power, the purpose is not to say that women have enough power and to justify their condition, but to say that in their oppressed situation they have found ways and means to survive (survival tactics). If this is so, it is important to examine the case to understand the psyche of women.

Maybe one should differentiate between survival tactics and manipulation and the real power which women enjoy. For example a mother's manipulation of her children against the authority of their father is a common phenomenon in Pakistan (perhaps because these children are the only hope and security for her future). Her special status as a mother-in-law is also significant. Does she control by way of manipulation (a part of her survival tactics) or does she exercise direct power? Aswad asks, whether it is a negative power, "that of cajoling, threatening, humiliation, withholding favors, gossip, pressuring and so on"? (Aswad 1978). One could argue that these patterns are institutionalized in the societies under discussion.

In the extended family and the collective family system, the oldest son usually lives with the parents. The property is supposed to be divided among the children according to Islamic instructions. In practice a woman recieves no share of the land – although the formal law gives her the right to property – and she never demands it; instead, families arrange large dowries for girls at the time of their marriage. This is seen as a sign of honour. I discussed the issue of dowry with a family in a village, and it was actually argued that while the girls do not recieve any share in the land, their dowry was the only share which they are given. However, according to the state law of Pakistan dowry is a social evil and therefore there is a restriction on how much dowry may be given to a girl at the time of her marriage. In fact, if state laws were obeyed, a woman would receive nothing in practice.

In the villages of Pakistan, there are also examples where women work as mediators and wise women. In the families these roles are widely respected and play an important part in solving disputes; these women

are accorded status in society. Their actions and style of behavior seem to reflect their position.

To conclude this discussion, one might simply state that the power enjoyed by women can be equated to the privileges and rights they enjoy in the cultural setting in which they live. But the fact still remains that women are not in the mainstream but on the edge and exercise power according to this position.

Conclusion

The situation of Muslim women is a vast field of research. It is a misconception to regard all Muslim women in one perspective because there are different interpretations of Islam, and Muslim women have different problems depending on the different social and economic environments in which they live. Furthermore, the reality of Muslim women's lives is complex and varies from one region to another, and different aspects of their problems must be considered in their particular contexts.

Women's different rights in formal *sharīʿah* need to be studied according to its different interpretations. On this level modernism and fundamentalism can be differentiated. However, Muslim women's actual standing necessitates the study of women in the semi-autonomous social field. Formal and informal *sharīʿah* have their advantages and disadvantages for women.

We should bury the traditional stereotypes of Muslim women. It is important to follow the women's movements in Islamic countries and support their cause in the light of their conditions and demands. Existing problems must be addressed in their context, as must the stereotypes created by the media and strengthened by superficial research. Such is the purpose of this paper, which is not a justification of the condition of women because women of the Third World are the most oppressed group, living in the worst conditions. *Sharīʿah,* however, does not reflect the true situation of women; there is a vast difference between state imposed *sharīʿah* laws and the actual practice thereof.

Table

Total subjection to men	Equality
Domesticity of women	Non-domesticity
Segregation	Participation
Legal inequality	Legal equality
Half witness	Full witness
Not assigned leader	Can lead
Limited rationality	Full Rationality

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Judicial Opinions in Contemporary Egypt

SAYYID ṬANṬĀWĪ, THE STATE MUFTI OF EGYPT

JAKOB SKOVGAARD-PETERSEN

If a Muslim is in doubt about the rules or the attitude of Islam on a certain issue, he can ask for a legal opinion, a *fatwā*, from a specialist in Islamic Law. This specialist is called a *muftī*. Evidently this task is as old as Islam itself. But with time another more delicate function was added to that of giving *fatwās* to the majority of Muslims; some muftīs were raised to a position where they must give *fatwās* to sanction the politics of the rulers.[1]

In Egypt, this role became increasingly institutionalized in the second half of the 19th Century. The *Dār al-Iftā'*, the administration of the Muftī, considers the year 1895 as its founding date.[2] Since then, all the *fatwās* issued have been registered in protocols. They amount to approximately 70.000. These *fatwās* deal with all conceivable and inconceivable issues (from the specific rules for adoption to the question of whether a Muslim about to starve to death may eat his own hand). Thus, they constitute a well of information for the theological, juridical and social history of contemporary Egypt. However, the *fatwās* are not binding on the recipient, who can be a ministry, a governmental or non-governmental organisation, or simply a private person. Furthermore, the majority of *fatwās* from the *Dār al-Iftā'* are very brief and give only cursory information on the context of the question, or how the conclusion was reached. Therefore, it is often difficult to assess the real *Sitz im Leben* of any given *fatwā*.

As early as 1931 a decree established that the courts were not bound by *fatwās* of any kind.[3] Thereby, the office of the State Muftī lost almost all influence on practical legal matters in Egypt. The only specifically legal function he retains is that of examining any death sentence in order to

[1] Tyan, E.: Historie de l'Organisation judicaire en pays d'Islam. Leiden, Brill, 1960, p. 223.

[2] Jādd al-Ḥaqq, Jādd al-Ḥaqq ʿAlī: *Mahāmm Dār al-iftā'*. In al-Majlis al-Aʿlā li 'sh-Shu'ūn al-Islāmīya (Ed.): *Al-fātāwa al-Islāmīya*. Cairo, 1982, vol. 10, p. 3653.

[3] Liebesny, Herbert J.: Judicial Systems in the Near and Middle East: Evolutionary Development and Islamic Revival. *The Middle East Journal* 37(2), 1983, pp. 202-17. p. 204.

establish that it does not contradict the principles of Islamic *fiqh*. However, the *Dār al-Iftā'* is still a separate administration under the Ministry of Justice. With the abolition of special Sharī'a Courts for personal matters in 1955, additional tasks were transferred to the Muftī, most importantly today the authority to certify the appearance of the new moon and thereby the declaration of the lunar months of the Islamic calender.

The present Muftī of Egypt, Dr. Sayyid Ṭanṭāwī, was appointed by presidential decree in October 1986. It was by no means an obvious choice since, contrary to his predecessors, Dr. Ṭanṭāwī had not graduated from the Sharī'a college, nor worked at the Ministry of Justice before. Being a graduate of the Azhar College of Theology, he had taught Islamic studies at the University of Asiyut and at al-Azhar for twenty years, whilst editing a 15-volume commentary on the Koran.

In an interview in *al-Ahrām* four days after his appointment, Ṭanṭāwī stated his visions for the *Dār al-Ifta':* From now on it was to concentrate on *fatwās* which were of relevance to the Egyptian people. These included an attempt to unify the beginnings of the lunar months, so that for instance Ramaḍān would begin simultaneously all over the Arab world. Other topics, the legality of which must be examined, are the introduction of modern medical techniques and various economic practices, such as *shahādāt al-istithmār,* capitalisation certificates. These were all subjects which had been discussed amongst juridical scholars, in Egypt and internationally, throughout the 1970s and 80s, so far without reaching much substantial agreement. Ṭanṭāwī expressed great optimism on the possibility of co-operation with other *fatwā*-issuing bodies internationally and locally: he expected to have weekly sessions with the *fatwā* council of the al-Azhar University and thought that they might even merge.[4]

Seven years have passed. What of all this has been achieved? Let me begin by asserting that so far, Dr. Ṭanṭāwī has been an extraordinarily active Muftī. How do I know?

First of all, Dr. Ṭanṭāwī has been so kind as to let me interview him, and allow me to sit and study the handwritten protocols of his *fatwās* in the new *Dār al-Iftā'*. Secondly, it is possible to follow his doings in detail in the Egyptian press. Here is one of the major developments in the role of the State Muftī: if in Egypt the Muftī has always been somewhat of a public

[4] *Al-Ahrām,* 1/11 1986, p. 7.

person, this one is eminently so. This can be illustrated by the number of references to him in the index to *al-Ahrām*. While the former Muftī, ʿAbd al-Laṭīf Ḥamza, is referred to twelve times during his four years in office, there are more than 200 references to Ṭanṭāwī for the four years 1987-90. And this is in *al-Ahrām* alone! Especially in the Islamic oppositional press he has figured in almost every issue since 1989. This gives us an opportunity to follow the activities of this Muftī and place a number of his *fatwās* in context, thereby greatly enhancing their value as sources for the Islamic legal debate in Egypt today.

Without going into detail, it is easy to discern a pattern in the life of the Muftī. There is the annual pattern: lecturing in the Muslim youth camps in Alexandria in summer, speaking to the new missionaries in October, commemorating the October victory etc. Moreover, there is the Muslim annual pattern: articles and speeches at the birthday of the Prophet, the pilgrimage, and most importantly Ramaḍān, where he features every day with prayers and *fatwās*. Then there are the campaigns against extremism: every year Ṭanṭāwī and the Minister of *Awqāf* Muḥammad ʿAlī Maḥjūb spend several weeks touring mainly Upper Egypt and speaking at public meetings to the *shabāb* (young men) about the dangers and mistakes of extremism and about Islam as the religion of tolerance and moderation. This is linked to other social engagements pertinent to e.g. the struggle against drugs, the advocacy of family planning etc. Ṭanṭāwī frequently re-iterates his *fatwās* on drugs and extremism, clearly feeling a personal commitment to fight these social evils with the authority of religion. Needless to say, this is appreciated and given full coverage in the semi-official part of the Egyptian press.

Dr. Ṭanṭāwī's *fatwās* can be divided into three categories: a) First there are the hundreds and hundreds of very small *fatwās* which require a minimum of research, the bulk of them being questions by private people on standard issues in Islamic inheritance law. These are not prepared by the Muftī himself, but presumably approved by him.

b) Secondly there are the *fatwās* on very uncommon or controversial issues. These *fatwās* are longer and have required a varying amount of research in *fiqh* manuals, as well as an *ijtihād* by the Muftī himself. There are around a hundred of these *fatwās*.

c) Thirdly there are the*fatwās* on major social issues, where there is a well-known disagreement among Islamic legal scholars. These are often issued at a press conference in the *Dār al-Iftāʾ*. These have also been thoroughly prepared, and in a couple of cases the Muftī has had to

continue investigating the matter in order to defend himself against his critics. To this third group belong the *fatwās* mentioned in the interview with *al-Ahrām*. I shall briefly review them.

The observation of the new moon and declaration of the lunar month is, as mentioned, a prerogative of the Egyptian State Muftī. Nevertheless, this issue has aroused bitter controversy. There are two issues at stake here. One: whether it is permitted to make use of astronomical calculations instead of observation by eye. Two: whether the Egyptians should fast in Ramaḍān if observation of the new moon is reported from afar.[5] Both issues have been discussed by Islamic legal scholars for centuries, but the discussions received new impetus at the turn of the century with the introduction of the telegraph and improved astronomical calculations.[6] Indeed, it is no major challenge for astronomers to predict exactly the first night where the new moon is in the horizon after the setting of the sun. On the fourth of March 1989, Ṭanṭāwī issued a *fatwā* stating the rules for the observation of the new moon. In practice, he is relying on astronomical calculations, but maintains that the new moon should still be observed by the human eye, as is stipulated in the Koran.

As for the co-ordination of the Islamic calender with the other Islamic countries, Ṭanṭāwī insists that it is up to the Egyptian *Dār al-Ifta'* to decide whether or not to follow reports that the new moon has been observed elsewhere, depending mainly on whether the observation can be confirmed by the astronomers.[7] This may sound trivial, but has acquired a political dimension. As is well known, Saudi-Arabia has since the 1960s appropriated some of the religious responsibilities formerly held by Egypt, such as the fabrication of the *kiswa*, the black cloth of the Kaʿba. Saudi-Arabia has also built an observatory for the observation of the new moons, and nobody denies it the right to declare the beginning of *dhū'l-hijja*, the pilgrimage month.

Perhaps realizing that the declaration of the new moon is an important justification for his own office, Muftī Ṭanṭāwī has grown more reluctant to surrender his final authority on the matter, even if it seemingly goes against the general endeavour to unify the Muslim world. A

[5] The Muftī's stand on these two issues is discussed, *inter alia*, in *al-Ahrām* 18/5, 7/6 and 17/6 1988.

[6] Skovgaard-Petersen, Jakob: The Telegraph and the New Moon. In *The Study of Religion in Denmark: an Anthology*. Edited by Geertz/Sinding. Aarhus, 1994.

[7] *Al-Ahrām* 11/2 and 13/3 1990.

tragic outcome of this symbolic struggle between the *waṭan* and the *umma* was reported from the town Bani Suef in April 1992, when what the Egyptian press labels the extremists had gathered to pray for the feast following the Saudi declaration that Ramaḍān was over, thereby defying Ṭanṭāwī who let the Egyptians fast for another day. This prompted the police to attack the mosque, and four young men were killed.[8]

Another major field are the *fatwās* on new medical techniques. Such *fatwās* have steadily increased throughout the 1980s, and the role of the Muftī here is more or less equivalent to that of the ethics councils set up in several European countries during the same decade.

Dr.Ṭanṭāwī's *fatwās* on new medical techniques are characterised by what could be called a technological approach: what will this technique be used for, – and is there something in this use which goes against a principle in Islamic legal thinking? In other words, every single technique introduced is evaluated like any previous type of technique, without any consideration of possible consequences. The Muftī seemingly does not share our ethics councils' fearful perception of modern medical science as a *system* with is own dynamic which threatens the human condition itself, if it is not subjected to strict control. Consequently, the *fatwās* are rather permissive of these new techniques, as long as they do not infringe upon public morality. I shall mention a couple of these *fatwās:*

a) Artificial insemination. Here it is stressed that children are a blessing, childlesness a shame, and modern science should work to help the fulfillment of marriage, viz. the begetting of children. Thus, it is permitted. However, the Muftī insists that artificial insemination must be restricted to married couples alone, sperm banks can never be allowed.[9]

b) Organ transplantation and death criteria. This is a current debate, involving many analogies to traditional *fiqh* debate on cutting into corpses in order to save an embryo, to save valuables from the belly, and the like. With the establishment in Egypt of blood banks by the beginning of the 1960s, the discussion was extended to the donation or sale of limbs or organs, with the donor's consent. Many scholars argued that this was forbidden on the grounds of the Koranic prohibition against suicide and self-mutilation; the idea being that the human body is not the property of the individual, but of God, and man is therefore not entitled to give it

[8] *Al-Wafd,* 5/4 92, *al-Ḥayāt* 8/4 92.

