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MUHAMMADAN JURISPRUDENCE

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THE PRINCIPLES OF

MUHAMMADAN

JURISPRUDENCE

ACCORDING TO THE HANAFI, MALIKI, SHAFI'I AND HANBALI SCHOOLS

BY

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LONDON: LUZAC & Co.

MADRAS: S.P.C.K. DEPOSITORY

PRINTED AT THE
S. P. C. K. PRESS, VEPERY, MADRAS
1911

PREFACE

THIS book embodies the substance of the lectures which I delivered in the University of Calcutta, as Tagore Professor for the year 1907, and I greatly regret that there should have been so much delay, due to reasons altogether personal to myself, in the publication of the book.

The first Chapter is intended to be introductory, and its usefulness will, I trust, be apparent, especially with reference to the topics discussed in Chapters XI to XII. I ought to mention that, in writing the earlier portion of the first Chapter, I derived valuable suggestions from Mr. Macdonald's excellent treatise on Muhammadan Theology.

Chapters II to V contain an exposition of 'Al-Uṣúl' or the Science of Law, as developed by the Muḥammadan jurists between the eighth and the fourteenth centuries of the Christian Era. Much of this part of the book is practically a translation of Ṣadru'sh-Sharí'at's 'Tauḍíḥ' which was written sometime in the fourteenth century and is recognized as a standard work on the subject. The other writings on Uṣúl which I have largely consulted are Taftázánis' 'Talwíḥ', which is a commentary on 'Tauḍíḥ', Fakhru'l-Islám's 'Al-Uṣúl' and its commentary 'Kashfu'l-Isrár', 'Musullumu'th-Thabút', by Muḥibbullah and its commentaries by Baḥrul Ulúm and others, 'Attaqrír-wa't Taḥbír', by Ibn Hammám, 'Núru'l-Anwár', by Mullah Jiwan; 'Jam'u'l-Jawámi'', by Tajuddin Subki with its commentary by Al-Máḥalli and the gloss known as 'Al-Áyátu'l-Bayyinát' and 'Al-Mukhtaṣar' by Ibn Hájib with Qáḍí Uḍud's commentary thereon.

In writing the remaining chapters I have not had the same invaluable help of these eminent jurists, who did not think fit to pursue their investigations beyond the limits of the topics dealt with in Chapters II to V. In Chapters VI to XII, I have endeavoured to explain the fundamental theories and legal ideas on

which the different departments of the Muḥammadan system are based and to set forth the important principles which impart to the Muḥammadan legal code, under its several heads, its peculiar features. These theories and principles are to be found interspersed in such authoritative works on Muḥammadan law as the Hedáya', the 'Sharḥu'l-Viqáya' and others and also in the various treatises on Uṣúl, already mentioned. It is always difficult to know exactly where one should draw the line in referring to the rules of law in illustrating the general legal ideas and relations which form the proper province of jurisprudence, and it will be seen that I have referred to such rules in somewhat profuse detail. My reasons for doing so were two-fold; in the first place, the jurisprudence I have had to deal with relates to one particular system, and in the second place, the Muḥammadan law is so seldom read with any care that I felt I should not be justified in counting on the possession of that quantum of knowledge of its rules which is necessary for the purpose of following the discussions of the jurists, on the part of the ordinary student for whose benefit the Tagore Lectures were primarily instituted.

I ought to state that throughout this treatise I have endeavoured to represent the ideas of Muḥammadan jurists as accurately as possible, and as far as possible in their own language, and at the same time to make their meaning quite clear to those who are only conversant with the modern forms and modes of legal expression. If I have failed in my effort in either direction, I would appeal especially to the indulgence of those scholars who are familiar with the difficulty of translating the ideas of a technical and abstruse subject expressed in Arabic into a modern European language.

In spite of the shortcomings of this treatise, I hope that it will be of some practical use in helping those who are desirous of studying the Muḥammadan law, to study it as the subject of a scientific system instead of treating it, as is the habit, I am afraid, of many lawyers in India, as an arbitrary collection of rules and dicta based on no intelligible data. Further, I venture to think that the contributions made by the Muḥammadan jurists to legal thought will have a special interest to those who are interested in the science of jurisprudence, having regard not only

to the age in which those jurists lived, but the nature and the difficulties of the task which they set before themselves, namely, to construct the science of a system which is not only entirely self-contained, but in which law is an integral part of religion, so that Muḥammadan Jurisprudence purports to be in fact a science of man's rights and duties both spiritual and social. I may also be allowed to hope that the book will be of some assistance to those who, though not directly interested in the study of law or its science, wish to understand the true basis and character of the principles which inspire and guide the lives and conduct of the Muḥammadans or, to be more accurate, of the Sunní Muḥammadans, that is, the followers of the four Schools of law specified in the title, who form the great bulk of the Muḥammadan population of the world.

In conclusion I wish to express my indebtedness to the Rev. Canon Edward Sell, D.D., M.R.A.S., in charge of the S.P.C.K. Press and Author of the 'Faith of Islám', who was kind enough to revise the transliteration of the Arabic words, and to Messrs. S. Ranganadhaiyar, B.A., B.L., High Court Vakil, and P. Kundu Panickar, B.A., M.L., Advocate, who prepared the Index, the Glossary of Arabic words, the List of Original Authorities referred to or mentioned, the Table of Cases, the Contents and the Errata.

A. R.

MADRAS,
May 1, 1911.

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Al-ashbah wán-nadhair (Lucknow edition).

Al-Áyátu'l-Bayyinát (Bulaq edition).

Al-Háwi.

Al-jámi'ul-kabír.

Al-jámi'u's-saghir.

Al-káfi.

'Al-khulása.

Al-mabsút.

Al-Majalláh (Constantinople edition).

Al-majmá'a'.

Al-manár (see Núrul Anwár).

Al-Mankhúl (MSS. Bohar Collections at the Imperial Library, Calcutta).

Al-muḥurrar.

Al-muḥit.

Al-mukhtar.

At-taqrír wa't Taḥbír (Bula'q edition).

Al-uṣúl (Constantinople edition printed with its commentary Kashful Isrár).

Al-Wajíz (Egyptian edition).

Al-wáqi'át.

Adh-dhakhira.

An-nahar.

As-síyaru-l-kabír.

As-síyarus-saghír.

At-Tafsíru'l-Kabír (Egyptian edition).

Az-ziyádát.

Baḥrúr-Raí'q (Cairo edition)

Durru'l-Mukhtár (Egyptian edition printed on the margin of Raddu'l Muḥtár).

Duraru'l-Bahiya (see Rauḍatu'n-Nadia).
Fatáwá 'Álamgírí (Calcutta edition).
Fatáwá-Rashidud-din.
Fatḥu'l-Jalíl (Tunis edition).
Fatḥu'l-Qadír (Egyptian edition, also contains Hedáya, Kifáya, Ináya and Chalpi).
Hárúniyat.
Hedáya (see Fatḥu'l-Qadír).
Ibn Khaldún.
Ináya (Egyptian edition, on the margin of Fatḥu'l-Qadír).
Jamiu'l-Fatáwa.
Jamiu's-Saghír.
Jam'u'l-Jawámi' (printed on the margin of Al-Áyátu'l Bayyanát).
Jurjániyat.
Kanz (printed on the margin of Baḥrur-Raíq).
Kashfu'l-Ghumma (Egyptian edition).
Kashfu'l-Isrár (see Al-Aṣúl).
Kashsháf-fi-Istilahi'l-fanún (Calcutta edition).
Khazanutu'l-muftaeen.
Kifáya (see Fatḥu'l-Qadír).
Kisániyat.
Majmu-un-nawázil.
Mukhtaṣar (Bulaq edition).
Musnadu'l-Imám Ḥanbal.
Musullumu'th-Thabút (Lucknow edition).
Nailu'l-Ma'árib (Bulaq edition).
Niqáya.
Núru'l-Anwár (Lucknow, Yusufi edition).
Qudúri.
Qur'án.
Qustaláni (Bulaq edition).
Qinyah.
Raddu'l-Muḥtár (Egyptian edition).
Rauḍatu'n-Nadia (Bulaq edition).
Ruqiyát.
Ṣáḥiḥ-ul-Bukhári (Mustafái edition).
Sahíḥ of Muslim (Bulaq edition).
Sharḥu'l-Viqáya (Lucknow, Yusufi edition).