[9] Unpublished *fatwā* of 11/10 1989. Record 118, fatwa number 132.

away, let alone to sell it. Against this Ṭanṭāwī piously states that at the end of the day, everything we trade in is in fact the property of God. Moreover, he applies the principles of, "necessity permits the forbidden things" (within certain limits) and "the lesser damage is to be preferred, if damage cannot be avoided" to advance the position that transplantation is permitted, if the physician can certify that a life can be saved or a disease cured, with no or little harm done to the donor. This is evidently the case with blood and other regenerating parts of the body, but less so with limbs. Much of the *fiqh* discussion is therefore concentrated on making judgments on the impact of loss of specific parts of the body, particularly those of which we have two, such as eyes and kidneys. Again, the Muftī is absolutely firm in his prohibition of any sort of sale or financial compensation related to the transplantation of limbs or organs.[10]

Special emphasis in the more recent *fatwās* has been given to the transplantation from dead bodies. From the very beginning, Ṭanṭāwī has permitted transplantations from dead bodies though asserting that the dead have a claim to respect equalling that for the living. Within the last couple of years, pressure has mounted for more of these operations, and in May 1992 the Muftī participated in a declaration which called for a re-evaluation of Egyptian law in order to introduce the cerebral death criterion.[11]

c) The last medical *fatwā* I shall mention, is from 1988 and concerns sex-change surgery. It is connected to a famous case, where a student at the Azhar University after years of psychological treatment was granted a sex-change operation, where his male genitals were removed. The al-Azhar and the Doctors' Syndicate sued the surgeon on the grounds that there had been no hormonal or physical indications that this operation was necessary. The doctor of the Public Prosecutor, however, accepted the explanation of the psychologists consulted, that there is such a thing as psychological hermaphroditism.[12] During the process the Muftī was

[10] The most elaborate *fatwā*, of 5/2 1989, has been reprinted in Ṭanṭāwī: *al-Fatāwā ash-Shar'īya*. Cairo: Mu'assasat al-Ahrām, 1989.
There are a great number of minor *fatwas*, often to government bodies, forbidding sale of organs and limbs. Moreover, Ṭanṭāwī has given statements to the newspapers on the issue, e.g. *Al-Ahrām* 13/7 87, 29/3 88, 24/1 89 (a declaration in Parliament), 9/2 89, 30/1 90, 23/2 90, 28/3 91 and 15/1 92.

[11] *Al-Ahrām* 24/5 1992, p. 1.

[12] *Majallat Hay'at al-qaḍāyā ad-dawla*, vol.35,4; Oct.-Dec. 1991, p. 159-69.

asked for a *fatwā* on the matter. Quoting a well-known hadith that God has not sent a disease without providing a cure for it, Ṭanṭāwī declared that an operation may be performed on weighty medical grounds, but a mere wish would not be sufficient. This was quoted by the Public Prosecutor as support for the surgeon who had consulted two psychologists before deciding to go ahead with the operation.[13]

Finally, there are the economic *fatwās*. They have become a speciality of Ṭanṭāwī's, and one where he has encountered the most outspoken opposition. On September 6th, 1989, Dr. Ṭanṭāwī issued a *fatwā* declaring a certain type of capitalisation certificate legal from the point of view of Islamic law.[14] The capitalisation certificates have been issued since 1965 by some of the state-owned banks which invest the savings mainly in housing projects. The investors receive a fixed percentage of interest, besides taking part in a lottery. A few days after the *fatwā* the Minister of Planning, Kamāl al-Janzūrī, increased the prizes of the lottery, clearly hoping that the Muftī's legalisation would boost this kind of investment for the benefit of public projects.[15]

By then, a storm of protests had arisen, which has not yet entirely subsided. The *fatwā* is seen as legalising the exaction of interest, thereby violating the serious Koranic prohibition against usury, *ribā*. A vast number of articles and several books, one of them by Ṭanṭāwī himself, have been published for or against the *fatwā*, discussing the precise impact of the Koranic prohibition against *ribā:* does this really mean a general ban on interest of any kind in an age of banking, inflation and so forth?

The *fatwā* was seen as crucial by supporters and opponents alike. In the Islamic press, the Muftī was accused of a general abandonment of Islamic legal principles for the sake of improving government finances. "The *Dār al-Iftā'* has degenerated" declared Shaykh Ṣalāḥ Abū Ismāʿīl, MP for the Islamic movement and probably the most brilliant critic of the *fatwā*.[16] By February 1990 the debate even reached the parliament, where Muslim Brotherhood leader Ma'mūn al-Huḍaybī accused the

[13] Unpublished *fatwā* of 8/6 1988, record 118, p. 290-92.

[14] This famous *fatwā* has been printed several times, for instance *al-Ahrām* 8/9 1989, p. 1 and 13, or in Ṭanṭāwī: *Al-Fatāwā ash-Sharʿīya.* Cairo: Mu'assasat al-Ahrām, 1989.

[15] *Al-Ahrām,* 12/9 89.

[16] Ṣalāḥ Abū Ismāʿīl: "*wa-min al-fatāwā al-Ṭanṭāwīya ma yudhhil wa-yufzi*" *Al-Iʿtiṣām,* October 1989, p. 22-27.

Muftī of being the puppet of the Minister of *Awqāf*.[17] On the other hand, defenders of the Muftī pointed to a number of *fatwās* which conflicted with the interest of the state, most notably the one declaring taxation on inheritance un-Islamic. Moreover, they could claim with some right that several of Ṭanṭāwī's critics amongst the scholars were themselves on the board of the Islamic banks and had great personal interest in denouncing any other form of saving as un-Islamic. Most commentators saw the controversy as an offshoot of the row about Islamic investment companies in 1986-88.[18]

In any event, the *fatwā* destroyed whatever hopes Ṭanṭāwī may have nourished about close co-operation with international bodies of Islamic *fiqh*, or the Azhar University, since both have stood aloof from the Muftī ever since. The relationship between Ṭanṭāwī and *Shaykh al-Azhar* Jādd al-Ḥaqq, himself a former Muftī, is notoriously bad. In 1992 Jādd al-Ḥaqq announced that al-Azhar will set up regional *fatwā*-committees, clearly an attempt to curb the influence of the Muftī.[19]

This, by the way, is one of the more important points to notice in the attacks upon the Muftī. Several of his opponents have stressed that with the increasing specialisation and complication of life today, *fatwās* should no longer be issued by single individuals, but only by committees of scholars. The modern means of communication have opened the era of collective jurisprudential decision-making *(al-ijtihād al-ijmāʿī)*.[20]

To sum up, the Muftī has delivered the *fatwās* he promised when taking office. However, they have no doubt led to more controversy than he anticipated in 1986. The office of State Muftī has become increasingly politicised during the 1980s. This is due, on the one hand, to Ṭanṭāwī's success in promoting the *Dār al-Ifta'*, but on the other hand to the ever-growing self-confidence of the Islamic movement in Egypt. The Muftī has been put under pressure in a number of ways: by a daring Islamic press, by a clamorous Islamic representation in parliament, by a parliamentary commission for religious questions, and by the various projects for Islamisation of the laws connected to the 1980-amendment of the Constitution. Even those in the Islamic movement, like Fahmī Huwaydī, who do not doubt Ṭanṭāwī's sincerity, assert that a politically

[17] *Al-Ahrām* 30/1 1990.

[18] See for instance *Rose al-Yussuf*, 18/9 89, p. 14-18.

[19] *Rose al-Yussuf*, 30/3 1992.

[20] Fahmī Huwaydī in *al-Ahrām*, 3/10 1989. ʿAlī Salūs in *Nūr*, 15/11 1989.

independent State Muftī is an illusion.[21] Consequently, *fatwās* published by independent scholars such as *Shaykh* Kishk, Yāsīn Rushdī, or Yūsuf al-Qaraḍāwī enjoy a wide readership in Egypt. In the more scholarly circles, al-Azhar seems recently to have reinforced its stand on a number of social issues, and on subjects like the capitalisation certificates pressure can also be felt from international scholarly organisations. The divisions and animosity amongst the scholars are there for all Egyptians to see.

The *fatwās* by Dr. Ṭanṭāwī do not differ substantially from those of his predecessors, although he tends to consult specialists in the various fields before issuing them; "Question the people of the the Remembrance, if you do not know", says the Koran.[22] This is a favourite quotation for scholarly self-legitimation throughout the ages, but Ṭanṭāwī sees in this a justification for consulting economists and medical researchers.[23]

Apart from that, there is a strong tendency to rely on the most general principles of *fiqh,* like the ones mentioned about the "lesser damage" or the "public interest". This is a fairly standard argument in the *fatwās* from the *Dār al-Iftā'*. The interesting question, and this is where the personality of the Muftī may be detected, is what is perceived as the public interest?

In the *fatwās* of Dr. Ṭanṭāwī one can observe a strong interest in protecting the poor and weak in Egyptian society. A telling example are the *fatwās* on third part liability insurance for medical doctors from 1989. After declaring them un-Islamic because of the element of gambling involved in insurance, Ṭanṭāwī received a letter from the Doctors' Syndicate expounding the principles of this type of insurance and stressing that the insurance would ensure that the injured patients received their compensation. Three weeks later he issued a new *fatwā* permitting them.[24]

Many of the economic *fatwās* reveal a suspicion of private enterprise and a support for state control and regulation. The responsibility for the well-being of the poor is mainly seen as incumbent on the state. In this respect, Sayyid Ṭanṭāwī seems to be a good example of what Olivier Roy has dubbed the "social-democratisation" of Islamic intellectuals.[25]

[21] Fahmī Huwaydī in *al-Ahrām,* 3/10 1989.

[22] Koran 21:7.

[23] The *fatwā* on capitalisation certificates, *al-Ahrām* 8/9 1989, p. 13.

[24] Unpublished *fatwās,* record 118, number 123 (14/5 1989) and 131 (15/8 1989).

[25] Roy, Olivier: *L'échec de l'Islam politique.* Paris: Seuil/Esprit, 1992, p. 102-37.

Sharī^{c}a in the discussion on secularism and democracy

M. Sa^{c}īd al-^{c}Ashmāwī

Premise

Before entering into the discussion of the concepts of *sharī^{c}a,* secularism and democracy, we should first define their meaning, then work out the relationships between them, and, finally come to some conclusive assessment of the subject. Many useless discussions and polemics are in progress in this instance, because writers do not follow a logical and scientific method in dealing with the problem.

A. Definition of the concepts of *sharī^{c}a,* secularism and democracy

1. Sharī^{c}a

The Arabic word *sharī^{c}a* is rendered into English as the "Islamic law". However, the word *sharī^{c}a* in Koranic terminology as well as in Arabic dictionaries does not exactly mean "law", in the sense of a set of legal rules. Its original meaning is "path" or "method" or "way" or "road" and the like.

Moreover, *sharī^{c}a* could also mean "law" in general, as when one speaks of the law of life, the law of justice, the law of conscience, and so on. The word *sharī^{c}a* was used by the first generation of Muslims in its proper meaning, viz. as the path, method, way or road to God.

In the Koran and the Islamic tradition this path or method consists of three basic aspects or elements: worship, ethical code (or morals) and social intercourse. In time, the word *sharī^{c}a* was limited to denote the legal rules mentioned in the Koran to regulate social intercourse.

The same happened to Judaism, before Islam, where the word *Torah,* which originally meant way of guidance, was first limited to mean the legal rules mentioned in the Pentateuch, and finally those invented by the Rabbis in the Talmud.

In the same way, the *sharī^{c}a* meaning was distorted from its original sense to signify only the legal rules mentioned in the Koran. Later it was

expanded to mean the legal rules existing in both the Koran and the Prophetic traditions. Finally, it came to incorporate all the legal rules which constitute the *corpus* of Islamic jurisprudence, i.e. the sum of all the interpretations and opinions given by Muslim jurists throughout Islamic history.

Consequently, today the term *sharīʿa* denotes the Islamic jurisprudence, which is a system of laws drawn up by human beings through a historical process, especially where it deals with political and social issues. Using the term in a different sense does not account for the historical development of the word and the different meanings and usages it assumed in the course of time.

2. Secularism

The term secularism signifies a political or governmental system which is free from any ecclesiastical jurisdiction or influence. In other words, secularism is a theoretical and practical movement which aims at freeing the social and political system from the control or dominion of the clergy.

Such a movement or tendency has its origins in the Western world, where two powers struggled for mastery over society: the Church, which ruled through the ecclesiastical laws, and the State, which ruled through the civil laws. No clear boundary existed between these two powers; on the contrary, history, witnessed their intrusion in each others fields.

Very often clergymen held direct political power, thereby dominating the political fields. In such instances, it became very difficult, if not impossible, to distinguish the ecclesiastical element, considered to be from a revelation of God, and as such infallible, from the civil element, supposed to be a human, and as such a fallible, act or law.

A very well-known example of such a situation, viz. of the confusion between the two powers, ecclesiastical and civil, occurred in the reign of Henry VIII, King of England (1491-1547), when Thomas Wolsey and Thomas Cromwell were bishops and political ministers at the same time. On the other hand, the King proclaimed himself the head of the Church of England.

A similar situation was associated with Cardinal Richelieu (1585-1642) in France, where he was Cardinal of the Church and Minister of the King at the same time.

In such systems the two powers, the ecclesiastical or divine and the civil or the secular were so intermingled that a shadow of infallibility was shed

on the very acts of the political ruler. In fact, any kind of opposition was prohibited as being a heresy punishable by a capital sentence, i.e. death.

To avoid such dreadful consequences, the peoples of the different nations in Europe fought in order to separate the two powers, and particularly to prevent the clergy from gaining any kind of political influence. Such a movement was called seccularism.

3. Democracy

The term democracy is a word of Greek origin. It comes from two Greek words *demos* (people) and *kratein* (to dominate, rule), and means the government of the people, by the people, for the people. Consequently, it came to signify the form of government in which the supreme power, viz. the legislative power, and its administration and execution, is vested in the people and exercised by those whom the people elect and appoint for such a duty.

B. The relationships between *Sharī'a,* Secularism and Democracy

1. In Islam there are neither clergymen nor Church

Islam gives attention to scholars not to clergymen, thus it encourages every Muslim to become a scholar. In such a system secularism, i.e. the problem of separating the clergy from the civil power, never existed or was claimed.

However, the distortion of the meaning of *sharī'a,* which from signifying path or method came to signify the legal system, including the whole jurisprudence, created in Islam a clergy *de facto.* Scholars became clergymen, and their opinions, being part of the *sharī'a* and endowed with divine authority, began to signify the divine law. And since the divine law is sacred, Muslim scholars, the new clergymen *de facto,* became infallible and have been quoted in every instance as absolute authorities not to be challenged or opposed.

In such a situation the attempt to introduce secularism cannot be effective. But the present situation can be changed through Islam itself, through the very Islamic concepts, by clarifying the real meaning of *sharī'a,* which never included the meaning of jurisprudence or the concept of priesthood.

On the other hand, there is no Church in Islam.

The mosque is a place for prayer and worship, but should never become an institution. Al-Azhar mosque in Egypt, for instance, and other similar institutions in other Islamic countries, are actually universities to teach religious and other studies. They are state institutions under the supervision of the civil power, sharing its power, not opposing it.

2. There is no single verse in the Koran that concerns politics or prescribes some political organization

As Commander of the Faithful, the Prophet led raids, arranged some public affairs; he was the arbitrator between people. The faithful are enjoined in the Koran to let the Prophet arbitrate in their affairs and to enforce his verdicts by themselves. This course of events was the result of the absence of any kind of political or juridical system.

After the Prophet's death, Abū Bakr was elected Caliph. The word caliph has in Arabic two meanings: It means the legal successor and the one who succeeds somebody else in time. At first, the word caliph was used in the second sense, but later on Caliphs and their scholars, used the word in the first meaning. In this way, Caliphs imposed themselves as the legal successors of the Prophet and the deputies of God. In such capicities Muslim Caliphs become infallible leaders and their office, the Caliphate, a religious office *de facto*.

As mentioned above, the word *sharīʿa* had already been distorted to mean the Islamic jurisprudence. Now, a new, more serious distortion occurred so that it came to include a specific political system and the Caliphate became integral part of the *sharīʿa*.