Tafsír-i-Aḥmadí (Bombay edition).
Tafsír-i-Jalálain (Delhi edition).
Tafsír-i-Kashshaf (Calcutta edition).
Talwíḥ (Constantinople edition).
Tafsíru'l-Madárik (Egyptian edition).
Taudíḥ (Calcutta edition, and also on the margin of Talwíḥ).
Tuḥfatu'l-Muḥtáj (Egyptian edition).

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ERRATA

Page 8.—*For* متعتة *read* متعة

„ 48.—*For* 'which is the science of the material law of the Muḥammadans' *read* 'which is the material science of law of the Muḥammadans'.

„ 64, line 31.—*For* 'it' *read* 'them'.

„ 67.—*For* اهليت *read* اهلية

„ 84.—*For* غايتة *read* غاية

„ 156, last line.—*For* 'to an effective cause' *read* 'to one based on an effective cause'.

„ 163, line 3 from bottom —*For* 'in adaptability' *read* 'inadaptability'.

„ 170, line 2.—*For* 'passed' *read* 'possessed'.

„ 176, line 9 from the bottom —*For* 'chose' *read* 'choose'.

„ 187, line 12 from bottom.- *For* 'some Fatwa' *read* 'some, Fatwa'.

„ 217.—*For* اهليتة الاداع *read* اهلية الاداء

„ 255, line 21.—*For* 'judgement' *read* 'judgment'.

„ 256, line 4.—*For* 'preceptible' *read* 'perceptible'.

„ 263, foot-note 1.—*For* 'Baḥru'l-'Ulún community' *read* 'Baḥru'l-Ulúm's commentary'.

„ 272, foot-note 3.—*For* 'H. C. Rept., 30' *read* '6 Mad. H. C. C., Page 30'.

„ 302, lines 15 and 18.—*For* 'donor' *read* 'donee'.

„ 354.—*Delete* 'Coercion' in the margin.

N.B.—In several Arabic words, ending with ة a superfluous ء has been added at the end Please read those words without the ء

Muhammadan Jurisprudence

According to the Sunni Schools

CHAPTER I

HISTORY OF THE GROWTH OF THE MUHAMMADAN LEGAL SYSTEM

Preliminary observation

BEFORE proceeding to the study of the subject, Muḥammadan Jurisprudence according to the four Sunní Schools of Law, I wish to draw attention to the general features of the more important stages in the growth of laws and of the science of law among the Muḥammadans. I will begin with a brief account of the customs and usages that prevailed among the Arabs at the time of the promulgation of Islám, for such customs and usages form an integral part of the history of the Islámic legal system. The Islámic legal system, as is well known, had its origin in Arabia, and has been developed by Arab jurists, and we should, therefore, naturally expect to find on it the impress of Arabia's social history and of the Arab mind and character. Moreover, it would not be correct to suppose that Islám professed to repeal the entire customary law of Arabia, and to replace it with a code of altogether new laws. The fact is, the groundwork of the Muḥammadan legal system, like that of other legal systems, is to be found in the customs and usages of the people among whom it grew and developed.

The author of the 'Hedáya' in establishing the legality of partnership says: 'Partnership is lawful

because the Prophet found people practising it and confirmed them therein.'[1] In commenting on this passage, Ibn Hammám remarks: 'There is a clearer authority in favour of legality of partnership than certain traditions, namely, continuous practice among men from the time of the Prophet; and thus there is no need for relying on any particular dicta.'[2] The general principle is thus expressed: 'We hold permissibility to be the original principle, and prohibition to be equivalent to abrogating, with reference to the interval of time between Jesus Christ and the Prophet, when lawfulness was the original attribute of human action; then the Prophet came and declared some acts to be unlawful, so that the rest remained lawful and permissible.'[3] The Muḥammadan Code, in fact, includes many rules of pre-Islámic customary law which have been embodied in it by express or implied recognition.

SECTION I—CUSTOMS AND USAGES OF THE ARABS BEFORE ISLAM

Constitution of Arab society

The constitution of Arab society, when the laws of Islám came into force, was that of a people which had not yet, generally speaking, completely lost its nomadic habits and characteristics. The Arabs were divided into tribes and sub-tribes, and these latter again into families. They were often at hostilities with each other, and on such occasions there was no recognized usage or general public opinion restraining the actions of the members of one tribe towards those of the other. But for some time a number of tribes had united together by compact for the purposes of offence and defence, and this had the effect of ensuring peace for a sufficient length of time to allow for the growth of law. Such was specially the case in large cities like Mecca and Madína. Mecca, which was the place of pilgrimage, contained a large and powerful population, composed of several tribes bound together by

[1] 'Hedáya', vol. v, p. 377.
[2] 'Fatḥu'l-Qadír', vol. v, p. 377.
[3] 'Tafsír-i-Aḥmadí', p. 18.

ties of kinship and interest. These two cities and some seaport towns were centres of busy trade, and the merchandise of, at least, some parts of Asia passed through them to Europe. We also find that marts used to be held at different places almost the entire year round. Besides the town populations there were the Arabs of the desert known as the Bedouins. They led a roving life, removing their tents as time and opportunity offered from place to place. Each of these tribes had no doubt its own peculiar usages. Our account is mostly concerned with customs that prevailed among the inhabitants of the principal cities; but the general characteristics of the customary law of the populations of the towns and of the desert did not differ in essentials. Only the one tended to a more settled form than the other. The bulk of the Arab population were idolaters, but there were some among them who had adopted Christianity, and some were Magians in religion. A large and influential community of Jews had for a long time settled in Madína with their own laws and usages. They were also found in southern Arabia.

The Chief and his functions

The Arabs of Arabia at the time of the Prophet had no certain constitution and nothing like a settled form of government, whatever might have been the condition of things previously. Each tribe elected its own chief. He was generally a man who, by his nobility of birth, age and reputation for wisdom, won the confidence and respect of his fellow tribesmen. His most important function was to represent his tribe in its relations with the other tribes. Sometimes he was assisted in the discharge of his duties by a council of elders. Within the limits of his tribe his orders and decisions were enforced not by any fixed machinery at his disposal, for properly speaking there was no constituted State, but by the force of tribal opinion. Sometimes it happened that the culprit belonged to a powerful family, and his kinsmen would refuse to surrender him to the chief of the tribe for punishment. That family would then break away and join another tribe and become their Aḥláf (sworn allies حلاف). If the culprit escaped alive and took refuge

with a rival tribe, he would be called Dakhíl (دخيل lit. one who has entered).

Things were tending towards settled Government at Mecca

In Mecca, however, things were tending towards the formation of a government. The tribes that composed the non-migratory population of that city had in their custody the Ka'ba, which was a place not only of public worship, but of many social and political ceremonials. The public offices were divided among the twelve principal tribes or families. Of these the office of deciding disputes was delegated to one tribe and used to be exercised by its chief. The duty incidental to another important office was for the chief who held it to pay from his own pocket fines and compensations for wrongs committed by any of his tribesmen towards a member of another tribe. Abú Bakr, who afterwards became the first Caliph in Islám, held this office for some time.