Once the Caliphate was part of the *sharīʿa*, true democracy became impossible. In fact, democracy means – as said before – the rule from the people, by the people, for the people. Furthermore that the people have the right to legislate for themselves, through their representatives, elected by themselves. In contrast, the Caliphate, as part of the *sharīʿa*, means that the sovereignty belongs to God alone, and that the Caliph is God's deputy, exercising God's sovereignty in God's name. Nobody else has the right to rule, or to choose a different ruler or another reprensentative.

If God is the only and true sovereign, God must also be the only and true legislator. Nobody else has the right to legislate.

In this way, Muslim jurists managed to give to the Muslim Caliphs a sacred, indisputable authority by which their juridical system could be put into effect and those who opposed them could be eliminated as

opposing religion, i.e. heretics. Islamic jurisprudence thereby became a divine set of laws imposed on the people by a divine authority. This is the principle of any kind of theocracy.

On the contrary, one who studies the Koran in a scientific way, will find that the legal rules therein are very few (just eighty verses of six thousand) and almost entirely related to family matters.

It was Muslim jurists (the *ʿulamā,* the Islamic clergy *de facto*) who created the vast complex of the Islamic legal system in which everything is included and by which all kinds of human activity and behaviour are controlled.

This happens especially by basing such laws on the so-called Prophetic tradition, on the authenticity of some of which, however, there are many reasonable doubts, because we know that many were purposely fabricated in order to fill a legal vacuum, or for political reasons and polemics.

In conclusion, Islamic jurisprudence, as it has become historically established and is propagated in our days by all manner of mass media, necessarily leads, in our view, not towards democracy, but towards its opposite, theocracy. A deep change in understanding and evaluating the historical past and a new interpretation of the sources of Islamic religion is needed: this is the appeal which we adress to all the people of the East and the West.

C. Conclusion

What we have said indicates the important role played by the very word *sharīʿa* in many fields of Islamic thought and life.

We have also proved that its original meaning, which was that of the "path to God", was distorted at a very early stage in Islamic history and understanding. It came to signify the whole set of Islamic rules of law and also the political and social order. We think the very meaning and understanding of Islam itself was thereby changed.

In fact, Islam never recognized any kind of clergy or priesthood *de jure;* on the contrary, the newly developed meaning of *sharīʿa* created a clergy and a priesthood *de facto.* These two institutions tried to control not only political life, but the whole range of human activities laying down a meticulous set of highly detailed laws.

Furthermore, Islam never advocated any theocratic state, but the historical development of the word *sharīʿa* paved the way for the establishment of a theocratic vision of the Islamic state *de facto.*

In the present Islamic world in general, and in Egypt in particular, there is a liberal movement which seeks to reform the inherited pattern of Islamic thought and life by re-establishing a truer and more correct concept of Islamic religion.

For this purpose, we see that it is very important correctly to define every single word we use, and to treat each subject with the proper method, based on a critical, historical and scientific approach.

Only through such an effort will the true and real Islam become apparent and Muslims will reject *de facto* the idea of clergy and priesthood through Islam itself, without any need to import the idea of secularism. At the samt time, Muslims will do their best to establish a true democratic state in which the ruler (government) comes from the people, by the people and for the people.

Islamic Law and Financial Intermediaries A Historical Inquiry and a Future Outlook

Elias G. Kazarian

During the last two decades, a large number of new Islamic financial institutions have been established both within and outside the Muslim world. These institutions, of which the majority are private commercial banks, are claimed to operate on the Islamic financial principles. Many interest-based banks have also set up branches, called Islamic branches, which operate according to the Islamic financial principles. Some countries such as Iran, Pakistan and the Sudan have by law forced all their financial institutions – both domestic and foreign off-shore institutions – to convert to Islamic financial principles. The main issues which will be discussed at this seminar are:[1]

– Why establish Islamic financial institutions?

– What makes a financial institution Islamic?

– Can an Islamic financial institution maintain its identity in the long run?

Why Establish Islamic Financial Institutions?

The main reason for promoting and establishing financial institutions based on Islamic financial principles is the rejection of Western style financial institutions by some Muslims. A narrow explanation for the rejection of these institutions is that their operations are based on interest which is forbidden by Islam. A broader explanation is that Western-style financial institutions reflect Western economic principles rather than the socio-economic thought of Islam, where the economic behaviour of the Muslims and the objectives and practices of the Islamic economic institutions have to be imbued with the rules and norms of Islam, *Sharī'a*.[2]

Modern Islamic financial institutions are claimed to derive their legitimacy from earlier Islamic financial institutions, and their frame-

[1] Some issues in this paper are treated in more detail in Kazarian (1993).

[2] For a description of the economic behaviour in Islam, see e.g., Naqvi (1981).

work is based on Islamic financial jurisprudence which developed during the earlier periods of Islam.[3] Therefore, some historical insight into the development of Islamic financial institutions can serve to establish what we know about earlier Islamic financial principles and institutions.

The development of Islamic financial institutions can be divided into five different periods: The formative period, the Islamisation period, the bureaucratisation period, the secularisation period, and, finally the reformative period.

The Formative Period

There is little information about the economic and financial conditions in Arabia before and during the emergence of Islam. Departing from the references about the mercantile practices, there are many indications that much of the trade took the form of barter exchange. Mercantile regulations and ethics were frequently expressed in terms of qualities of goods, and not in the form of currency or prices.[4] In the available records dealing with this time, the valuation of products was rarely mentioned in terms of currency, but rather in terms of other goods, or by the same object with different qualities. Furthermore, the spoils of war acquired during the Muslim conquest of Arabian regions were mentioned in kind, whereas those acquired from the regions controlled by Byzantium and the Sasanid, were virtually always expressed in currency.[5] The currencies in circulation among the Arabs were struck by either the Byzantine or the Sasanid regimes. Therefore, there are reasons to assume that the economy was characterised by a relatively low degree of monetisation, and by the absence of established financial institutions. Furthermore, the socio-economic structure of the Arabian Peninsula was less developed than that of the neighbouring societies of Byzantine and the Sasanid empire.

From the available literature, two main financial techniques are known as a means of financing economic activities: *ribā* ('interest'), and *muḍāraba* (profit-sharing arrangements). A borrower could obtain a loan and pay a predetermined fixed amount as a cost. Alternatively, the financier could share the profit acquired from the use of the loaned

[3] See, e.g., Ahmed *et al.* (1983), Khan (1987), Siddiqi (1983), and Chapra (1985).

[4] The regulation of trade during this period, as mentioned in early literature such as *Ḥadīth*, denoted mainly in terms of barter economy.

[5] See al-Balādhurī (1866), p. 81f.

funds with the lender according to a predetermined ratio. It is difficult to determine from the available literature which of these types of financing was the more common. After the birth of Islam *ribā*-transactions were forbidden. The reason for the prohibition of *ribā* has never been discussed by earlier Muslim jurisprudents, other than from a legal viewpoint.[6]

As the early Muslim community grew and became a political and economic power, the need for better economic organisations arose. The wars against the relatively rich tribes and cities brought a large inflow of wealth, especially in the form of currency.[7] This new situation necessitated the establishment of new economic institutions. The first known 'financial' institution established by a Muslim community was created about ten years after the death of the Prophet Muhammad by the second Caliph, ʿUmar. This institution registered all the members of the Muslim community *(dīwān)* in order to facilitate the distribution of the conquered wealth, *ʿatā'*. The common funds acquired from the conquered territories were kept in a so-called house of wealth, *bayt al-māl,* and managed by the leader of the community, the Caliph. In general, the whole sum of wealth was distributed immediately.[8]

The existence of the institution of *bayt al-māl* was irregular, depending on the inflow of conquered wealth. Thus, when no funds were available for distribution among the members of the Muslim community, the institution lay dormant, as it had no other function, and no remunerated officials had been appointed.

The establishment of *bayt al-māl* and the distribution of wealth among Muslims had an ideological and a military dimension. According to the new faith, all resources are considered to be gifts from Allāh to all human beings, and therefore should not be concentrated in a few hands but rather benefit all members of the community. It was the duty of the leader of the new community to ensure that every individual was guaran-

[6] According to the modern Islamic references, the charging of interest during the pre-Islamic period caused great economic misery to people who borrowed in order to meet their essential needs. However such a statement lacks evidence in earlier literature, See Ahmad (1978). pp. 3-6.

[7] For example, al-Balādhurī stated that the wealth of the Byzantine in Syria was an explicit and important argument used by the Caliph to attract various Arab tribes to carry out the holy war, *jihād.* See al-Balādhurī (1866), p. 107 and pp. 81ff. See also Abū ʿUbayd, op. cit., p. 249f., no. 618; Abū Yūsuf (1886). p. 25; and al-Māwardī (1853), p. 344.

[8] Abū ʿUbayd (1935), pp. 248ff., no. 613 and 621.

teed a 'fair share' of the wealth.[9] Furthermore, the distribution of *ʿatā'* was aimed at attracting new believers. Both Arabs and non-Arab Muslims were immediately granted an equal share in the wealth. Finally, the distribution of *ʿatā'* also had a military objective. It stimulated the soldiers' zeal to continue the invasion. The soldiers became dependent upon there pay and were obliged to abandon all their earlier occupations such as trade and agriculture. This had the result that Muslim soldiers were permanently mobilized for defending the new conquered areas or/and for further raids.[10] It is important to mention that before the rise of Islam the Arab Peninsula lacked a permanent military institution.

The Islamisation Period

During the first century of Islam, the early Muslim rulers adopted the legal and administrative institutions of the conquered territories of Byzantium and the Sasanid empire. Consequently, they were also prone to adapt to local financial practices. Successively, however, the inherited economic institutions underwent a process of Islamisation, which included administrative, fiscal, and monetary reforms. The first major administrative reform towards Islamic norms was the replacement of virtually all important officials of the *dīwān* by Muslims, and the introduction of Arabic as the official language to supersede the local ones.[11]

The Muslims gave the existing system of taxes a religious character by levying different types of tax on different individuals depending upon their religious affiliations. In addition to the existing taxes, the Muslims introduced two new types which are mentioned in the Qur'ān: an alm-tax for Muslims, *zakāt* or *ṣadaqa,*[12] and a poll-tax, *jizya,* applied to non-Muslims, *ahl al-dhimma.*[13] In consistency with the *Sharīʿa,* Muslim jurists

[9] Ibn al-Ṭiqṭaqā (1895), p. 116.

[10] See Moosa (1965), p, 70.

[11] It was in Syria, in 82/703, that Arabic was introduced as the official language. See al-Balādhurī (1866), pp. 193 and 301f.

[12] This tax is considered as a religious obligation, *farḍ,* aimed at purifying the souls of the believers. See Aghnides (1916), Løkkegaard (1950), and al-Dūrī (1974).

[13] This tax was regarded as a punishment intended to disgrace non-believers. Irrespective of their economic situation, all non-Muslims had to pay this tax, except women, children, and old people. According to al-Māwardī, the term *jizya* is derived from *jazā,* which literally means punishment, al-Māwardī (1853), p. 246. However, the *jizya* was applied only for a short period on the newly converted Muslims. One major reason for converting to Islam was to escape the tax burden. Consequently tax revenue to the state decreased. See al-Māwardī (1853), pp. 350-5.

developed the features of the fiscal system in terms of detailed descriptions concerning the objective of various taxes, their levels and extensions, and beneficiaries. The fiscal system was value-oriented, which includes both quantitative and qualitative aspects. It sought to improve the socio-economic situation of the less wealthy members of the Muslim community. For this reason, the rate of the taxes was deterrnined *ex ante,* depending upon the results of the economie activities of the taxpayers; it was not a fixed rate determined in advance. The monetary system inherited by the Muslim conquerors consisted of gold coinage struck by the Byzantine Empire and silver coinage produced by the Sasanid Empire.[14] At this time, the Muslims produced new kinds of currencies. At first they were, to some extent, imitations of the existing Byzantine and Sasanid currencies. The new "Islamic" currencies were struck in different places in the Empire.[15] This meant that the *dīnār* and *dirham* came to meet different standards of fineness, imprint, and form due to different local minting practices.[16] However, an attempt was made to produce a standard of currency. From the available records, it is evident that the Caliph Hishām, *c.* 106/725, centralised the production of coins to this capital at Damascus.[17] A standard "Islamic currency" was struck, as a result of a consensus among Islamic legal scholars concerning the standard of fineness, form, and imprints. All private mints were forbidden.

A centralised financial system and the production of currency by a locally based regime gave the new community a socio-economic independence. Furthermore, it implied a higher degree of monetisation, which should have a positive impact on the economy.[18] There are many statements in earlier literature indicating that the economic standard improved, and that several towns and trade centres experienced an economic growth.[19]

The prohibition of interest, *ribā,* obliged the new community to develop financial instruments based on a profit and loss sharing princi-

[14] See al-Balādhurī, op. cit., p. 465.

[15] Ibid., p. 468.

[16] Ibid., pp. 469-72.

[17] Ibid., p. 467.

[18] Prior to this period, the production of currencies was limited to the capitals of the Byzantine and Sasanid Empires. See Ehrenkreutz (1970), pp. 38f.

[19] See the references given by Hini, (1937), pp. 221-26.

ple. The two financial instruments – *muḍāraba* and *musharāka* – were modified to carry out the economic activities of the new society.

It seems that during this stage a pragmatic solution was achieved, where both the economic and the religious requirements of the 'good community' were fulfilled. The fiscal/financial instruments reflected the Islamic ethos, where *ribā* is prohibited, and simultaneously included driving forces such as the profit incentive for carrying out economic activities.[20]

The Bureaucratisation Period

From being a temporary store for conquered wealth awaiting immediate distribution among the Muslims, the institution of *bayt al-māl* became a permanently centralised institution. It attained its highest development during the period 833-892 A.D. (218-279 A.H.), when the political and economic administration was charactensed by a high degree of centralisation.[21] However, as early as the end of the second century after the rise of Islam, the budget of the state was characterised by chronic deficits due mainly to:

– a) the lower inflow of wealth from the conquered areas,

– b) the increase in military expenditures due to numerous rebellions, and

– c) the growth of the bureaucracy.

In order to finance the growing expenses, the public authorities were obliged systematically to break the Islamic financial injunctions, developed during the formative period of Islam.

The budgetary policy of fitting expenditure to income was abandoned. Fiscal policy was instead tied to a planned, regulated budgetary system based on an annual term.[22] The increase in the budget deficit made financial instruments based on a profit and loss sharing principle insufficient and inconvenient for raising funds to finance the activities of the state. For example, it was impossible accurately to determine the rate of return on the borrowed funds as a share ratio, since the capital was not used for commercial pursuits, but rather for state activities which did not generate any pecuniary profit. Consequently, new financial policies were

[20] For more details, see the comprehensive work of Udovitch (1970).

[21] See, e.g., the various text of Hilāl al-Ṣābī (1904), pp. 257-61. *Cf.* Løkkegaard (1950), p. 178f.