What happened in the case of an offence committed by a member of one tribe against a member of another tribe

If a member of one tribe killed a member of another tribe, no distinction being made whether it was wilful or otherwise, the heirs or chief of the tribe of the deceased were entitled to demand that the offender should be given up to them to suffer death. But the matter might be compounded by payment of a fine or compensation amounting to a hundred camels. If the two tribes happened to be, at amity with each other, and the person accused denied the charge, then, on a number of men belonging to his tribe pledging their oaths to his innocence, the matter would be dropped. A case is reported in 'Al-Bukhári'[1] which is important as illustrating the custom of the Arabs in this connexion. A man of the family of Banu Háshim was hired by a man called Khadísh, belonging to another branch of the tribe of Quraish, to go with him to Syria in charge of his camels. On the way, because the hired man had given away a tether rope to a passer-by without his master's knowledge, the latter in rage threw a stick at him which, happening to strike the man in a vital part, caused his death. But before he died, a man of Yaman happening to pass that

[1] Delhi edition, vol. i, p. 542.

way, he requested him when he arrived in Mecca to tell Abú Ṭálib, the chief of his family, how he had been killed by his employer for the sake of a tether rope. When the employer afterwards returned to Mecca, Abú Ṭálib inquired of him what had happened to his man, and he said that he had sickened on the way and died. Subsequently, however, the man of Yaman who had been charged with the message by the deceased, came to Mecca and communicated the same to Abú Ṭálib. The man who had engaged the deceased was then making the circumambulation of the Ka'ba. A member of the family of Banu Háshim went up to him and struck him saying: 'You have killed one of our men', but Khadísh denied the charge. Abú Ṭálib next went up to the man and said: 'Choose at our hands one of three things: if you wish, give a hundred camels for the murder of our kinsman, or, if you wish, get fifty of your tribesmen to swear that you have not killed him. If you refuse either of these we will kill you in his place.' But, according to Zubair-ibn Bakkár, both the parties referred the case to Walíd ibnu'l-Maghira who decided that fifty men of Banu Ámír—the family of the man charged should swear before the Ka'ba that Khadísh had not killed the man. Khadísh spoke to his kinsmen, and they said that they would swear that he had not killed him. Then a woman of Banu Háshim, who was married to a man of Banu Amír and had borne him a son, came to Abú Ṭálib and requested him to accept her son, as one of the fifty and forgo his oath. Abú Ṭálib acceded to her request. Next a man of the family of the accused person came to Abú Ṭálib and said: 'You want fifty men to swear in lieu of payment of a hundred camels, so it comes to two camels for every man's oath. Take from me two camels and do not insist on my taking the oath at the place where oaths are taken.' Abú Ṭálib accepted the two camels, and forty-eight men came and took the oath.

Procedure

The procedure that used to be adopted when a dispute or claim had to be decided was to call upon the plaintiff to adduce proof in support of his claim.

If he had no witnesses, the defendant, in case he denied the charge, would be given the oath, and if he took it he would be absolved thereby from all liabilities. Sometimes the parties would go to a diviner and abide by his decision. If a suspected person was a slave, torture was sometimes resorted to in order to extort a confession.

Oaths

Oaths formed an important part of the procedure in settling a dispute. An oath was held in great reverence, not merely as an inducement to speak the truth, but was regarded in the nature of an ordeal finally settling the dispute. Much solemnity was attached to the ceremony of administering it and a place called Ḥaṭím (حطيم lit. one that destroys, referring to the belief that a man taking a false oath would be destroyed by the deities) was set apart just outside the Ka'ba for this purpose. The exact form of the oath is not known, but it appears that the pre-Islámic Arabs used to swear by Ḥubal their chief deity, or by their ancestors, and at the end of the ceremony would throw down a whip or sandals or a bow as a token that they had taken a binding oath.[1]

Punishment by retaliation

The principle of punishment for all crimes against the person was retaliation commutable to a payment of blood-money or compensation for the injury. If the injury resulted in death, the loss caused was regarded as a loss to the tribe or family of the deceased, and it was their right to demand satisfaction from the tribe or the family of the offender. This would often assume the form of Vendetta. We also find that the doctrine of retaliation underwent modification according to the relative positions of the families of the parties. If a member of an inferior tribe killed a member of a nobler tribe, the latter would exact the blood of two men in lieu of one, of a male in lieu of a female, of a freeman in the place of a slave.[2]

Other forms of punishment

Among other forms of punishment that prevailed among the Arabs, it appears that they used to cut off

[1] 'Qustaláni' (Bulaq edition), vol. vi, pp. 176, 182.
[2] 'Tafsír-i-Aḥmadi', p. 57.

the right hand of the thief. Among the Jews of Madína an adulterer used to be stoned to death if he was poor, but latterly they punished the adulterer, rich or poor, by blackening his face and flogging him.[1]

Customs regulating relations between the sexes

The customs regulating the relations of the sexes and the status of the children, issue of such relations, were at the time of the establishment of Islám uncertain and in a state of transition. Side by side with a regular form of marriage, which fixed the relative rights and obligations of the parties and determined the status of the children, there flourished types of sexual connexion under the name of marriage, which are instructive as relics of the different stages through which the Arabian society must have passed. It is narrated that there were four kinds of marriage in vogue at the time when the Islámic laws came into force: '(1) A form of marriage which has been sanctioned by Islám, namely, a man asks another for the hand of the latter's ward or daughter, and then marries her by giving her a dower. (2) A custom according to which a man would say to his wife: "Send for so and so (naming a famous man) and have intercourse with him." The husband would then keep away from her society until she had conceived by the man indicated, but after her pregnancy became apparent, he would return to her. This originated from a desire to secure noble seed. (3) A number of men, less than ten, used to go to a woman and have sexual connexion with her. If she conceived and was delivered of a child, she would send for them, and they would be all bound to come. When they came and assembled, the woman would address them saying: "You know what has happened. I have now brought forth a child. O so and so? (naming whomsoever of them she chose), this is your son." The child would then be ascribed to him, and he was not allowed to disclaim its paternity. (4) A number of men used to visit a woman who would not refuse any visitors. These women were prostitutes and used to fix at the doors of their tents

[1] 'Kashfu'l-Ghumma', vol. ii, pp. 105–6.

a flag as a sign of their calling. If a woman of this class conceived or brought forth a child, the men that frequented her house would be assembled, and physiognomists used to decide to whom the child belonged.'[1] Of the above, the first form of marriage must have been of the latest growth, and apparently it is a mere contradiction in terms to call the rest examples of forms of marriage. It admits of no doubt that the Arabs used also to contract what has been called a temporary marriage under the name of mut'a (متعة).

Temporary or mut'a marriage

It is stated in the 'Fatḥu'l-Qadír'[2]: 'When a man came to a village and he had no acquaintance there (to take care of his house), he would marry a woman for as long as he thought he would stay, so that she would be his partner in bed and take care of his house.'

Dower

In the regular form of marriage the fixing of mahr (مهر) or dower for the benefit of the wife was in vogue among the pre-Islámic Arabs. It formed a part of the marriage contract, but in some cases the guardian of the girl used to take the dower himself.[3] Whether such an appropriation was a mere violation of the ordinary usage, or whether it showed that dower was originally the price paid for the bride to her parents, and that the payment to her was but a later development, can only be a mere matter of conjecture. At all events, at the time of the Prophet, dower was regarded as a principal term of the marriage contract and the right of the wife. Its payment, in the event of divorce or death of the husband, was enforced by the voice of public opinion, or by the power of the woman's relatives, unless it had been paid at the time of the marriage. A device used at times to be resorted to under the name of shighár (شغار) marriage[4] in order to deprive the wife of her dower. A man would give his daughter or sister in marriage to another in consideration of the latter giving his daughter or sister in

[1] 'Kashfu'l-Ghumma', vol. ii, p. 56.
[2] *Vide* vol. iii, p. 151.
[3] 'Tafsír-i-Aḥmadí', p. 226.
[4] 'Kashfu'l-Ghumma', vol. ii, p. 52.

marriage to the former. In such a form of marriage neither of the wives would get a dower. Unchastity on the part of the wife made her liable to the forfeiture of her dower and frequently a false charge used to be brought against the wife by the husband, so that he might get rid of her without paying the dower.[1] And many a time a divorced wife or a widow would be coerced to give up her claim to dower or to restore it, if it had been already paid.

Woman not a free agent in marriage

Before Islám a woman was not a free agent in contracting marriage. It was the right of her father, brother, cousin or any other male guardian to give her in marriage, whether she was old or young, widow or virgin to whomsoever he chose. Her consent was of no moment. There was even a practice prevalent of marrying women by force. This often happened on the death of a man leaving widows. His son or other heir would immediately cast a sheet of cloth on each of the widows (excepting his natural mother), and this was a symbol that he had annexed them to himself. If a widow escaped to her relatives before the sheet was thrown over her, the heirs of the deceased would refuse to pay the dower. This custom is described as the inheriting a deceased man's widows by his heirs, who, in such cases, would divide them among themselves like goods.[2]

No restriction as to the number of wives

There was no restriction as to the number of wives an Arab could take. The only limit was that imposed by his means, opportunity and inclinations. Unrestricted polygamy which was sanctioned by usage was universally prevalent. This was exclusive of the number of slave-girls which a man might possess.[3]

Prohibited degrees

The limits of relationship within which marriage was prohibited were narrow and defined only by close degrees of consanguinity.

There can be no doubt that an Arab could not marry his mother, grandmother, sister, daughter or grand-daughter, and perhaps he was not allowed to

[1] 'Tafsír-i-Aḥmadí', p. 257.
[2] Ibid., p. 256.
[3] 'Kashfu'l-Ghumma', vol. ii, pp. 54–6.

marry his aunt, or niece. But those among them that followed the Magian religion could marry their own daughters and sisters. An Arab was permitted to take as his wife his step-mother, cousin, wife's sisters, and could combine in marriage two sisters or a woman and her niece. It is doubtful whether he could marry his mother-in-law or step-daughter.[1]

Unrestrained as an Arab was in the number of his wives, he was likewise absolutely free to release himself from the marital tie. His power in this connexion was absolute, and he was not required or expected to assign any reason for its exercise, nor was he under the necessity of observing any particular procedure. The word commonly used for this purpose was ṭaláq (طلاق). It depended upon his discretion whether he would dissolve the marriage absolutely and thus set the woman free to marry again or not. He might, if he so chose, revoke the divorce and resume marital connexion. Sometimes an Arab would pronounce ṭaláq ten times and take his wife back and again divorce her and then take her back and so on.[2] The wife in such a predicament was entirely at the mercy of the husband and would not know when she was free. Sometimes the husband would renounce his wife by means of what was called a suspensory divorce.[3] This procedure did not dissolve the marriage, but it only enabled the husband to refuse to live with his wife, while the latter was not at liberty to marry again. Another form of divorce in use among the Arabs was Ilá' (إيلاء), the husband swearing that he would have nothing to do with his wife.[4] According to some, such an oath had the effect of causing an instant separation, but others say that it was regarded as a suspensory divorce. Sometimes when an Arab wanted to divorce his wife, he would say that she was like the back of his mother. This would have the effect of an irrevo-

Divorce

Talaq

Ila'

[1] See W. Robertson Smith's 'Kinship and Marriage in early Arabia', p. 164.

[2] 'Tafsir-i-Aḥmadí', p. 130.

[3] Ibid., p. 121.

[4] Ibid., p. 122.

cable divorce and was known as ẓihár (ظِهار) (from ẓahr back).[1] Zihar

The wife among the Arabs had no corresponding right to release herself from the bond of marriage. But her parents by a friendly arrangement with the husband could obtain a separation by returning the dower if it had been paid or by agreeing to forgo it if not paid. Such an arrangement was called khula' (خُلع) lit. stripping, and by it the marriage tie would be absolutely dissolved. Khula'

A woman if absolutely separated by ṭaláq, ẓihár, ílá' or khul might remarry, but she could not do so until some time, called the period of 'iddat (عِدّة), had elapsed. This precaution was evidently observed in the interest of the child that might be in the womb. But an Arab before Islám would sometimes divorce his pregnant wife, and she would under an agreement with him be taken over in marriage by another. On the death of the husband the period of 'iddat was one year. Effect of divorce 'Iddat

The status of a child was determined not merely by marriage, but also as may be gathered from what has preceded by other forms of sexual relations. Regarding the issue of a regular form of marriage no doubt was entertained as to the establishment of the descent of the child from the husband of its mother. In the other cases, as we have seen, it was the right of the mother of the child to affiliate it to any one with whom she had sexual connexion. Legitimacy

Adoption among the Arabs was also in vogue as a legitimate mode of affiliation. Whether any form of ceremony was observed at the time of adoption is not known, but it seems that it was generally effected by a contract with the parents of the boy. The right to adopt was not based on any fiction, and it was not restricted by any condition as to the age of the adopted child, or the absence of a natural born son to the adoptive father. The adopted son passed into the family of his adopter and assumed his name, and his Child by adoption

[1] 'Tafsír-i-Aḥmadi', p. 160.

rights and disabilities were the same as those of a natural born son.[1]

Female infanticide

In proportion to his eagerness to have a son, an Arab father regarded the birth of a daughter as a calamity, partly at least because of the degraded status of women. Even in the time of the Prophet female infanticide was prevalent, and many fathers used to bury their daughters alive as soon as born.

Tenure of property

The property of an Arab generally speaking was of a simple description. Camels, cattle, tents, clothes and a few utensils usually composed the bulk of his possessions. The use of money had been known to him for some time, and slaves were a common and valuable form of property. In towns there were properly built houses and shops, and land had value. Proprietorship was individual, and the principle of a joint family, with reference to the holding of property, was unknown. No distinction was made between ancestral and self-acquired moveable and immoveable property. Except the places of worship there was hardly any public property.

With the exception of a slave who himself was the property of his master, the Arab customary law recognized the right of every one to hold property. Though a woman, as we shall see, was debarred from inheriting, she was under no disability in the matter of owning property. Anything that she might receive from her husband as dower or by gift from him or her parents and relatives was absolutely hers. Sometimes women acquired riches by trade and commerce and some of them were owners of land and houses. But neither the person nor possessions of a woman were safe unless she was under the protection of her parents or some male relatives or her husband. If her protector proved rapacious or dishonest, she hardly had any remedy.

The position of an infant or a *non compos mentis* was still worse, and the customary law of the Arabs provided no protection to him from the dishonesty of his guardian.

[1] 'Tafsír-i-Aḥmadi', p. 610.

Power of alienation

Different forms of sale

An Arab owner had absolute power of disposal over his property. He could, by an act *inter vivos*, alienate his entire interest by a sale or gift or only a partial or limited interest by lending, pledging or leasing. Under the name of sale he enjoyed a perfect freedom of contract. Some of these transactions were purely speculative and even of a gambling nature. The following list of the different kinds of sale[1] in vogue among the pre-Islámic Arabs will furnish a clue to many of the principles of transfer of property established by the Muḥammadan jurisprudence:—

1. Sale of goods for goods (Muqáyaḍa مُقايضة), being an exchange or barter.

2. Sale of goods for money (Bai' بَيع), a form of sale commonly in use.

3. Sale of money for money (Ṣarf صَرف), or money-changing.

4. Sale in which the price was paid in advance, the article to be delivered on a future date: this sale was called Salam (سَلم).

5. Sale with an option to revoke.

6. An absolute or irrevocable sale.

7. Sale of goods, the price to be paid in future.

8. Murábaha (مُرابحة), a transaction in which the vendor sells the article for the cost price and certain stated profits.

9. At-Tauwaliya (اَلتَّولية), sale at the cost price.

10. Waḍí' (وَضيع), sale at less than cost price.

11. Musáwama (مساومة), sale by bargaining.

12. Sale by throwing a stone (بَيع بِالقَاء الحَجر), several pieces of cloth, for instance, being exposed for sale, the buyer throws a stone and whichever piece it falls upon becomes the property of the buyer, neither party having the option of revoking the sale.

[1] 'Ḥidáya' and 'Fatḥu'l-Qadír' (Egyptian edition), vol. vi, pp. 49–55; and 'Kashfu'l-Ghumma', vol. ii, pp. 6-7.

13. Mulámasa (مُلامسة), in this form of sale the bargain was concluded by the buyer touching the goods which at once became his property whether the vendor agreed to the price or not.