[22] Mez (1937), p. 107f., and Shimizu (1966), pp. 21.

introduced by the "civic regimes". Two financial techniques, which were based on an annual predetermined, fixed rate of return, were used:

– a) taking loans against interest, by issuing paper money in the form of goverment bills and letters of credit, *sakk* and *suftaja,* and

– b) the sale of rights to collect taxes from certain regions, *ḍamān,* to private bankers and higher officials.[23]

The central *bayt al-māl* sold the letters of credit to the bankers of the Court, *jahābidhat al-ḥaḍra,* at lower prices than their face values.[24] The state also borrowed from private bankers and merchants. The loans were based on annually predetermined fixed costs. Hilāl al-Ṣābī asserts that the state took loans from its Jewish bankers of the Court for a duration of 13 years at an annual rate of interest of 30 percent. It is also reported that annual interest rates as high as 80 percent were not unusual.[25]

The 'Islamic state' may be considered as the main factor contributing to the development of private financial intermediaries. The increasing expenditure obliged the state to look for new financing methods. Earlier, the Court had its own private bankers who supplied funds. The demand for funds increased and private bankers were consequently urged to turn to the public in search of loans, which where based on an annual fixed rate of return. This did not, however, hinder the state from inviting money changers, merchants, and landowners to offer funds on competitive terms. The latter became more frequent as a result of the increasing expenditures of the state.

Furthermore, the state contributed to the development of private financial intermediaries by confiscating private wealth. The Muslim rulers, who often lacked religious and political legitimacy, frequently used confiscation as a political instrument. Secondly, the rulers and their armies were not from the local population, as was the case in Egypt and the Levant. Opponents of, and revolts against the central power were punished by confiscation of wealth. In order to avoid the loss of their assets to the state, savers were forced to find safe means of holding their wealth.

According to Arabic sources, the private bankers were mainly the

[23] See Miskawaihi (1920), vol. 1, p. 320; and al-Ṣābī (1904), p. 81.

[24] See Fischel (1937), p. 9f.

[25] Miskawaihi mentioned that a *dirham* was paid as a cost for each borrowed *dīnār* for a period of one month. During this period, the value of one *dīnār* was 15 *dirham.* See Miskawaihi (1920), vol. 1, p. 326 and p. 213. See also al-Ṣābī (1904), p. 81f.

clerks of *bayt al-māl.* They were, however, easily identified by the authorities, who would search their offices in case of confiscation. Therefore, savers were always looking for anonymous bankers. At the beginning of the ninth century, merchants established themselves as a new category of bankers, and their stores acted as financial institutions. These institutions offered the possibility to exchange different currencies, deposit money, transfer money from one place to another, and take loans. They developed advanced financial techniques such as depository accounts, *waḍīʿa,* letters of credit, *suftaja,* letters of exchange, *ḥawāla,* and bills of order or cheques, *sakk.* These financial instruments had a fixed period and were based on interest. There was a consensus between the state and the bankers of the Court concerning the rate of the interest. If the bankers charged an excessively high rate of interest, the state could force them to lower it.[26]

The economic order during this period was characterised by the introduction of a feudal military system into the Middle East by the Ayyubid-Mamluk regime.[27] Thus the political and economic policies were predominantly determined by the political law, *siyāsa,* based on military and feudal principles, rather than by the Islamic Sacred Law, *Sharīʿa.*

An important fiscal feature of the feudal system was the increase of the use of a predetermined fixed land tax imposed annually on the farmers. This tax system, called *iltizām,* prescribed that a "lord", *multazim,* appointed by the central authority should be responsible for a district or a village, collect taxes among peasants, pay annual fixed tax to a public department, *dīwān al-iqtāʿ al-mufrad,* and keep the remainder, *fāʿiḍ,* for himself. The peasants were serfs under their lords and attached to the village, which they could not leave without permission.[28] The taxes levied by the lords were very high.[29] Historically speaking, this new economic order was an innovation in the societies of the Middle East. From an Islamic legal viewpoint, this new fiscal system, based entirely on a predetermined annual rate independent of the result of the harvest, contravened the Islamic injunctions of a 'just' taxation policy.

[26] Al-Tanūkhī (1922). vol. I, pp. 201-4.

[27] For more details concerning the feudal system in the Middle East, see Poliak (1939).

[28] See the references given by Poliak, ibid., p. 65.

[29] Poliak stated that "toward the end of eighteenth century the Syrian peasants usually paid 12- 30 percent as annual interest." ibid., p. 68f.

During the reign of the Mamluks and particularly in the fifteenth century, the monetary system was characterised by a shortage of silver and the emergence of copper as a means of payment. Copper coinage was current during the earlier period, but used mainly by the poor. The reasons for the shortage of silver, given by the historians, were mainly that the goldmines in the Sudan dried up, and that silver was shipped to the West in exchange for copper.[30] The copper coinage successively replaced the silver, and hence became the main currency in which all commodities were accounted.[31]

The shortage of silver currency and the predominanee of the copper coinage as means of payment indicated that the economy was deteriorating. According to al Maqrīzī, the shift from silver to copper caused a substantial decline of the economic standard of all social classes of Egypt.[32] The shift of the economy from gold and silver to copper coinage contradicted the Islamic monetary principles. According to the Islamic law, all social and economic contracts had to be denoted by either gold or silver coinage, as this was the practice at the time of the Prophet.

As a result of the fragmentation of the Islamic Empire into various autonomous regions and independent states, the management of the public finance was decentralised and each provincial *bayt al-māl* became independent. In the earlier stages, funds could be mobilized from any of several different regions. The state took loans from private bankers and traders, and these lenders could be paid in the future against bills and promissory notes by the local *bayt al-māl,* where the funds had been invested. With the dissolution of the Islamic Empire, government bills and promissory notes from different regions became less acceptable, as the new states were characterised by different religious affiliations and politics. Furthermore, the political instability which characterised this period made the acceptance of paper money very risky, as the new regime would not necessarily accept the obligations of the previous one. Therefore, there is a reason to assume that the handling of money papers was relatively limited compared with the previous period.

With the defeat of the Mamluk regime by the Ottomans, the political and economic hegemony was transferred to Constantinople. Subsequently, the Arab regions in the Middle East became provinces of the

[30] See the references in Shoshan (1982), p. 102.

[31] Al-Maqrīzī (1957), p. 73f.

[32] Ibid., p. 81ff.

Ottoman Empire. However, the fiscal and financial policies remained unchanged at the beginning of this regime. An annual fixed amount of tax was to be paid to the Imperial treasury by the lords, who in turn could make a profit by collecting a higher rate from the peasants.[33] The main difference was that the surplus of tax revenues was transferred to the capital of the Empire, Constantinople.

However, it should be noted that at the beginning of virtually every new regime or dynasty, all financial activities which contravened Islamic principles were forbidden, and financial agents, often non-Muslims, were punished. This policy, adopted by almost all regimes, was one measure among many in a process which aimed to give them legitimacy.

The Secularisation Period

The French expedition to Egypt in 1798 may be considered as the beginning of a new fiscal/financial era in the Middle East, characterised by the establishment of modern Western-inspired financial institutions. In virtually all countries, the existing legal systems were reformed by modernist Muslim scholars, who added new Western-influenced legal codes.[34] This facilitated the establishment of many central, national, and private banks, and the introduction of new financial methods and operations based entirely on interest. At the beginning of the nineteenth century, modern banking was introduced to the Western part of the Ottoman Empire. Compared with the previous period, the state not only took interest-based loans, but also provided loans based on interest. New private financial institutions, which were Western-influenced and operated on interest, were also established, first by foreigners and then by indigenous bankers. Some of the earlier private financial institutions which offered loans based on interest were transformed into new, modern, financial institutions, called *maṣrif* or bank, while others retained their structure and, thus, came to belong to the informal financial market. Some institutions, which were mainly owned by non-Muslims – Jews, Greeks and Armenians – even disappeared from the market completely after the Second World War after a process of confiscation and nationalisation.

The practice of taking and offering loans against interest became an

[33] Shaw (1962), p. 22.

[34] See, e.g., Adams (1933).

accepted natural feature in many official records and documents produced by officially appointed judges with religious authority. Interest received a religious legitimacy as many high ranking Muslim jurisprudents and theologians, *muftī,* formulated legal precedents, *fatāwā,* permitting the advance of loans based on interest. However, the acceptance of interest as a basis for financial transactions by many legal scholars of a high religious standing did not mean that the problem of interest associated with banking activities had been solved in the Muslim world.

The 'Reformative' Period

The disparity between Islamic theories, developed by Muslim jurisprudents, and the practices of the state throughout Islamic history was due mainly to the rigidity of the former in facing the economic requirements of that time. The taxes developed during the earlier period were not intended to finance increased military expenditure and the expansion of the bureaucracy. The only ideological basis for these taxes was to transfer funds from the well-to-do to the less wealthy members of the Muslim community. The financial instruments based on a profit and loss sharing principle also proved to be inconvenient for financing public activities. These instruments were developed for financing short-term trade activities, where profits could be calculated.

The reason for the rigidity of Islamic financial theories was the inability of Muslim legal scholars to develop these theories further in order to create new financial instruments. This inability was not confined to the field of financial transactions, *muᶜāmalāt,* but also impeded other personal and religious activities, *ᶜibādāt.* It has been argued that a consensus was reached among leading jurisprudents to close the door of independent reasoning, *ijtihād,* to search for new legal rules for solving new problems.[35] This means that new problems had to be solved by copying solutions which were recognised by earlier traditional jurisprudents. In this sense, the new financial situation of the state, in terms of a budget deficit, was not recognised by the earlier traditional jurisprudents, and therefore no new solution could be advanced by the contemporary jurisprudents.

After the Second World War many Muslims advocated the reopening

[35] See Schacht (1964), pp. 69-75.

of the gate of *ijtihād* in order to save the Muslim community from stagnation. In the financial context, a tacit consensus has been reached among highly ranked Muslim jurisprudents, theologians and some economists that Islamic financial theories have to be developed in order to meet contemporary economic requirements, and that these principles should function as alternatives to the modern Western financial techniques. An experimental financial institution based on Islamic financial principles was established in Pakistan in the late 1950s with succes.[36] The first phase of establishing modern Islamic financial institutions was, however, initiated by members of the Saudi and Kuwait royal families.[37] This coincided with a steep rise in wealth in the Gulf countries due to higher oil prices. With respect to historical evidence, the main question to be posed in this context is whether the establishment of Islamic financial institutions by these regimes has to be considered as a measure aimed to give legitimacy to their wealth increase or whether the increase of wealth was a precondition to carry out such an expensive and risky experiment.

What Makes a Financial Institution Islamic?

The establishment of Islamic financial institutions is regarded by the majority of Muslim scholars as an integral part of a complete Islamic economic system. This system is claimed to be a unique system, which differs from both the capitalist and the socialist system. Regardless of whether this system is peculiar or similar to the capitalist or socialist economic system, there is a consensus that the economic behaviour of the Muslims and the objectives and practices of the Islamic economic institutions have to be imbued with the rules and norms of Islam, *Sharīʿa*.

In order to conform with the Islamic financial principles, an institution has to fulfil a number of requirements which are developed by authors selected from among the highest ranked theologians and economists in the Muslim world. Many of them occupy high positions in

[36] See Qureshi (1974), pp. 187-206.

[37] The majority of Islamic banks are promoted or owned by two financial groups. The first one is Dār al-Māl al-Islāmī, and its major owner is Prince Mohammed al-Faisal al-Saud. son of the late King Faisal of Saudi Arabia. The second institution is Al-Barak International, which was founded by Shaykh Saleh Abdulla Kamel.

religious and economic institutions.[38] The Islamic requirements are given in the *Handbook of Islamic Banking* (HIB), *al-Mawsūᶜa alᶜIlmīya walᶜAmalīya lil-Bunūk al-Islamīya.* The HIB serves also as a basis for the organisation and operation of Islamic banks. The HIB is published by the *International Association for Islamic Banks* (IAIB). The IAIB has observer status at the Organisation of Islamic Conference and is recognised by the 50 member states. This means that the HIB reflects the opinions of the majority of the established Muslim elites, belonging to the Sunni sect of Islam. The most important requirements or principles which determine the religious identity of a financial institution are:

– a) the absence of interest-based financial transactions, *ribā* transactions,

– b) the avoidance of economic activities involving speculation,

– c) the discouragement of the production of goods and services which contradict the value-pattern of Islam, and

– d) the introduction of the Islamie tax, *zakāt.*

The Elimination of Interest, Ribā

Based on various verses in the Qur'ān, there is a consensus among Muslim jurisprudents and theologians that *ribā* is prohibited by Islam. The term *ribā* appears four times in the Qur'ān;[39] its literal meaning is growth, rise, swell, increase, and addition.[40] However, the technical interpretation of *ribā* is a controversial matter among Muslim jurisprudents and scholars. The main controversy revolves around the question of whether Islam prohibits usury or interest, or whether it prohibits the charging and payment of both. According to a pragmatic view, the Qur'ān prohibits the usury prevailing during the pre-Islamic era, but not the interest of the modern financial system.[41] This argument is based on a Qur'ānic verse, which prohibits the redoubling of the loan through an usurious process. The Qur'ān states:

[38] A large number of the Muslim jurisprudents or theologians have occupied the post of the Grand Mufti in their countries, such as Jad Al-Haqq Muhammad Khātir, ᶜAbd Al-ᶜAzīz E.Bāz, and Muhammad Al-Ḥarakān. The HIB is financed by the Prince Muhammad Al-Faisal Al-Saud, son of the late King Faisal of Saudi Arabia. See the Introduction of the HIB (1982).

[39] Quran, 2:274-80, 3:130, 4:161, and 30:39 (The figures to the left of the column denote the number of the sura and those to the right the number of the verse).

[40] See al-Jāzirī (1986), p. 215.

[41] For a comprehensive analysis of this view, see Rahman F. (1964), pp. 1 -13.

> "O ye who believe! Devour not usury, doubling and quadrupling. Observe your duty to Allāh, that may be successfull".[42]

Furthermore, as a reflection on the literature of the Tradition, *ḥadīth*, the pragmatic view argues that there is no firm evidence that the *ribā* prohibited by Islam is the interest of the modern financial system. The reports on the *ribā* in the literature of the Tradition are considered to be ambivalent and inconsistent. As Fazlur Rahman points out:

> ...the contradictions and inconsistencies in the riba-hadith and the evolutionary trend in this literature leading to an ever-increasing rigidity vitiate its authenticity and authority.[43]

Thus, according to the pragmatic view, transactions based on interest are regarded as legitimate, and interest becomes legally prohibited when the sum which is added to the loanable funds is exorbitant, and thereby used by the lenders to exploit the borrowers.

Contrary to the pragmatic view, the conservative view implies that *ribā* should be translated as interest and usury. It is argued that this interpretation is supported by the Qur'ān as well as by the Tradition. Any predetermined fixed positive return on the loan as a reward for the delay is defined as *ribā* and hence forbidden by Islam.[44]

According to the strict interpretation of *ribā*, the taking and paying of interest is forbidden by Islam regardless of whether the rate of interest is high or low, regardless of whether the funds will be used for production or consumption, and regardless of whether the loan is taken by a private borrower or by the government. The charging of *ribā* is prohibited in both the Qur'ān and the Tradition, while the paying of *interest* is forbidden only in the Tradition. Many orthodox legal scholars refuse to give any intellectual argument to support this Islamic injunction. As stated by one scholar:

> When the Creator... himself has forbidden something, this should be the greatest intellectual argument in support of it.[45]

[42] Quran, 3:130.

[43] Rahman F. (1964), p. 41.

[44] This form of *ribā* is called *ribā al-nasī'a*. Al-Jāzirī (1986), vol. 3, pp. 245-50. See Saleh (1986), pp. 13-8.

[45] See Manazir A. Gilani in Qureshi (1967), p. xix.