14. Munábadha (مُنابذة), a sale in which the shop-keeper would throw an article towards the intending buyer, this having the effect of completing the sale.

15. Muzábana (مُزابنة), sale of dates on a tree in consideration for plucked dates.

16. Muḥáqala (مُحاقلة), sale of wheat in the ears or of a foetus in the womb.

17. Mu'ámila or Bai'u'l-wafá (بَيع الوفا); in this form of sale the vendor of the article says to the buyer, 'I sell you for the debt which I owe you on condition that when I repay the debt you will give back the article to me.' The buyer, however, could not make use of the article without the vendor's permission.

18. A form of sale called 'two-bargains-in-one' in which the condition was that the buyer should sell the article back to the vendor within a stated period.

19. 'Urbún (عُربون); in this sale the purchaser pays a portion of the price to the vendor stipulating that, if he approved of the article, he would pay the balance, otherwise he would return it, and the amount paid by him would be forfeited.

20. A sale in which the subject-matter was not in possession of the vendor at the time of the contract, but which he was to secure afterwards in order to fulfil the contract.

Leases

A lease of land used to be granted generally for the term of a year, but sometimes though rarely for two or three years. There is no record of a lease for a long term. The rent was paid either in money or part of the produce or wheat. Sometimes it used to be a condition of the lease that the lessor should supply the seed for cultivation, and sometimes that it should be supplied by the lessee. Of the former the tenure was called mukhábara (مُخابرة) and of the latter muzára'a (مُزارعة). Sometimes the stipulation

used to be that the lessee should cultivate the land with seed found by himself, and the lessor would have for his share the crops that would grow on the portion adjoining the stream or on some other specified plot. The Arabs also used to farm out the fruit trees.[1]

Loans riba or usury

The Arabs used to lend out money on interest, and at least among the Jews of Madína usury was rampant under the name of ribá (ربوا).[2] Loans of articles by way of accommodation were designated 'áriya (عاريّة), the borrower in this form of contract enjoying the use and income without consuming or disposing of the substance.

Testamentary dispositions of property

An Arab's capacity to dispose of his property by will was as full as his power to deal with it by acts *inter vivos*. He was not limited in making testamentary dispositions to any proportion of his possessions, nor to any particular description of property. He could make the bequest in favour of any one he chose, and there was nothing to prevent him from giving away his entire property to some rich stranger, leaving his own children, parents and kindred in want. Or if he chose he might give preference to one heir to the exclusion of the others.[3]

Succession and inheritance

On the death of an Arab his possessions, such as had not been disposed of, devolved on his male heirs capable of bearing arms, all females and minors being excluded.[4] The heirship was determined by consanguinity, adoption or compact. The first class consisted of sons, grandsons, father, grandfather, brothers, cousins, uncles and nephews. The sons by adoption stood on the same footing as natural-born sons. The third class of heirs arose out of the custom by which two Arabs used to enter into a contract that, on the death of one of them, the surviving party to the contract would be an heir to the deceased or receive a certain fixed amount out of the estate. The shares of the

[1] An-Nawáwi's Commentary on 'Saḥíḥ of Muslim' (Bulaq edition) vol. vi, pp. 401 and 405-7.

[2] 'At-Tafsíru'l-Kabír' (Egyptian edition) vol. ii, p. 357.

[3] 'Tafsír-i-Aḥmadí', pp. 60-1.

[4] Ibid., pp. 234-5.

different heirs in the heritable estate were not fixed, and it is not easy to ascertain what was the order of succession among them, if any. It appears that the chief of a tribe used to divide the estate of a deceased person among the recognized heirs, and possibly the shares allotted varied according to the circumstances. If there were grown-up sons they probably excluded daughters; wives, sisters and mother did not inherit at all, but the estate was considered liable for the payment of the widow's dower, and among some tribes at least for her maintenance.

SECTION II.—LAW AND THE SCIENCE OF JURISPRUDENCE AFTER THE PROMULGATION OF ISLAM

Such briefly was the state of Arabia's social life when Muḥammad, himself an Arab belonging to a prominent family of the tribe of Quraish, began to promulgate the principles of Islám. We now pass from the stage of unconscious evolution of laws by the customs and usages of a people to that of conscious law-making, always a most important step in the progress of communities. But Muḥammad preached Islám not merely for the municipal government of the Arabs, but for the guidance of men's lives generally. In other words he propounded the principles of municipal law as an integral part of a comprehensive scheme of universal religion.

The history of Muhammadan law and jurisprudence broadly divisible into four periods

The history of Muḥammadan law subsequently to the promulgation of Islám and of the Muḥammadan legal science is divisible into four distinct periods. The first period commenced with the Ḥijrat or retirement of the Prophet to Madína (A. D. 622) and ended with his death (A. D. 632). This has been rightly called the 'legislative period' of Islám when laws were enacted by the divine legislator and promulgated in the words of the Qur'án, or by the precepts of Muḥammad. These are the texts upon which as their foundation the superstructure of the four Sunní Schools has been constructed.

The second period extends from the date of the Prophet's death to the foundation of different schools of jurisprudence, and would cover, roughly speaking, the

time of the Companions of the Prophet (Aṣḥáb) and their successors (Tábi'ún). It was an age as has been observed mainly of collection and of interpretation and extension of laws by collective deliberations.

The third period was marked by a theoretical and scientific study of the law and religion, and it was then that the four Sunní Schools of jurisprudence were established. It commenced about the beginning of the second century of the Ḥijra and practically ended with the third century.

Since then there has been no independent exposition of Muhammadan law, and jurists have been engaged within the limits of each School to develop the work of its founders. This may be called the fourth period in the history of Muḥammadan law and cannot properly be said to have yet come to an end. An elaborate classification has been made of the jurists of this period and their work, but it will be more appropriate to deal with that question in any detail in connexion with the doctrine of taqlíd.[1]

The first period

The Qur'an

Qur'án is the name of the collection of those revelations which were made to Muḥammad when he was vested with the office of the Prophet and Messenger of God. The revelations were made in God's own words as containing His wishes and commands. Its text which existed from eternity was communicated from time to time in pieces called áyát or verses. Many of the verses laying down rules of law were revealed with reference to cases which actually arose. Sometimes God in His wisdom repealed some previous injunctions, and laid down others in their stead more suitable to the needs of men.

The precepts

The other sources of the ordinances of God, during the lifetime of the Prophet, were his precepts or Aḥádíth. Often questions arose for decision, for the solution of which no direct revelation was forthcoming, or certain points had to be explained and made clear. The pronouncements made by the Prophet on all such occasions are known as Aḥádíth or precepts, and are regarded as of sacred authority. His

[1] See post, Ijtihád and Taqlíd.

dicta in all matters of law and religion were inspired and suggested by God, though expressed in his own words, while the Qur'ánic texts were God's, both in language and thought. The Prophet's precepts and usages were likewise guided by God, and, in the same way as the texts of the Qur'án, furnished an index of what was right and lawful. His approval or disapproval was sometimes implied from his conduct. If, for instance, a certain usage or course of action was followed by the Muslims within his knowledge, and the Prophet expressed no disapproval thereof, its legality was presumed. Similarly, if the Prophet studiously avoided a certain course of conduct, it has to be presumed that he disapproved it.

The second period

When the Prophet died in June A. D. 632, the eleventh year of the Ḥijra, the task of the spiritual and worldly government of the Muḥammadan commonwealth devolved on his Companions, and a new era commenced in the history of Muḥammadan jurisprudence. He being the last of the prophets, there was no longer any one through whom God could promulgate His wishes and commands for the guidance of the Muslims. The divine Book and the precepts and the precedents of the Prophet were, however, still left for reference and instruction. If a text of the Qur'án or pronouncement of the Prophet covered a point, or if the Prophet had decided a similar case, there could be no difficulty. But fresh facts and new circumstances often arose for which no provision had been made, specially as the affairs of the community became more complex with the growth of empire. In the absence of authority, the Companions had to guide themselves by the light of their reason, having in regard those usages of the community which had not been condemned by the Prophet. Those who were associated with the Prophet as his Companions, and often shared his counsels, must have known, as if by instinct, the policy of Islámic law, and whether a particular rule or decision was in harmony with its principles. It is presumed, therefore, that an agreement among the Companions in a particular view vouched for its absolute soundness, and even their isolated opinions are regarded as of high authority.