Recently, some Muslim scholars with an educational background in economics have, however, offered a number of socio-economic arguments as a reason for the prohibition of interest.[46] The most important, is that interest has a tendency to concentrate wealth in the hands of a few, and is condemned by Islam. Furthermore, the supplier of capital on an interest basis is not subject to the uncertainty facing the borrower. Such a contract is considered as unjust, and will lead to selfishness, which contravenes the Islamic injunction of brotherhood. Another argument for the prohibition of interest is that in the Islamic economics framework, 'capital as a separate factor of production does not exist, but is a part of another factor of production, namely enterprise.'[47] This implies that profiteering from the supply of capital without any personal commitment or exposure to financial risk is discouraged by Islam.

The Avoidance of Speculative Transactions, Gharar

Another feature condemned by Islam is economic transactions involving elements of speculation.[48] Speculative business like buying goods or shares at low prices and selling them for higher prices in the future is considered to be illicit.[49] Similarly, if future prices are expected to be lower than the present ones, an immediate sale in order to avoid a loss in the future is condemned.[50] The argument given for such a ban is that speculators promote their private gains at the expense of society at large by creating an artificial scarcity of goods and commodities, which results in inflationary pressures in the economy.

In general, Islam condemns the sale of goods and shares which are not in the possession of the trader.[51] Following strict interpretation of the *Sharīʿa,* it is unlawful to sell against advance payment for future delivery. However, as an exception to a general rule, in order to serve the public needs of the Muslims, some legal schools allow such contracts to be applied to goods but not to transactions of currencies, *bayʿ salam.*[52] Trade activities in the stock exchange markets are a controversial issue among

[46] See Qureshi op. cit., al-Mawudūdī (1961), al-Ṣadr (1968), Siddiqi (1983), and Chapra (1985).

[47] Uzair (1980), p. 38f.

[48] For the definution of this term, see Saleh (1986), Chapter 3.

[49] HIB (1982), vol. 5, p. 427. See also Mannan (1986). p. 289f.

[50] Mannan (1986), p. 289.

[51] HIB (1982), vol. 5, pp. 402-9. See also Saleh (1986), pp. 71-6.

[52] HIB (1982), vol. 5, p. 335, and pp. 430-32.

Muslim scholars. Some scholars advocate the prohibition of spot transactions as well as derivative transactions,[53] while according to the HIB transactions taking place in the spot market are permitted, but not in the derivate markets (futures, forwards and options).[54] Moreover, the purchasing of shares or commodities for short periods solely to make a pecuniary profit is not allowed.[55] It has to be a long-term participation which aims to promote investments. Any financial transaction undertaken by an Islamic financial institution must be related to real production.

Financing Business Activities permitted by Islam

It is forbidden for an Islamic financial institution to finance activities or items forbidden in Islam, *ḥaram,* such as trade in alcoholic beverages and pork.[56] Furthermore, as the fulfilment of material needs assures a religious freedom for Muslims, Islamic financial institutions are required to give priority to the production of essential goods which satisfy the needs of the majority of the Muslims. The participation in the production and marketing of luxury activities, *isrāf waṭaraf,* is considered as illicit from a religious viewpoint.[57] The production and marketing of luxury goods is only encouraged when Muslim societies do not suffer from a lack of essential goods and services such as food, clothing, shelter, health, and education.

The Introduction of the Islamic Tax, Zakāt

Many Muslim scholars emphasise that fiscal policy has to evolve from the ideological framework of Islam.[58] It cannot be value-neutral and has to be integrated within all Islamic economic institutions. The fiscal policy will be based on the Islamic tax, *zakāt.* Consequently, every Islamic financial institution has to establish a *zakāt* fund for collecting the tax and distributing it exclusively to the poor directly or through other religious institutions. This tax is imposed on the initial capital of the institution, on the reserves, and on the profits.[59] It is also collected from the profit of

[53] See, M. Amini quoted in Siddiqi (1981), p. 241, and Mannan (1986), p. 289.
[54] HIB (1982), vol. 5, pp. 429-34.
[55] Ibid., p. 427.
[56] See Ahmed *et al.,* (1983), p. 260.
[57] HIB (1982), voh 6, p. 293.
[58] See al-Mawdūdī (1985), pp. 12-15.
[59] HIB (1986), the section of *Muḥāsabat al-Zakāt,* vol. 3, pp. 19-24.

the projects which are established or financed by the institution. At the discretion of the depositors, an Islamic bank has the right to collect *zakāt* from the returns paid on the deposits. However, it should be mentioned that a minority of Muslim scholars argue that the collection of *zakāt* is not the task of financial institutions but rather that of public welfare institutions.[60]

Socio-Economic Objectives

Some Muslims argue that the identity of an Islamic financial institution is determined not only by the above-mentioned principles. An Islamic institution has to operate according to the spirit of Islam. In this sense, the primary goal of an Islamic financial institution is not to maximise the profit as a Western-style institution does, but rather to render socio-economic benefits to the Muslims.[61] It should participate actively in the process of economic and social development of the Islamic countries within the framework of Islamic rules and norms, *Sharī'a*. In other words, an Islamic financial institution has to combine both profit maximisation and the simultaneous achievement of socio-economic objectives. These objectives are (a) to increase the economic welfare of the Muslims, and (b) to arrive at a balanced economic development, characterised by social justice and an equitable distribution of income and wealth.

On the other hand, Muslim bankers and a minority of Muslim economists try to enforce a distinction between the *identity* of an Islamic financial institution and its *role*. The identity of this institution, which is called *ḥalāl institution*, is determined by the requirements mentioned above. A *ḥalāl* institution need not have a socio-economic responsibility but must rather maximise the wealth of the owners.[62]

The two examples, mentioned above, seek to illustrate the controversial opinions among Muslim scholars concerning the identity and the role of Islamic financial institutions in the economy.

Operational Basis of an Islamic Financial Institution

From an ideological point of view, the operation of any Islamic financial institution has to be based on trust finance, *muḍāraba*. The rules and conditions of the *muḍāraba* contract, which have their roots in the

[60] Ismail (1986), p. 2.

[61] HIB, (1982), vol . 5, pp. 153-5.

[62] See Khan and Mirakhor (1987), pp. 1-6.

Middle Ages, vary from one Islamic school of law to another.[63] In general terms, a *muḍāraba* is defined as a contract between at least two parties, whereby the one, the financier *(sāḥib al-māl)*, entrusts funds to the other, the entrepreneur *(muḍārib)*, to undertake an activity. The entrepreneur returns the principal to the financier with a predetermined share of profit. In the case of a negative profit, the financier loses some or all of his capital, and the entrepreneur does not receive any remuneration for his labour and effort. The financial positions of both the financier and the entrepreneur have to be exposed to a risk, *mukhāṭara*.

Contemporary Muslim jurisprudents and economists have modified and combined the different rules of this contract to a convenient synthesis for the purposes of modern financial activities. The new concept of *muḍāraba* can be considcred as a mixture of different definitions provided by various Islamic schools of law. In an Islamic bank, for example, the *muḍāraba* contract has been extended to include three parties: the financiers, the financial intermediary, and the users of funds. An Islamic bank acts as an entrepreneur when it receives funds from depositors, and as a financier when it delivers the funds to entrepreneurs.

The *muḍāraba* contract has been chosen as the cornerstone for the operations of modern Islamic financial intermediaries because it is considered (a) to be the most convenient instrument which has its roots in the Islamic legal traditions, *ḥadīth*, and (b) to fulfil the Islamic concept of a 'just' economic transaction, as it includes the element of risk, for all parties.

The validity of *muḍāraba* as a basis for the operations of Islamic banking has been questioned by some Muslim scholars.[64] It has been argued that this contract was developed in the Middle Ages, related to a particular time and conditions. This contract lacks the legal basis to be valid in a complex industrial society for carrying out modern financial activities.[65] This argument is based on the assumption that contemporary Muslim jurisprudents do not have the right to reinterpret earlier legal principles.

The *muḍāraba* contract has also been rejected on politico-ideological grounds.[66] It is argued that Islamic banks, established by Muslim capita-

[63] See Udovitch (1970), pp. 170-248, and Saleh (1986), pp. 92-114.
[64] Haque (1985), pp. 190-214, and Muslihuddin (1976), p. 37.
[65] Haque (1985), p. 199f.
[66] Ibid., p. 213.

lists, will exploit small savers by using a medieval religious financial instrument as a legal device. The shareholders of Islamic banks would expose the funds of small depositors in order to make 'an exorbitant profit without risking their wealth'.[67] Finally, the introduction of *muḍāraba* as an alternative to interest has been criticised on the grounds that it will create or enlarge an informal financial market based on interest earnings.[68] Savers would prefer to lend their funds for a price or a hidden interest built into the repayment of the principal sum rather than deposit them in a risky *muḍāraba* bank.

Another important instrument applied by Islamic banking to providing finance is equity participation, *mushāraka,* whereby two or more partners contribute to the joint capital of an investment.[69] A financial intermediary may participate in a new project or in an already established company by buying equity shares. The financial results are also regulated, as in the case of *muḍāraba,* according to the profit and loss sharing principle (PLS). The profit is shared according to a predetermined proportion. Both parties bear the risk of financial losses. The bank is also entitled to be represented on the board of directors of the enterprise, and has voting rights.

In addition to financial techniques based on PLS, Islamic banking provides other financial instruments such as mark-up *(murābaḥa),* leasing *(ijāra),* and lease-purchase *(ijāra wa-iqtinā').* Contrary to the PLS contract, these instruments are based on a predetermined, fixed rate of return and are associated with collateral.[70]

The mark-up contract, *murābaḥa,* implies that a bank purchases a certain asset and sells it to the client on the basis of cost-plus profit contract.[71] The additional cost is negotiated and established in advance for both parties. The total cost is usually paid in instalments. The ownership of the asset is transferred to the clients in proportion to the paid instalments. Thus, the purchased product functions as collateral until the entire cost is paid. The bank may request a collateral from the client.

[67] Ibid., pp. 214-6.
[68] Abū Saud (1981), pp. 73-5.
[69] HIB (1982). vol. 5, pp. 194ff.
[70] Ibid., pp. 196- 200.
[71] HIB, vol. 5, pp. 329-33.

The leasing contract, *ijāra*, is similar to any leasing activity provided in the traditional financial system. The bank leases a purchased asset to its clients for a fixed period, the rental amount being agreed in advance. The contract is termed lease-purchase contract, *ijāra wa-iqtina'*, when a leasing contract is completed by the transfer of the ownership of the asset to the clients. Beside some minor variations in the legal technicalities, the mark-up and leasing contracts do not differ from those used by the traditional banking system other than in their terminologies. The rate of return is fixed and known in advance, and the purchased goods serve as collateral. The use of these instruments is considered to conform to Islamic financial principles, since the rate of return is tied to each transaction rather than to the time dimension. For two main reasons, these instruments receive weak support from some Muslim jurisprudents, who advocate a restrictive application thereof.[72] Firstly, they are associated with risk avoidance. The additional costs associated with transactions provided according to these instruments are fixed and determined by the bank in advance. For example, the bank adds a certain percentage to the purchased price as a profit margin. In addition, the purchased assets serve as a guarantee, and the bank may also require the client to offer a collateral. Thus, the predetermined fixed cost and the collateral offered in association with these instruments ensure that the risk taken by the bank is negligible. Such arrangements are considered to contradict the Islamic spirit of sharing the risk between the financier and the entrepreneurs.[73]

Secondly, according to the legal opinion, the additional costs may include only *recognised* expenses and *legitimate profit*. However, many scholars recognise that the bank may include a premium, based on previous experience, as compensation for the delayed payment, which strongly contradicts Islamic financial principles. Therefore, a number of scholars advocate that the use of these instruments should be restricted to 'unavoidable cases'. However, there is no explanation of what it is meant by unavoidable cases.[74]

[72] Siddiqi (1983), p. 49f, and Khan S.R. (1987), p. 145-7.
[73] Siddiqi (1983), p. 115.
[74] Ibid., pp. 137-9.

Can an Islamic Financial Institution Maintain its Identity in the Long Run?

As has been recognised above, an Islamic financial institution must offer financial transactions subject to ideological restrictions. Firstly, all parties engaged in a transaction must be exposed to the element of risk, *mukhāṭara*. Secondly, an Islamic financial institution is obliged to fulfil socio-economic objectives. These restrictions may lead to a lower financial efficiency as the transaction costs will increase.

Providing capital on the *muḍāraba* basis is also linked with many inherent difficulties. This contract is associated with serious incentive problems, which will in turn lead to an inefficient financial market. Many Muslim savers, for example, will refuse to deposit their funds in a financial institution on the basis of risk sharing. In the long run, the lack of such devices as a savings instrument with a fixed rate of return will induce a lower rate of financial savings. Or an informal financial market may be developed in order to meet the preference of some savers. Many studies have shown that savings in Islamic banks decrease when the rates of return decline.[75]

Many entrepreneurs with a high risk project will request funds on the basis of the profit sharing principle so that they will not suffer from losses because there is no collateral requirement. Other entrepreneurs with an acceptable level of risk will prefer to pay a fixed cost and keep the profit. Many entrepreneurs do not allow the suppliers of funds to interfere with the management and monitoring of the investment. Finally, the determination of the rate of return as a variable ratio of profit will cause problems, particularly when the contract is undertaken for short-term finance for consumption. However, many Muslims argue that in an Islamic society the individual should not live beyond his means. Therefore, Islamic financial institutions should not grant loans for consumption.[76]

Furthermore, in a real economic situation, an Islamic financial institution is sometimes obliged to choose between maximising a profit and providing socio-economic benefits. Thus, there is a trade-off between pecuniary and ideological objectives. The religious restrictions will curtail the pecuniary profits.

[75] See, e.g., Kazarian (1993).

[76] Khan M.A. (1982), p. 241.

The inefficiency problems, mentioned above, are crucial in a competitive financial environment. There are unlimited opportunities for some institutions to violate the Islamic ideology in order to increase the profit. Therefore, some institutions and individuals will prefer to replace a *muḍāraba* contract wiith other financial instruments, where collateral may be required and a fixed rate of return can be charged such as *murābaḥa* and *ijāra*.

The main conclusion which may be drawn from many studies dealing with the experiences of Islamic banks located in Egypt, Iran, Pakistan, or the Sudan is the failure of these banks to adopt an Islamic financial-economic approach. The main activities of these banks were not founded on profit and loss sharing principles, but rather on traditional financial practices – financial instruments based on a fixed rate of return.[77]

Socio-religious preferences

According to Muslim scholars, the Islamic norms will induce a Muslim to act for the benefit of Islamic society, even at the expense of his own interest.

> A truly Muslim entrepreneur who can serve...society by offering better goods at cheaper rates will never manipulate prices to increase his own profit.[78]

In addition, the actions of a Muslim are considered to be determined by the Islamic altruistic incentive. One of the most fundamental Islamic economic injunctions, which is argued to function as a spiritual incentive, is to contribute to the social solidarity of religious brotherhood. Well-to-do Muslims are encouraged to contribute to the improvement of the economic conditions of the needy. Contrary to a capitalist society, this socio-economic objective is to be attained by individual actions rather than by pressures enforced by laws and rules. The economic actions of a Muslim are expected to be promoted and directed by the Islamic moral norms and codes, those of the *Homo Islamicus*. As Umer Chapra argues:

> These goals have been closely integrated into all Islamic teaching so that their realisation becomes a spirituel commitment of the Muslim society.[79]

[77] See Kazarian (1993), Chapter 10.
[78] Siddiqi (1972), p. 31.
[79] Chapra (1985), p. 36.

The behaviour of a Muslim economic agent is, of course, determined to some extent by the Islamic normative system. There is no doubt that the actions of an economic agent need not be guided only by rationality and determined solely by expected future rewards but can also be dictated by ideological norms. A Muslim may be willing to sacrifice a share of his wealth to benefit his "brothers in religion". He may be willing, for example, to deposit his fund in an Islamic bank and accept a rate of return lower than the market rate. This lower rate of return can be considered as a premium paid by a Muslim for satisfying his religious preferences.

The Islamic norms were created, and probably also effective, in a homogeneous society characterised by strong ties of kinship, as for example in the seventh century. At that time, the economic agents belonged practically to the same tribe, where each member could be identified by the others, and any deviation from the prevailing norms and customs was punished by sanctions, ranging from loss of esteem to exclusion from the community, and thereby to defenselessness and exposure to predatory tribes. The Islamic society has since expanded and become heterogeneous. Islam embraces societies with a wide variety of ethical, political, cultural and geographical characteristics. Norms are less effective as an incentive, and a restriction mechanism when the society expands and becomes heterogeneous. In a large society, where members cannot easily be identified, it is more difficult to induce the individual to make voluntary sacrifices for some segments. It is also difficult to impose sanctions when norms are violated. Consequently, homogeneously defined norms and values can not be accepted by all members. The violation of a specific norm by one group need not be considered illicit by another.

Secondly, the earlier Islamic norms were developed in a simple economic environment. At present, the mode of production in the Islamic societies is relatively advanced. This means that the Islamic norms will become more ambiguous when they are applied to a different, modern economic situation. There is plenty of evidence concerning controversial interpretation of laws and rules derived from the Qur'ān. The problem will of course become greater with regard to the application of Islamic norms of behaviour, particularly if these norms cannot be derived from and legitimised by the actions of the Prophet Muhammad and the four Caliphs.

The Establishment of a Religious Supervisory Authority

In order to ensure that the practices and activities of Islamic financial institutions are in accordance with *Sharīʿa,* a compulsory religious supervisory authority may be established. The task of this authority will be to provide detailed rules and recommendations which will guarantee that the activities of the financial institutions are sound from a religious point of view. The authority will also be obliged to monitor and control these institutions on a regular basis. In addition, financial mediations will be subject to financial regulations which are intended to create a sound and safe financial system. However, severe constraints – religious and regulations – may increase the transaction costs for the financial institutions and lead to an inefficient financial sector. Currently, there exists a Religious Supervisory Board (RSB) in the majority of Islamic banks. This board consists of Muslim jurisprudents, who act as advisers to the officials of the banks. The RSB is set up as a permanent institution located at, and financed by the bank. The opinion of the RSB is published in the bank's annual report.

Extension of the Definition of the Term Risk, Mukhāṭara

At present, Islamic financial intermediaries have extended the definition of the term risk, *mukhāṭara,* from two to three parties: the supplier of funds, the bank, and the user of the funds. In addition, a depositor in an Islamic bank does not take a risk in a specific project. His risk is related to all activities carried out by the bank. The bank has the right to aggregate the profits from different investments, and to share the net profit with the depositors according to a predetermined ratio.

Furthermore, a depositor may benefit from the profit of a project which took place before he opened an account. At present, an Islamic bank pools the returns from various projects which cover different periods. This implies that a depositor may benefit from the profit of a project and/or may bear the loss of a project which was completed before he opend an account. The return to the depositor is dependent upon the duration of his deposits.

In some countries, e.g. the Sudan, Pakistan and Iran, where Islamic financial institutions offer investment certificates for financing government activities, the risk is related to all the economic activities in the country. The rates of return on these certificates are also fixed in advance.

Nevertheless, it should be noted that there is no discussion among Muslim jurisprudents concerning the religious legitimacy of the bank's procedure for the distribution of the return on investment accounts. From a religious viewpoint, the fact that the retums to the depositors are not related to a specific project but rather are tied to a time dimension implies that this system is similar to that based on interest.

In summary, Islamic banks may in the long run maintain their religious identity in countries where sanction mechanisms are established, which will make deviation from what is religiously acceptable very costly. However, this may occur at the expense of an efficient financial system defined in strict pecuniary terms. Alternatively, what are considered Islamic requirements for the identity of an Islamic bank may be modified in a sense that incentives for various legal devices may be encouraged.

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Citizens of Islam
The institutionalization and internationalization of Muslim legal debate

Reinhard Schulze

I

It may be rather sophisticated to ask whether we may trace, within the contemporary Islamic debate, the idea that Islam constitutes a specific form of citizenship which transcends traditional forms of national loyalties. This question presupposes that Islamic intellectuals involved in this discussion would address a State of Islam (not simply an Islamic State), and that the *sharīʿa* once codified in form of a constitution and in laws depending thereon would conceptualize such an Islamic nationality or citizenship. In fact, most scholars and intellectuals advocating an Islamic state do not postulate a state unity of the Muslim *umma,* but argue in favour of an Islamic communality in which there is an equilibrium of nation-state identity and Islam. With an international Islamic public emerging, however, the question of the legal identity of the *umma* has again been included in the agenda of the debates.

In my paper I would argue that in contemporary Muslim legal debates there is hardly any scope for a legal conceptualization of the Islamic *umma.* This is contrary to the growing inclination among Islamic radicals of various tendencies to fight for a State of Islam *(daulat al-islām)* which should be totally different from any existing nation-states in the Muslim world. Such a State of Islam should not be confounded with the conception of an Islamic state to which many an Islamic jurist would subscribe instantly. In many parts of the Islamic world radical isolationists regard their small organizations as an expression of the polity of Islam; subjects of such a polity should be all who are accepted as its members. In such a case Islam serves as a marker of identity which often equals "secular" markers of nation-state identity.

The transformation of nation-states in the Muslim world also raised the question of the political identity of what traditionally had been called the Islamic *umma.* In fact, the process of nation-state formation may be mirrored by the legal and intellectual debates on the identity of the

umma. As the nation-state required a clear legal frame, the Islamic *umma* also was seen as a legal concept.

During the 18th century, the concept of *umma* had been gradually secularized. The famous Indian scholar Muḥammad Aʿlā ath-Thānawī, who compiled a famous encyclopaedia of technical terms in about 1745, for instance defined the *umma* as an assembly of religion or time or place. He subordinated the religiously defined concept of *umma* under the general idea of *umma* and said that those *umam* to whom a prophet had been sent should be specifically called *ummat ad-daʿwā*.[1] Accordingly, ath-Thānawī perceived the Islamic *umma* as a cultural entity only, without any further political implications. In his definition of *imāma*, he stated that the *imāma* is the "general lordship in matters of religion"; an *imām* should fulfil the five traditional conditions (he must be of good character, intelligent, legally adult, male etc., i.e. he must be a fully responsible free Muslim)[2]; any further religious preconditions of the imamate are explicitly denied except for the capability of being a *mujtahid* in the field of *uṣūl* and *furūgh*. The *imām* does not even have to strive for recognition by the whole *umma*, but only by those who follow him.[3] Legally, the caliph is seen as the *imām* who does not have an *imām* "above him".[4]

The history of political terms of the 18th century has still to be investigated. Up to now only a few conclusions may be drawn from the evidence at our disposal. Some important work has already been done as regards the Ottoman empire[5], but in the case of the Arab provinces thereof, the independent Arab states Algeria and Morocco and Persia we must admit that we still do not know to what extent a new political language developed.

The secularist view of the Indian scholar ath-Thānawī reflects a situation in which the semantics of the *umma* and of the caliphate had

[1] Muḥammad Aʿlā ath-Thānawī, *Kashshāf iṣṭilāḥāt al-funūn*, Calcutta 1863, 1, p. 91.

[2] These, of course, were the common qualities of a *qāḍī*, too; see Abu l-Qāsim ʿAlī b. Muḥammad as-Simmānī (died 493/1100), *Rauḍat al-quḍāt wa-ṭarīq an-najāt*, ed. S. an-Nāhī, 1-4, Baghdad 1970-1974, 1, pp. 5 ss., for a textual discussion see Irene Schneider, *Das Bild des Richters in der "adab al-qāḍī"-Literatur*, Frankfurt a.M. 1990, pp. 230 ss.

[3] ath-Thānawī, 1, p. 92.

[4] Ibid., p. 441, cit. *Jāmiʿ ar-rumūz* of Shamsaddīn Muḥammad al-Kūhistānī (died around 950-962/1534-54) from Bukhara, see ʿAbdalḥayy al-Kattānī *Fihris al-fahāris*, 2:503, Cmt. to *Bidāyat al-mubtadi'* of the ḥanafite jurist ʿAlī b. Abī Bakr al-Farghānī al-Marghīnānī, died 593/1197.

[5] See e.g. Virginia H. Aksan, "Ottoman political writing 1768-1808", *IJMES* 25/1993, pp. 53-69.

dramatically changed. During the period of the large empires, the concept of *umma* had lost all political connotations in favour of the concept of *daula*. Whereas *daula* originally meaning a dynasty, now also comprised the idea of an economically unified territory, the *umma* was restricted to cultural identities. The extensive use of the Ottoman term *ummat-i Muḥammad* shows that from the 16th and 17th centuries on, the *umma* was identified with Islam as a whole and was antagonistically contrasted to the Christian West. In this conntext, *umma* may be best translated by the European term civilization; as in Europe, Muslim intellectuals considered "their" culture as the only true civilization; and they, of course, associated it with the tradition of Islam. Such a civilizationary concept of *umma* could not be interpreted legally. Law had helped to define the frontiers of the empires, and monarchs often sponsored efforts to unify Islamic law under the term of their respective power.[6] Civilizations, however, did not require a specific law, but a moral and aesthetic code which would define the frontiers of the native and the alien.

The "de-legalization" of the concept of *umma* reached a first peak in the 19th century as nation-states in the Middle East started to establish a specific citizenship or nationality and abrogated the traditional forms of sovereignty. On January 9th, 1869, the Ottoman government passed a new law on citizenship[7] which was an adaption of the French law no. 7 of February 11th, 1851, and in which Ottoman citizenship was based on *jus sanguinis* without reference to any religious identity. In fact, this law terminated the long process of secularization which had characterized the political development of the Ottoman Empire from the 18th century onwards. Likwise, the famous codification of the *sharīʿa (mejelle-yi aḥkām-i ʿadlīya)* as civil law promulgated in 1877 marked a further step in the process of secularization. The *sharīʿa* as modelled in the *mejelle* had to be used by secular tribunals whereas the *qāḍī* courts continued to judge according to the unwritten ḥanafite tradition.[8]

[6] For instance the famous *al-Fatāwā al-ʿĀlamgīrīya*, sponsored by the Mughal Emperor Aurangzīb ʿĀlamgīr (1067/1658-1118/1707).

[7] I do not want to make a distinction between the subject in a monarchy and a citizen in a republic as Bernhard Lewis, *The political language of Islam*, Chicago 1988, p. 63, did.

[8] Joseph Schacht, *An introduction to Islamic law*, Oxford 1965, pp. 92 s.

II

In this context I do not want to discuss the civilian identity of the *sharīᶜa* from the time when public and private spheres were separated in the Muslim world. Obviously, however, the *sharīᶜa* continued to play an important role in the self-identification of certain groups of Muslim civilians who regarded the public as legally and ethically construed by norms of the *sharīᶜa*. They did not surpass the frontiers of the nation-state and consequently advocated what may be called a national *sharīᶜa*. In this respect, as Islamic terminology was still common, the word *umma* was conceived as a civil expression of state and society.

In so far as the Muḥammadan *umma (al-umma al-muḥammadīya,* or more often *ummat Muḥammad)* had ceased to constitute a legal concept, the term Muslim itself had also lost most of its legal and political implications. Being a Muslim now did not constitute a specific relation of the individual to the state, and consequently citizenship in any country was not determined by the fact of one's being a Muslim, but in most cases by *jus sanguinis*. In 18th century Egypt, for instance, the idea of being a subject *(tābiᶜ)* of a Mamluk prince was always associated with loyalty and not with the virtue of being a Muslim; true, every paladin of a Mamluk prince had to be a Muslim; being a Muslim, however, did not make a man (or a woman) a subject of a Mamluk. The Egyptian bourgeois who called themselves *abnā* (or *aulād) al-balad*[9] when acting politically derived their identity from the social stratification only; although being a Muslim was again a precondition of belonging to the bourgeoisie not every Muslim became a bourgeois. Here we see, that the Islamic identity did not condition the citizen's legal position within the royal or bourgeois order.

No wonder that *umma per se* now referred to the new nation-states and partly became synonymous with *milla;* with the predicate *muḥammadīya* added to it, however, the *umma* meant the unique civilization contrasted to "Christians", "barbarians" and other peoples who were not regarded as possessing a civilization of their own.

The antagonistic construction of the world, by which other cultures were excluded from the procedures of the self-identification, was equally

[9] In 18th century Arabic political writings, *balad* had a much higher prestige than during the 19th century. In fact, *balad* served to denote a political entity which later was called *waṭan;* thus, what in the late 19th century was called *muwāṭin* (citizen), replacing the earlier *ibn al-waṭan,* stood in a direct line with the 18th century term *ibn al-balad.*

common in the Muslim world and the Christian West. The further advanced process of secularization, however, did not allow this construction to take root in legal affairs. From the 19th century, at the latest, law in the Muslim world had been secularized from the Muḥammadiyan *umma* which continued to function as a world of symbolic references. This, of course, was a challenge to those Islamic intellectuals who regarded themselves as representing the idea of the Islamic *umma;* in a way, they continued to formulate the procedures whereby the Islamic *umma* continued to exist; they founded circles and clubs in which they debated the future of the Islamic *umma,* published Islamic journals, and even tried to establish institutions which would serve as organs representing the Islamic world.

The reformulation of the Islamic *umma* as a political body which would administer a unified Islamic law began in the early seventies of the nineteenth century. At first, the advocates of an Islamic *umma* rarely tried to mobilize law as a medium to reintegrate society. In 1884, Jamāladdīn al-Afghānī, for instance, raised the question of an Islamic citizenship.[10] ᶜAbdarraḥmān al-Kawākibī argued that the *sharīᶜa* should serve as a powerful instrument to provide the Islamic *umma* with a political identity and demanded a thorough re-evaluation of the legal tradition in order to accomodate the *sharīᶜa* to the whole Islamic *umma.*[11]

This, of course, was a purely fictitious debate, as hardly any Muslim jurist of the late 19th and early 20th century really had the ambition to inaugurate a transnational debate on the *sharīᶜa.* The jurists' public was still the nation-state; it was here that the jurists tried to preserve their social position by stressing the role of *sharīᶜa* law in the society.[12] As the secular courts very seldom acted in the traditional way of Islamic jurisprudence, the jurists focussed on *iftā'* as a means of broadcasting their

[10] Jamāladdīn al-Afghānī, "al-Jinsīya wa-d-diyāna al-islāmīya", *al-ᶜUrwa al-wuthqā,* Cairo ² 1958, pp. 9-12.

[11] ᶜAbdaraḥmān al-Kawākibī, *Umm al-qurā,* ed. Beirut ² 1402/1982, pp. 148 s.