Election of the Caliph, the executive chief of the community

The first and the most momentous problem that the community had to solve on the Prophet's death was that of finding a successor to him as the head of the Muḥammadan Commonwealth. Over this question the Muḥammadan world has since then divided itself into two hostile factions, the Shí'ahs who assert that the Imámate or Caliphate should have continued in the family of the Prophet, and the rest of the Muḥammadans who support the right of the community (Jamá't جماعة) to elect the chief. At the time of the Prophet's death, however, the claims of 'Alí according to accepted history were not openly put forward, and Abú Bakr was elected the first Caliph. He was the head of the State, and as Imám he led the Friday prayers. He was no doubt in his capacity of Caliph the chief executive authority, but he had no sovereign power nor any royal prerogative. He was simply the principal magistrate to carry out the injunctions of the Qur'án, and the ordinances of the Prophet. He had no legislative functions, for God alone is the legislator in Islám.

Collection of the Qur'an

As the Muḥammadan community was to be governed in the main on the principles already laid down for the purpose, the necessity of collecting the verses of the Qur'án and the precepts and precedents of the Prophet forced itself upon the attention of the early Muslims. The texts of the Qur'án during the lifetime of the Prophet had been preserved, either in the memories of his companions, or by being inscribed on bones, date-leaves and tablets of stone. In an expedition against the impostor Musailima, a large number of the reciters of the Qur'án (Qurrá' قراء), were slain, and at the suggestion of 'Umar, Abú Bakr had the divine Book collected. Zaid, who used to be constantly with the Prophet and often acted as his amanuensis, was employed at this task which he accomplished between A. H. 11 and 14. But several different versions and readings of this edition soon crept into use, and 'Uthmán, the third Caliph, perceiving the need for a correct version again utilized the services of Zaid in revising the first edition. On

the revision being completed, 'Uthmán caused all the remaining editions to be destroyed, and it is due to this fact that at the present day only one authentic and uniform text is in use throughout the Muslim world.

The traditions were not collected by authority of the State

The sayings and decisions of the Prophet were not, however, collected by the authority of the State as was done in the case of the Qur'án. What the reason was can only be conjectured. Their collection was left to the piety and private enterprise of the Muḥammadans. Men who were most learned in the traditions soon gathered round them an increasing band of students eager to learn and store up every saying of the Prophet. It seems that this very zeal gave rise to many a false and inaccurate tradition, for 'Umar, during his Caliphate, discouraged and even stopped for some time the reporting of traditions. But his action had only a temporary effect, and the study of traditions continued with the progress of time to be pursued with all the greater vigour.

Traditionists and jurists

All traditionists, however, were not necessarily jurists. Among those who, by their learning and aptitude in deducing rules of secular and canon law, acquired eminence among the Companions of the Prophet, the names of 'Alí, 'Umar, Ibn 'Umar, Ibn Mas'úd and Ibn 'Abbás stand out most prominent, and many important principles of Muḥammadan jurisprudence are based on their opinion. Ibn Mas'úd for a long time gave lectures in Ḥadíth and law at Kúfa, while other jurists and traditionists carried on the work of teaching at Madína. These two places, especially the latter, continued for a long time to be the seats of sacred learning. Of Ibn Mas'úd's pupils the names of Al-qama and Aswad are best known. Al-qama occupied the professorial seat, and when the latter died he was succeeded by Aswad. On Aswad's death the mantle of the teacher fell on the shoulders of the famous Ibráhím an-Nakha'í, who was known as 'the jurist of 'Iráq'. Ibráhím is reported to have made a collection of the principles of law that had been hitherto established, and Hammád, under whom Abú Ḥanífa afterwards studied jurisprudence, had a copy of this collection.

Madina and Kufa

The study of the traditions was the especial feature of the Madínite school, though it is not to be supposed that other jurists in any way overlooked or minimized the importance of this subject which is one of the fundamental sources of law. A jurist must be learned in the traditions, though every traditionist was not a jurist. The mode of teaching the traditions was like this. The teacher or reciter used to call out from his seat: 'It was related to me by so and so, to whom it was related by so and so . . . that the Prophet of God said this. . . .' The students would then take down word by word the tradition, as well as the chain of authorities with which it was prefaced. This statement of authorities was called asnád (اسناد), and as time receded from the age of the Prophet, the chain of narrators necessarily lengthened.

Administration of justice under the first four Caliphs

For some time after the death of the Prophet no Qáḍi was appointed, and Abú Bakr himself administered justice as the Prophet had done before him. But when the political affairs of the community increased and pressed upon his time, he delegated his judicial functions to 'Umar. Abú Bakr was the first to establish a prison-house for the malefactors. His successor 'Umar appointed the first Qáḍi, and he enforced the principle that the majesty of law was supreme, and that the administration of justice must be above the suspicion of subservience to executive authority. He had once a lawsuit against a Jew, and both of them went to the Qáḍi who, on seeing the Caliph, rose in his seat out of deference. 'Umar considered this to be such an unpardonable weakness on his part that he dismissed him from office. It does not, however, appear that during 'Umar's time the power and jurisdiction of the Qáḍi were properly defined, or that any distinct machinery was provided for the execution of decrees and sentences. But by the time of 'Alí, who like 'Umar was noted as a jurist, the jurisdiction of the Qáḍi and the legal procedure appear to have acquired a greater fixity and certainty. He was assassinated in A.H. 40, and this brought to a close the age of 'the rightly-guided Caliphs (الخلفاء الراشدون). This period, from the

point of view of jurisprudence, was characterized by a close adherence to the spirit of the ordinances of Islám. Law was administered either by the head of the State and the Church, or under his direct supervision. The boundaries of Islám expanded with growing rapidity, and it came into contact with the laws and customs of the different subject nations. The first four Caliphs were men of action and experience of the world, and law in their hands, while it was not separated from religion, became imbued with principles of practical application.

The study of law and traditions during the Umaiyad Caliphate

The first act of the Umaiyad dynasty, their successors, was to remove the seat of the Caliphate to Damascus, outside the limits of Arabia Proper. Though they were at the head of the State as Caliphs, they were not generally speaking noted for their knowledge of the sacred laws. A bright exception must, however, be made in favour of 'Umar ibn 'Abdi'l-'Azíz, who was remarkable not only for his rigid piety, but also for his extensive knowledge of the law and the traditions. There are many traditions which rest upon his authority. The Qáḍi still administered justice, but law during the reign of the Umaiyads grew and developed only in the lecture rooms of the professors, who did not come into contact with the practical concerns of the administration of justice. The zeal, however, for the study of law did not abate, and during the latter days of the Umaiyads it was largely influenced, at least in 'Iráq and Mesopotamia, by the recently introduced sciences of divinity and scholastic logic. It is in this newly awakened scientific spirit that we must seek the beginning of the science of Muḥammadan jurisprudence. The distinction of first classifying the laws under different subjects, of introducing the use of technical phraseology, and of arranging the different sources of law is ascribed by some to Wáṣil ibn 'Aṭá, the founder of the Mu'tazila sect.

Commencement of the study of law as a science

Its encouragement by 'Abbasides

With the fall of the house of the Umaiyads and the accession of the 'Abbásides to power, in A.H. 132, a new impetus was given to the study of jurisprudence. The 'Abbáside Caliphs loved to patronize learning and extended special encouragement to the jurists, partly it may be from political motives.

Baghdad their capital became the centre of culture and attracted jurists and traditionists from Hijáz, Syria, Mesopotamia and other parts of the empire. The 'Abbáside Caliphs appointed as Qáḍis men noted for their learning and legal acumen, and gave them handsome salaries and a high place of dignity in the State.