[12] See for instance the work of the Egyptian Councillor of the Mixed Courts, Muḥammad Qadrī (1821-1888), and his codification of Ḥanafi law of family and inheritance (1875), of the law of property (p.h. 1891) and of the law of *waqf* (p.h. 1893; see Schacht, *Introduction,* p. 100 and ibid., n. 1); or the activities of ᶜAbdarrazzāq as-Sanhūrī, cf. E. H. Hill, "Islamic law as a source for the development of a comparative jurisprudence, the "modern science of codification": theory and practice in the life and work of ᶜAbd al-Razzāq Aḥmad al-Sanhūrī", in Aziz al-Azmeh (ed.), *Islamic law. Social and historical contexts,* London 1988, pp. 146-197.

legal opinions. They maintained that by *iftā'* they could describe what a true Muslim should be; the responsibility of executing a Mufti's ruling lay in the hands of the Muslims themselves irrespective of their nationality. Tradition, however, ensured that most *iftā'* activities were restricted to a specific audience: the public was mostly local, sometimes regional, seldom national and rarely transnational. Muḥammad ᶜAbduh's and Rashīd Riḍā's efforts to institutionalize and transnationalize *iftā'* through the famous journal *al-Manār* (1898-1935/39), in fact, had some influence in propagating a non-national Islamic way of life. Yet, they only reached a very small elite group in other Muslim countries (chiefly in Morocco, the Malayan principalities and Java).

As long as the Islamic *umma* was not repoliticized on a much broader level, there was no need for Muslim jurists to surpass the frontiers of the nation-state and debate the legal identity of the *umma*. The Islamic criticism of the national identity of existing states was only one of several impulses towards an internationalization of Muslim legal debates. Already in the late forties of the 20th century, the discussions of the possibility of unifying five Islamic traditions of law (Ḥanafite, Ḥanbalite, Mālikite, Shāfiᶜite and Jaᶜfarite), which the members of the Cairo-based *jamᶜīyat* (or *dār*) *at-taqrīb baina l-madhāhib* (founded in 1948) had inaugurated, showed that among a specific group of Muslim scholars there was a need to restore the authority of Islamic law (and hence their own authority) by calling for a transnational reformulation of Muslim jurisprudence.[13] Yet, the scholars involved in these discussions seldom pleaded for a transnational Islamic citizenship. Instead, they mostly wanted to clarify what in many constitutions of Muslim states had been stated, namely that one, or the source of, jurisdiction should be the *sharīᶜa*. In this context, the Rector of al-Azhar University, Maḥmūd Shaltūt (1893-1963, Rector since 1958) issued his famous fatwa concerning the recognition of the Jaᶜfarīya as the fifth accepted Islamic tradition of law and regarded it as a cornerstone for further investigations concerning the unification of Islamic law.[14] Many critics, mostly jurists, however agreed with Muḥammad Muḥammad Abū Zahra (1898-1974),who tried to separate the discussions on law from the politics of "approaching the Muslims

[13] See Werner Ende, "Sunniten und Schiiten im 20. Jahrhundert", *Saeculum* 36/1985, pp. 187-200, esp. pp. 198 ss.

[14] *Risālat al-islām*, 55-56/1963-64, pp. 14-16.

to each other". An Islamic rapprochement should be "the realization of the meaning of unity as laid down in the Koran and the *sunna.*"[15]

As many, or even most, Islamic jurists denied the possibility of a rapprochement of the traditions of law, they continued to abstain from a transnational Islamic debate on jurisprudence and consequently did not argue in favour of an Islamic citizenship however defined. The second impulse for a legal perception of the Islamic *umma* resulted from the Pakistani constitutional discussions of the late 1940's and 1950's. Only in Pakistan were the ideas stressed that "Muslim law is based on the conception of the unity of Islam"[16], and "a common acceptance of the law of Islam - and not ethnic, linguistic, or other similar bonds - is the proper basis for organizing the Muslim polity", in which "all Muslims, regardless of their ethnic or cultural backgrounds, have the same rights and obligations".[17] During the constitutional debates in Pakitan, the question was raised whether it is sufficient to be a Muslim in order to become a Pakistani.[18] The *muhājirūn* community in Pakistan for instance had come to an "Islamic polity" in which cultural and ethnic differentiation should be ranked second after Islam. This, of course, was only fictitious, as with regard to the Pakistani nationality the tradition of *jus sanguinis* continued to play an important role; only later did the *jus loci* allow the *muhājirūn* to acquire Pakistani nationality.

Furthermore, Muslim jurists did not concentrate on the question of citizenship; typically the preamble of the Constitution of 1956 affirmed that "sovereignty over the entire Universe belongs to Allah Almighty alone, and the authority to be exercized by the people of Pakistan within the limits prescribed by Him is a sacred trust."[19] The jurists of the Islamic Board, however, did not consider the legal identity of the *umma muḥammadīya,* or of "Islamistan" as the second Qā'id-i Aʿẓam Chaudhuri Bāqir az-Zamān had put it in 1949[20] but that of Pakistan.

Although Islamic transnational politics played an important role in creating an international Islamic public opinion, legal aspects of the

[15] Muḥammad Muḥammad Abū Zahra, *al-Mīrāth ʿinda l-jaʿfarīya,* Cairo n.d., p. 17.

[16] Muhammad Hamidullah, *Muslim conduct of state,* Lahore 1961, p. 175.

[17] Anwar Hussain Syed, *Pakistan. Islam, politics, and national solidarity,* New York 1982, p. 13.

[18] See Erwin I. J. Rosenthal, *Islam in the modern national state,* Cambridge 1965, pp. 125-153 and 181-281; Abu Aala Maududi, *The Islamic law and constitution,* Lahore (5th ed.) 1975.

[19] Cit. Aziz Ahmad, *Islamic modernism in India and Pakistan, 1857-1964,* London 1967,p. 243.

[20] *Oriente Moderno* 29/1949, p. 113, cit. *an-Naṣr* (Damascus), 11.10.1949.

reconstruction of the *umma* as a polity were rarely discussed. Contrary to many Islamic ideologists, most jurists accepted the structural diversity of Islamic law and the *Realpolitik* of nation-states. Eventually, they favoured an Islamic reformulation of existing constitutions; gradually, however, the idea of instituting a transnational Islamic law gained a foothold in the international Islamic public. In 1963, Taqīaddīn an-Nabhānī (1905-1978), the famous founder of the *Ḥizb at-taḥrīr al-islāmī* (founded in 1952), published his Prolegomenon to an Islamic constitution.[21] An-Nabhānī was a jurist from Haifa and had served as a judge at a local *sharī-ʿa* court in Haifa before going to Cairo to study at al-Azhar. His disputed affiliation to the Egyptian Muslim Brotherhood dated from that time. In his later writings, i.e. after 1952, he stressed a legal standpoint in dealing with political matters.[22] In his *muqaddima,* he included the following formulation under § 6:

> "The state imposes the Islamic law on all who carry the Islamic citizenship *(at-tābiʿīya al-islāmīya)* regardless of their being a Muslim or a non-Muslim with respect to the following:
> a. It imposes all Islamic rulings on the Muslims without exception.
> b. It passes over the non-Muslims in what they believe and whom they worship.
> c. The punishment for apostasy is executed upon apostates from Islam if they themselves are the apostates; if, however, they are children of apostates and born as non-Muslims, then they shall be treated like non-Muslims (...)"[23]

The constitution does not define any territory; the official language of the Islamic state shall be, however, Arabic.[24] Even if the subjects are not Arabs, the Arabic language should be used as official language.[25] Everyone is responsible for Islam; no "men of religion" are allowed.[26] *Ijtihād* is

[21] *Ḥizb at-taḥrīr al-islāmī, muqaddimat ad-dustūr au al-asbāb al-mūjiba lahū,* s.l. 1382/1963, 2nd ed. with corrections, s.l., saa.; I quote from the second ed. See David Commins, "Taqī al-Dīn al-Nabhānī and the Islamic Liberation Party", *The Muslim World* 81/1991, pp. 194-211.

[22] Of his earlier writings I mention *Inqādh Filasṭīn,* Damascus 1950; his first book published after the split from the Muslim Brotherhood was *Nizām al-islām,* Jerusalem 1953. Also from this year: *ad-Daula al-islāmīya; Mafāhīm ḥizb at-taḥrīr; Nizām al-ḥukm fi l-islām; at-Takattul al-ḥizbī; an-Nizām al-ijtimāʿī fil-islām* and *an-Nizām al-iqtiṣādī fi l-islām.* Later writings include: *al-Khilāfa* (s.a.); *at-Tafkīr* (s.a.); *ash-Shakhsīya al-islāmīya* (s.a.).

[23] *Ḥizb at-taḥrīr al-islamī, muqaddima,* pp. 26 s.

[24] Ibid., pp. 34 s.

[25] Ibid., p. 38.

[26] Ibid., p. 42.

regarded as a collective duty, and the *shāfiʿī* tradition of law should be accepted as the only basis for jurisdiction.[27] As the Constitution does not define a state territory, the nationhood should be construed through a person's membership of the *jamāʿa* which should be equivalent to "nation".[28] A country, or even a single person, may become "citizen of the Islamic nation" through *baiʿa,* by acknowledging "the president of the state" who "is the state"[29] as sovereign.[30]

III

I quoted this example to show that within the reformulation of the Islamic *umma* as a polity, Islamic intellectuals tended to "ethnicize" Islam in order to define citizenship and nationality. Islamic law served as a marker of ethnicity. In a way, an-Nābhanī followed the Pakistani experience as here, Islam was also used to legitimize traditional ethnicity in order to define the Pakistani nationality. The Islamic Liberation Party, however, did not refer to a specific tradition of Muslim identity, because the party leaders wanted to construct a *jamāʿa* and not a tradition as a political *umma.*

Tradition has been used to define an Islamic nationality within Jugoslavia. In 1967, Tito declared that the Muslims of Bosnia-Herzegovina (and not including the Albanian Muslims of Kosovo, Turks, Muslim Serbs, Muslim Croats and Macedonian Muslims!) constitute a separate nationality.[31] Although Muslim nationality did not refer to a particular statehood, Islam as a marker of ethnicity was used to distinguish local and regional social and cultural traditions within Bosnia-Herzegovina.[32] In a way, this concept followed the *jus sanguinis.* The Jugoslavian case demonstrates that Islam as a national identity did not create an internationally recognized citizenship. After the independence of Bosnia-Herzegovina, however, tradition suddenly became political: although the new state at first tried to define citizenship on the ground of *jus soli,*

[27] Ibid., p. 45.

[28] Ibid., pp. 102 s.

[29] Ibid., p. 143.

[30] Ibid., pp. 132 s.

[31] For details see Alexandre Popovic, *L'Islam balkanique. Les musulmans du sud-est européen dans la période post-ottomane,* Berlin 1986, pp. 344 ss.

[32] One of the purposes was to rise to the proportion of Orthodox Serbs in Bosnia-Herzegovina.

the subsequent war enforced a demarcation along ethnic boundaries; evidently, Islam was more important as a marker than clear linguistic traditions, and reciprocally, the government of Bosnia-Herzegovina stressed Islam as a national identity. Citizenship, however, continued to be defined according to traditional concepts; although the public now spoke of "Moslems" who were fighting "the Serbs" or "the Croats", the state itself tried to avoid regarding Islam as a condition for citizenship.

In a totally different setting, namely in the USA, the idea of an Islamic citizenship had become popular already in the early 1930's. After the reorganizer of the Moorish movement, Wallace Fard Muhammad, had disappeared in Chicago in 1934, Elijah Muhammad (Elijah Poole, died 1975) assumed leadership and called the organization "Nation of Islam"; again ethnicity played an important role in identifying the underlying markers: the first was "being black", the second "being Muslim". Membership in the Nation of Islam became equal to citizenship. Some 100.000 members had to pay taxes (*ʿushr*) and were called to buy and work only in shops and enterprises belonging to the Nation of Islam. Consequently, the Nation of Islam should disregard all rights and obligations derived from American citizenship (in particular compulsory military service). Somehow, Elijah Muhammad used the *jus sanguinis* to separate an "alien" from a "citizen" and propagated the withdrawal from the White Devils' society.[33] After Wallace Deen Muhammad had dismantled his father's organization and reorganized it by "denationalizing the Nation of Islam", Abdul Hareem (Louis) Farrakhan, the successor to Malcolm X, restored the Nation of Islam in 1978 and reintroduced the concept of a political Black Muslim citizenship.[34]

In contrast to the conception of citizenship, which the Islamic Liberation Party had heralded, in the three cases of Pakistan, Bosnia-Herzegovina and USA, Islamic citizenship or nationality was nothing but a political idea, without any juridical implications. Consequently, an Islamic nationality was not enforced by law which would be a precondition for a Muslim to become a legal person; only through law could a legal relationship betwen the individual and the State have been esta-

[33] Louis E. Lomax, *When the word is given: a report on Elijah Muhammad, Malcolm X and the black Muslim world*, Berkeley, Cal. 1981.

[34] For further literature on the Nation of Islam see the respective entries in Clifton Brown, Ethel Williams, *Afro-American religious studies: a comprehensive bibliography*, New Jersey 1972, and *Howard University Bibliography of African and Afro-American religious studies*, Wilmington, Del. 1977.

blished. Without such a legal relationship, Islamic citizenship remains a fictitious conception which, nevertheless, has helped to create ethnicity in certain contexts. We may say that within the manifold radical Islamic movements, there is a growing tendency to accept Islam as a marker for ethnicity of a civil society. As long as the legal aspect of nationality or citizenship, however, is not incorporated, the Islamic citizenship is merely political. Finally, a political conception of Islamic citizenship did not help to repoliticize the *umma* on a transnational level; on the contrary, it tended to reduce the *umma* to a specific environment which is specified by ethnic markers other than Islam; as for the three cases cited above, we should mention as specific markers tradition, colour (not race), homeland and language.