Was Muhammadan jurisprudence influenced by the Roman jurisprudence?

During this period, though for a short while, Muḥammadan law once more, as in the age of the Companions, came into contact with the practical concerns of life, and the study of the Greek and perhaps Roman literatures and sciences also came into considerable vogue about this time. To the students of comparative jurisprudence it must be interesting to note the points of resemblance between the rules of the Muḥammadan and the Roman laws and the theories of their respective jurisprudence, but since the Muḥammadan jurists themselves make no allusion to the Roman system, and their theories exclude its recognition as a factor in moulding the Muḥammadan system, it is difficult to determine with any degree of certainty the extent of the obligations, if any, of the Muḥammadan jurists to the Roman jurists.

The third period

Foundation of the Sunni Schools of law

It was during the reign of the 'Abbásides that the four Sunní Schools of law, with whose jurisprudence we are now concerned, were founded. The principles of these four Schools are substantially the same, and they differ from each other merely in matters of detail. They are classed together in contradistinction to the only other important existing school of law among the Muḥammadans, namely, the Shí'ah school, though the differences even between the Shí'ahs and the Sunnís centre more round questions relating to political events of the past, rather than to any general principles of law or jurisprudence. We are not, however, called upon to deal with the legal system of the Shí'ah School.

Abu Hanifa

Abú Ḥanífa an-Nu'man ibn Thábit, commonly known as Imám Abú Ḥanífa, the founder of the most important of the Sunní schools, was born in the year A. H. 80, during the time of the Umaiyad Caliph, 'Abdu'l-Málik, and died at an advanced age, eighteen years

after the 'Abbásides came to power. He first studied scholastic divinity, but soon abandoned it in favour of jurisprudence. He attended the lectures of Ja'far aṣ-Ṣádiq and of Hammad, the first of whom, a descendant of the Prophet, was noted for his great learning and piety, and is regarded as an Imám of the Shí'ah School. The latter, as already stated, was a disciple of Ibráhím un-Nakha'i and enjoyed high reputation as a jurist. The traditionists from whom he heard traditions were Ash-Sha'bi, Qatádah, Al-A'mash, and other men of eminence in that branch of learning. Abú Ḥanífa was endowed with talents of an exceptional nature and had the true lawyer's gift of detecting nice distinctions. He possessed remarkable powers of reasoning and deduction, which, combined with the resources of a retentive memory and a clear understanding, brought him into rapid prominence as a master of jurisprudence. Men flocked to his lectures, and among his pupils the names of Abú Yusúf, Muḥammad and Zufar are intimately connected with the science of Muḥammadan law.

Abu Hanifa known as the upholder of private judgement

The teachings of Abú Ḥanífa acquired for him the title of 'upholder of private judgement' (أهل الرأي), and his School of Law was distinguished by that epithet. There can be no doubt that he was considered by his contemporaries to rely less upon the traditions in arriving at legal conclusions and more upon deductions than the other jurists. In fact in his time, it must be noted, the jurists were broadly divided into two classes: those of Hijáz or Arabia Proper who were called 'the upholders of the traditions' (أهل الحديث), and those of 'Iráq who were known as 'upholders of private opinion'. It would not however be correct to suppose that Abú Ḥanífa lacked a sufficient knowledge of the traditions, or that he did not regard them as a legitimate source of laws. Ibn Khaldún observes: 'Some prejudiced men say that some of the Imáms had a scanty knowledge of the traditions, and that is the reason why they have reported so few of them. This cannot be true regarding the great Imáms, because the law is based on the Qur'án and

Upholders of traditions

the Sunna (i. e. Traditions), and it is a duty incumbent on them to seek out the traditions. But some among them accept only a small number of traditions, because of the severity of the tests they apply.'[1] In sifting the traditions Abú Ḥanífa was undoubtedly more strict than the others, and the tests that he applied to them resulted in excluding many traditions which the people generally accepted as genuine. Further, the principles that he laid down confined within a narrow compass the traditions from which a rule of law might be legitimately deduced. It ir said that he felt justified in acting upon eighteen traditions only out of the great mass that was then in vogue.

Qiyas or analogical deduction

But his chief work lay in formulating the theories and principles of jurisprudence, and he was in fact the founder of the Muḥammadan science of law as we find it. He was the first to give prominence to the doctrine of Qiyás or analogical deduction, though, as a principle of law, it was undoubtedly in practical operation before his time. He, however, assigned a distinctive name and prominent position to the principle by which, in Muḥammadan jurisprudence, the theory of law is modified in its application to actual facts, calling it istiḥsán (استحسان lit. preference), which bears in many points remarkable resemblance to the doctrines of equity. An example will best illustrate the respective operation of the doctrine of Qiyás and of istiḥsán. A contract of the nature of sale according to the Muḥammadan law in order to be valid requires that the subject-matter must be in existence at the time of the contract. Arguing analogically a contract with a manufacturer or artisan that he is to supply goods of a particular description for a specified price would be invalid. The principle of istiḥsán, however, intervenes and establishes the legality of such a transaction on the ground of necessity based on the universal practice of mankind. Abú Ḥanífa also extended the doctrine of Ijmá' (consensus of opinion) beyond what many of the contemporaries were willing to concede. Some were of opinion that

Istihsan or juristic equity

[1] 'Ibn Khaldún' (Bulaq edition), vol. i, p. 371.

Ijma' or consensus of opinion

the validity of Ijmá' (إجماع) as a source of laws should be confined to the companions of the Prophet and others would extend it to their successors, but no further. Abú Ḥanífa affirmed its validity in every age. He also recognized the authority of local customs and usages ('urf عُرف) as guiding the application of law. It is laid down in Al-Ashbáh wa'n-Nadhair: [1] 'Many decisions of law are based on usage or custom, so much so that it has been taken as a principle of law.' The Qur'án and the precepts of the Prophet were with him as with all other jurists, the primary sources, Ijmá' coming next to them, and analogy, juristic preference and local customs being regarded merely as secondary sources.

'Urf or usage

In the work which Abú Ḥanífa did in the domain of jurisprudence, he was assisted by many able disciples, some of whom have already been mentioned. He also instituted, it is said, a committee consisting of forty men from among his principal disciples for the codification of the laws. Of this committee Yaḥyá ibn Abi Zaid, Ḥafṣ ibn Ghiyáth, Abú Yusúf, Dá'úd aṭ-Ṭái, Habbán and Mandal were men of great reputation as traditionists, Zufar was noted for his power of deducing rules of law and Qásim ibn Nu'ím and Muḥammad were great Arabic scholars. The committee used to discuss any practical and theoretical question that arose or suggested itself, and the conclusions which they agreed upon after a full and free debate were duly recorded. It took thirty years for the code to be completed, but each part as it was finished was circulated broadcast. The entire code, however, has now been lost, an irreparable loss no doubt to the cause of Muḥammadan jurisprudence. With the exception of his contributions to this code, it is doubtful whether Abú Ḥanífa wrote any other book, for 'Fiqh-i-Akbar' commonly attributed to him is not considered by some well-informed authorities to be his production. We have, however, a small collection of traditions based on his authority and called 'Musnadu'l-Imám Abú Ḥanífa' and a letter which he

Codification of the laws by Abu Hanifa and his disciples, and their works

[1] Lucknow edition, p. 116.

wrote for the instruction and guidance of his disciple Abú Yusúf in his office of Qáḍi is still in existence.

Abú Yusúf, who for a long time acted as the chief Qáḍi of Baghdad, enjoyed the confidence of his teacher and was held by him in great esteem for his talents, learning and knowledge of the world, and many a principle of practical application in Ḥanafí law may be traced to his influence. Muḥammad, the other well-known disciple of Abú Ḥanífa, was a copius writer, but only some of his books are available. Abú Ḥanífa was offered the office of Qáḍi, and because he refused to accept it on conscientious grounds, Ibn Ḥubaira, the Governor of Kúfa, had him flogged. Al-Manṣúr at last cast him into prison, ostensibly for the same reason, and there the great jurist expired, having been, as believed, poisoned at the instance of the Caliph. He was held in such esteem that his funeral prayers, it is reported, were said for ten days, and on each day about fifty thousand people attended. The Muḥammadans of India, Afghanistan and Turkey are mostly Ḥanafís, and the followers of his School are also largely found in Egypt, Arabia and China.