IV

From the 1960's on, Muslim jurists proposed a totally different approach towards a repoliticization of the *umma* containing all aspects of nationality. Seeing that the secular law had helped to determine national citizenship in the 19th and 20th centuries and that the conception of Islam had thereby been largely depoliticized, they promoted the *sharīʿa* as a means to re-establish a transnational Muslim identity which should be legal in international relations. They very simply argued that the *sharīʿa* constitutes the *umma*. As the *sharīʿa* is not codified and unified, the main task of Muslim jurists should be to call for at transnational legal debate in which they would lay down the preconditions for a political *umma*. This idea, of course, stood in sharp contrast to the national tradition which most Muslim jurists had accepted.[35]

Legal debates were a cornerstone of the self-image of Muslim law scholars. The conflict between the need for a consensus *(ijmāʿ)* and the allowance of disagreement *(ikhtilāf)* often determined the legal discourse. Nevertheless, in the course of history, tradition helped to counterbalance the alleged contradiction between the two basic concepts of jurisprudence. Under the condition of the nation-state, however, law

[35] The literature on the efforts to codify the *sharīʿa* is voluminous; see for instance the earlier works of E. Bussi in *Oriente Moderno* 20/1950, pp. 251-261, and A. Giannini in *Oriente Moderno* 11/1931, pp. 65-74, and of Abu Bakr Abd al-Salam B. Choaïb, "La codification de droit musulman", *Revue du monde musulman* 8/1909, pp. 446-456. For a contemporary view see e.g. ʿAbbās Ḥusnī Muḥammad, *al-Fiqh al-islāmī - āfāquhū wa-taṭawwuruhū*, Mecca 1402, pp. 234-249.

had to fulfil the task of integrating the society. Consequently, a unification of the *sharīᶜa* would enhance a total revision of the basics of Islamic jurisprudence, including the abolition of the accepted dichotomy of consensus and disagreement. No wonder only a few Muslim jurists favoured a transnational debate; eventually, most scholars feared a loss of influence within the national framework when turning to transnational positions. So, it was not the jurists themselves who initiated the transnational debate, but governments. In 1964, the Egyptian government realized a plan to establish an Academy of Islamic Research *(Majmaᶜ al-buḥūth al-islāmīya, MBI)* by inviting a selected group of Muslim scholars in order to unify the Islamic social and cultural code. They should act as the "highest authority" of Islamic research in general.[36] In reality, the *MBI* was an Egyptian organization, although eight of the 27 members of the Board were foreigners.[37] This implies that the *MBI*, like its Saudi Arabian rival, the Muslim World League *(Rābiṭat al-ᶜālam al-islāmī)*, founded in 1962, was used as a state instrument to promote foreign policy on a transnational level. But a review of the foreign members of the Board shows that one purpose of the *MBI* was to establish a broader consensus with regard to *iftā'*.[38]

Non-Egyptian Members of the *MBI*

Name	Origin	Funktion	Year of Membership
Aḥmad ᶜAbdarraḥmān al-Amīn	Sudan	Grand Qadi	1971
ᶜAbdaljalī l Ḥasan	Malaysia	Jurist	1972
ᶜAbdallāh b. Kannūn	Morocco	Scholar from Tanger	1964
ᶜAbdarraḥmān Qalhūd	Libya	Mufti	1964
ᶜAlī ᶜAbdarraḥmān	Sudan	Minister for the Interior	1964
Isḥāq Mūsā al-Ḥusainī	Palestine	Scholar, Muslim Brotherhood	1964
Mālik b. Nabī	Algeria	Ministry for Higher Edūcation	1971
Muḥammad al-Bashīr al-Ibrāhīmī	Algeria	Scholar	1964
Muḥammad Shīt Khaṭṭāb	Irak	Former Minister	1971
Muḥammad al-Fāḍil b. ᶜĀshūr	Tunisia	Mufti	1964
Muḥammad al-Ḥabīb b. al-Khūja	Tunisia	Mufti	1972
Nadīm al-Jisr	Lebanon	Mufti	1964
Wāfiq al-Qassār	Lebanon	Jurist	1964

[36] Reinhard Schulze, *Islamischer Internationalismus im 20. Jahrhundert*, Leiden 1990, pp. 153 s.

[37] The number was reduced to two in 1970; in 1972, there were seven foreigners among the 22 members, see Schulze, *Internationalismus*, p. 236 and sources cited there.

[38] Sources in Schulze, *Internationalismus*, pp. 237 s.

In addition, the *MBI,* depending on al-Azhar and the Ministry of *auqāf* was able to convince other jurists to co-operate at its conferences. The *MBI* tried to acquire a strong image as a legal authority by solemnly declaring the opening of the *bāb al-ijtihād* in 1964.[39]

In December 1973, the Secretary General of the Saudi Arabian Muslim World League, Muḥammad Ṣāliḥ al-Qazzāz (1902-1990) proposed the creation of a transnational Academy of Islamic Jurispludence *(al-majmaᶜ al-fiqhī al-islāmī).*[40] This announcement coincided with the growing readiness of the Muslim World League to integrate foreign Muslim cultural elites into its apparatus. In 1978, the League realized this proposal; seven members of the new Board of the Academy were Saudi Arabian subjects, thirteen were foreign jurists. According to its fundamental order, the Academy should

revitalize and spread the Islamic legal legacy,

stress the superiority of Islamic law, and

judge all "new questions" according to the *sharīᶜa* on the basis of Koran, Sunna, *ijmāᶜ* and *qiyās.*[41]

From 1978 to 1992, the Academy held 14 conferences during which manifold legal problems were discussed which may be summarized under the following headings:[42]

questions concerning rents, interests and banking in general,

questions concerning the use of *zakāt,*

questions concerning new technologies and medical methods,

questions concerning cultic and ritual problems.

Obviously, the League wanted to establish a transnational network of *iftā'* in order to unify the divergent opinions concerning actual legal problems. This implied that the Academy did not tackle classical problems of legal disagreement. Only in 1985 did it accept the idea of the opening of the *bāb al-ijtihād;* and it may be due to the great influence of the *wahhābī* scholars that the Academy reacted very late to the equivalent

[39] *Majallat rābiṭat alᶜālam al-islāmī* (Mecca, *MRAI)* 1, 1385/1964, 10, pp. 75 ss., reproducing an article by the al-Azhar official Nūr al-Ḥasan.

[40] *Akhbār alᶜālam al-islāmī* (Mecca,AAI), 357/17.12.1973, p. 11.

[41] *AAI* 283/29.6.1978, p. 10.

[42] For details see Reinhard Schulze, "Political law in contemporary Islam, as exemplified on the basis of Saudi-Arabian judicial opinions", *IJMES* (in preparation).

decision of the *MBI*.[43] Further activities expanding the field of jurisprudence were heavily dependent on the late Secretary General of the League, Muḥammad ʿAlī al-Ḥar(a)kān (1915-1983) who was, up to now, the only jurist at its top. He obviously wanted the League to become a transnational authority on Islamic law. Just before his death in June 1983, he was able to invite European Muslim scholars and jurists to Mecca to inaugurate a European Council of Islamic Jurisprudence.[44] Only a few days later, however, the Islamic Conference Organization (founded in 1969/1972) established an Academy of Jurisprudence of its own.[45] The task of the new Academy was to coordinate the activities of national institutions of Islamic jurisprudence.

The intensified legal debates which the *MBI* and the Islamic Jurisprudence Academy had initiated did not constitute a step toward a unification of Islamic law which would be a precondition for the legal framing of an Islamic citizenship. At al-Azhar, however, the idea of politicizing the conception of *umma* gained a much stronger foothold, when a subcommission of the Higher committee of the *MBI* following a suggestion made at the Eighth Conference of the *MBI* (October 1977) published a "plan for an Islamic Constitution" in autumn 1978.[46] One of several motives behind this proposal was to embed the discussions of the Egyptian constitution and, in particular, of the role of Islamic law in jurisdiction, in a broader context. Article 1 of the *MBI*-constitution stated, "that the Muslims are one single *umma (al-muslimūn ummatun wāḥidatun)*". From this identity, the authors of the constitution derived very different aspects of state law which, however, did not touch the question of nationality or citizenship.[47]

The *MBI*-proposal was not discussed openly. The *MBI*-session of 1979 could not be held, as most participants from the *duwal ar-rafḍ*, i.e. from

[43] In 1976, the Wahhabiya from the Muḥammad b. Saʿūd University in Riyadh also tried to establish a transnational Law Academy; during its preparatory conference on Islamic Jurisprudence, several non-Saudi jurists presented papers on the question of the legitimacy of *ijtihād*, see *Jāmiʿat al-imām Muḥammad b. Saʿūd al-islāmīya* (ed.), *al-Ijtihād fī sh-sharīʿa al-islāmīya wa-buḥūth ukhrā*, Riyadh 1404/1984. On that conference, see *at-Tauthīq at-tarbawī*, Riyadh, 13/April 1977, pp. 36 ss.

[44] *AAI* 830/6.6.1983, pp. 8 s., and 831/13.6.1983, pp. 2-4.

[45] *al-Umma* (Qatar) 34/July 1983, pp. 54-58.

[46] Text in *Majallat al-Azhar* 51 (1399/1979), 4, pp. 1092-1100.

[47] See also J. J. Donohue, Islamic constitutions, *CEMAM Reports 1978/1979*, Beirut 1981, pp. 121-137, with a short analysis pp. 139-141.

those states which rejected the Egyptian Israeli peace treaty of 1978, were not allowed to travel to Cairo. Again, divergent political views prevented the jurists from defining a legal conception of the Muslim *umma*. The main problem, of couse, was to what extent an Islamic constitution should be the legal framework of the *umma;* mostly it was postulated that an Islamic constitution should be the model of nation-state constitutions. It should prescribe an Islamic form of government and jurisdiction without questioning the sovereignty of the nation-states. It was in this sense that the Secretary General of the Islamic Council of Europe, Sālim ᶜAẓẓām, presented a "model of an Islamic Constitution" at an International Islamic Conference on "Islam Today" held at Islamabad on December 10th-12th, 1983.[48] This proposal did not define the Muslim *umma* other than culturally. Chapter 1, Article 2 reads:

> "... is part of the Muslim world and the Muslim peoples of ... are an integral part of the Muslim *umma.*"

The legal provisions of the Constitution now include:

> "Sovereignty belongs to Allah alone, and the *sharīᶜa* is paramount" (Chapter 1, Article 1a)[49]

and

> "The *sharīᶜa* - comprising the Qur'an and the Sunnah - is the source of legislation and policy." (Chapter 1, Article 1b)

Citizenship should be determined by law (Chapter 2, Article 14a), but "every Muslim has a right to seek citizenship of the State. This may be granted in accordance with law" (Ibid., b).[50]

Referring to the absolute sovereignty of God, the Islamic Council of Europe had introduced a new legal theme into the discussions of the political identity of the *umma,* which had hitherto been the domain of

[48] English text in *Journal of the Muslim World League* (Mecca, *JMWL*), 11 (1404/1984), 5-6, pp. 27-33. An Arabic translation may be found in ᶜAlī Muḥammad Jarīsha, *I'lān dustūrī islāmī,* Manṣūra 1985, pp. 119-160, cit. from Badry, *Wasfī,* p. 100, n. 2.

[49] In a "Constitution of the Islamic State", the President of the World Federation of Islamic Mission, Muhammad Fazl-ur-Rahman Ansari simply stated: "Sovereignty belongs to God" and "The right to legislate belongs basically to God", see *The Qur'anic foundations and the structure of Muslim society,* vol. 2, Karachi n.d., pp. 344 ss.

[50] Cf. Abul Aala Mawdudi, *Human rights in Islam,* Leicester 1976, p. 11.

the ideological programmes of Islamic intellectuals like al-Maudūdī and Sayyid Quṭb.[51] In the 1989 draft of the Islamic Declaration of Human Rights of the ICO[52] this conception was reiterated as follows:

> "All human beings are Allah's subjects, and the most loved by Him are those who serve His subjects, and no one has superiority over another except on the basis of piety and good deeds" (Article lb).

Closely linked to the idea of an Islamic citizenship is the question of apostasy. In a legal sense, apostasy would mean the deliberate abandonment of Islamic nationality. As Islam, if constituting a state *(daulat al-islām)*, is what in German would be called a «Zwangskörperschaft", nobody is allowed to cease to be a Muslim; of course, he may leave the territory of Islam and change his "nationality" by becoming e.g. a Christian; the apostate would, however, be prosecuted if he retumed to the State of Islam. Jurists who considered Islam as (divine) law sometimes accepted the *sunna* to kill a Muslim apostate and to imprison a Muslim woman who "left Islam";[53] they did not, however, regard this as a step towards the establishment of a State of Islam, but as a symbol of the Islamic identity of a state.

It should be added that following the Wahhabi doctrine that the Koran is the Islamic constitution, many Islamic intellectuals rejected the idea of a genuine Islamic constitution. In 1980, the former Muslim Brother Muḥammad ʿAbdallāh as-Sammān who in the 1950's bitterly attacked the Islamic scholars and later went to Riyadh wrote:

> "All other states based on sound principles are states which are absolutely bound by their constitutions. Do not say that they are ossified; no, they are developed states. The State of Islam is a state which is regarding to its constitution exceptional. The difference between it and these states is that their legislation is made by human beings who have the tendency to let in passions and interests; as for the Muslim State, its constitution is made by God and not for passions and interests."[54]

[51] For a summary of the discussions on *ḥākimīyat Allāh* (or *al-Islām)*, see Aḥmad Muḥammad Jamāl, *Fikrat ad-daula fi l-Islām*, Riyāḍ 1406/1986, pp. 51 ss. This booklet contains a strong attack against al-Maududī's opponent, the Indian scholar Abu l-Ḥasan ʿAlī an-Nadwī.

[52] Cit. *Kayhan International*, 30.12.1989.

[53] Cf., e.g., Muḥammad Muḥammad Abū Zahra, *al-Waḥda al-islāmīya*, 1971, pp. 266 s.

[54] Muḥammad ʿAbdallāh as-Sammān, *al-ʿAqīda wa-sh-sharīʿa*, Cairo 1400/1980, p. 12; on him see Schulze, *Internationalismus*, p. 311.

This shows, I think, that in modern political thought, Islam is sometimes construed as a nation-state. Here we may trace the influence of al-Maudūdī who idealized Islam as a state and emphasized the second part of the famous dictum *al-islām dīn wa-daula.* Citizenship in a Nation of Islam, of course, is nothing but a political ideal of those Islamic intellectuals whose political ideology centers around the notion of the State. Others who focus on the notion of society would not accept the formulation that Islam is a State, but would rather stress the ethical identity of Islam. Consequently, intellectuals who favoured a legal conceptualization of the Islamic *umma,* mostly adhered to the state apologists.

Despite this clear intellectual orientation, contemporary Muslim jurists have seldom advocated a State or a Nation of Islam. It seems that jurists have been far more conscious of the vague character of the *sharīʿa* which does not allow either its own codification or its application to a single state. In a way, jurists involved in transnational debate on Islamic law tended to accept some conceptions which clearly refer to such conceptions as *ḥākimīya* which originally referred to the identification of Islam as a state, but nevertheless they did not develop the underlying legal implications. They instead based their activities on dogmatic and ethical questions, for instance with regard to *iftā'* or the conceptualization of Islamic human rights.

The debates on the politicization of the *umma* through the unification of the Islamic law which would inevitably lead to a concept of Islamic citizenship did not prove successful. It seems that the classical distinction between religion and law prevented a further theoretical approach. As Baber Johansen put it:

> "Dennoch sind das Subjekt der Religion und das Subjekt des Rechts nicht identisch. Das Subjekt der Religion ist das Individuum, das den Islam annimmt, und zwar aus freiem Willen (...) Die Annahme des Islams entscheidet sich im unmittelbaren Verhältnis des Individuums zu Gott und ist dem Staatszugriff entzogen. Das Subjekt des Rechts aber ist staatsabhängig: es ist der Untertan einer islamischen Regierung."[55]

Insofar as the Maudūdian conception of *ḥākimīya* defines an Islamic citizenship, the classical Islamic separation of religion and law (or if we may say the state, as every law requires a state) is abrogated. Naturally, most Muslim jurists will fight such an ideology as otherwise their own

[55] Baber Johansen, "Staat, Recht und Religion im sunnitischen Islam", *Essener Gespräche zum Thema Staat und Kirche,* 20/1986, pp. 12-60, here p. 56.

social and cultural position would be endangered. Hence, as long as jurists are responsible for Islamic law they will help to consolidate the secular character of centemporary nation-states. Perhaps, Islamic law is able to stress the ethnification of Muslim communities; but this would not mean a step towards a politicization of the Islamic *umma;* on the contrary: the ethnification and communalization of Muslim identity would contribute to a restoration of nationalism. It is here that Islamic law plays an important role. The intellectual debates on the legal character of the Islamic *umma* will, however, remain a subject of a very limited public.

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