Malik

The age of Abú Ḥanífa was the age of jurists. At Madína, the city where the Prophet fulfilled his mission and died, a great jurist arose in the person of Málik ibn Anas. We have seen that ever since the death of the Prophet, that sacred city continued to be regarded as the home of traditionary learning. Málik was born in A. H. 95, at Madína, and there he studied and taught and did all his work. In his time he was looked up to as the highest authority in Ḥadíth, and his fame in this respect has not suffered by the lapse of time. He was not only a traditionist but a jurist, and founded a school of law which exercised great influence in his lifetime. The Moors of Spain belonged to his school, which still counts numerous followers in northern Africa. Muḥammad, the disciple of Abú Ḥanífa, studied traditions under him for three years. His doctrines were not, however, essentially different from those of Abú Ḥanífa. Málik leaned more upon traditions and the usages of the Prophet and the precedents established by his Companions. He

He leaned more upon traditions and the usage of Madina

upheld the exercise of judgement when the other sources failed him. Being in a better position than Abú Ḥanífa to be acquainted with the laws as laid down by the Companions and their successors, he embodied them more largely in his system. He attached a preponderating weight to the usages and customs of Madína, relying on the presumption that they must have been transmitted from the time of the Prophet. He recognized a principle, corresponding to that of Abú Ḥanífa's istiḥsán, namely, that of public welfare (muṣlahat مصلحة) as a basis of deduction. To the four main sources of law, the Qur'án, the Ḥadíth, Ijmá' and analogical deduction he would add Istadlál (استدلال) as a fifth source. Istadlál is a principle of juristic deduction which according to his School does not come within the scope of analogy.[1] Málik ibn Anas died twenty-nine years after Abú Ḥanífa. Imam Málik's 'Al-Muwaṭṭa', a collection of traditions, is well known and contains about three hundred traditions.

Shafi'i

Among Málik's pupils, Muḥammad ibn Idrís Ash-Sháfi'í attained even greater eminence as a jurist than the master himself. He was born in Palestine, being descended from 'Abdu'l-Muṭṭalib, the grandfather of the Prophet. He attended lectures on law and traditions not only of Málik ibn Anas, but of other noted doctors in law including Muḥammad, the disciple of Abú Ḥanífa. At an early age he evinced proofs of great talents, and while still a youth delivered lectures in jurisprudence. His fame soon spread and the doctrines which he enunciated found great vogue. The school of law with which his name is associated takes rank in the number and importance of its followers next only to the Ḥanafí school. He was noted for his balance of judgement and moderation of views and though reckoned among the upholders of traditions, he examined the traditions more critically and made more use of analogy than Málik. He allowed greater scope to Ijmá' (consensus of opinion) than Málik, putting a more liberal and workable

He adopted the middle course between Abu Hanifa and Malik in the use of traditions and analogy

[1] 'Mukhtaṣas' of Ibn Ḥájib (vol. ii, p. 281) and 'Al-Mankhúl' of Imám Muḥammadu'l-Ghazáli, MSS. Bohar Collection, Imperial Library.

interpretation on the well-known dictum of the Prophet, 'My people will never agree in an error.' But he agreed with Malik in adopting istadlál[1] as a fifth source and rejected Abú Ḥanífa's equity of the jurist.[2] He was the first to write a treatise on Uṣúl or principles. Egypt is the principal stronghold of his doctrines, but his followers are to be found in other parts of Africa, in Arabia and also some in India, specially in Bombay and Madras.

Among the scholars who attended Ash-Sháfi'í's lectures was Abú 'Abdi'lláh Aḥmad ibn Ḥanbal, known as Imám Ḥanbal, who founded the fourth and the latest of the Sunní Schools of jurisprudence. He was born at Baghdad (A. H. 164) and studied under different masters including Sháfi'í. But from all the accounts that are left of him, he appears to have been more learned in the traditions than in the science of law. As a traditionist and theologian his reputation stood very high, and in the number of traditions that he recollected no one, even in that age, approached him. In law he adhered rigidly to the traditions, a much larger number of which he felt himself at liberty to act upon than any other doctor. His interpretation of them was literal and unbending, and according to some he allowed a very narrow margin to the doctrines of agreement and analogy.[3] He was a man of great piety and uncompromising opinions, and was persecuted by the Caliph Al-Ma'mún, because he adhered to his own views on certain points of divinity, and refused to conform to those that had found favour in court. This unjust persecution served only to enhance the great reverence in which he was held by the people, and it is said that, when he died in A. H. 241, 800,000 men and 60,000 women attended his funeral. His followers, who were regarded as reactionary and troublesome, were persecuted from time to time. Now his School consists only of a few followers and those only in certain parts of Arabia. He himself does not appear to have written any treatise on law, and I have been able to

Ahmad ibn Hanbal

More a traditionist than a jurist

[1] 'Áyátu'l-Bayyanát', vol. iv, p. 174.
[2] 'Al-Mankhúl', pp. 213-5 and 229.
[3] Ibid, p. 189.

secure only one treatise which expounds his doctrines. One also meets with occasional references to his views in the law-books of other Schools. His great work, a collection of 50,000 traditions reported by him and known as 'Musnadu'l-Imám Ḥanbal', has now been printed and forms a valuable addition to the literature on the subject. But, as it is not arranged according to the subjects, its usefulness for purposes of reference is much impaired.

The age of the four Imáms produced other teachers who had for some time a considerable following of their own. Among them Sufyánu'th-Thúrí and Dá'úd-uẓ-Ẓahiri (the literalist) attained eminence as jurists. But their systems are now extinct and do not call for any notice here. With Imám Ḥanbal, therefore, the age of independent jurists came to an end, and the work that has been done since then in developing the laws and legal science has been mainly supplementary.

Study of the science of traditions during this period

But before continuing the narrative of jurists, I ought to make some mention of the great teachers of traditionary learning who succeeded Imám Ḥanbal. These men do not rank as great jurists, but the influence of their labours on the development of laws cannot be overrated. Imám Ḥanbal's remarkable erudition in traditionary learning combined with the austere piety of his life gave a fresh impetus, if any indeed was needed, to the study of traditions. A new band of scholars, the most prominent of whom are known as the Imáms of tradition as distinguished from Imáms of jurisprudence, headed by Abú 'Abdi'lláh Muḥammad Abú Ismá'íl al-Bukhárí commonly known as Bukhárí, a pupil of Ḥanbal himself, devoted themselves exclusively to a scientific investigation of this important branch of religious learning. Zuhri, Málik and Ibn Juraij had already set the example in collecting traditions in the more durable and reliable form of a book, and the jurists generally had demonstrated the need for critically sifting and examining them, laying down, each according to his own light, rules for their interpretation and application as a source of laws. From the latter half of the third until the earlier part of the fourth century (A. H.) the task of collecting and sifting the traditions

was undertaken in the same spirit of comprehensive thoroughness which characterized the work of Abú Ḥanífa, Sháfi'í and Málik in the domain of jurisprudence. Bukhárí was the pioneer in this enterprise and his collections are regarded by the Muḥammadans of Sunní Schools as the most authoritative. His book contains about 7,000 traditions which he selected as authentic out of 600,000. He died in A.H. 256 (A.D. 869). Side by side with Bukhárí and in the same field and with same scientific methods though independently, worked Muslim ibnu'l-Ḥajjáj of Nishapur known as Muslim. He died in A.H. 261 (A.D. 874). Muslim's work, though smaller in bulk, can hardly be said to be of inferior authority to that of Bukhárí, and the collections of these two are pre-eminently distinguished as the two 'Ṣaḥíḥs' or the two correct collections out of the six collections which are regarded by the Sunnís as authentic. The remaining four collections are by Tirmidhí (died A.H. 279 or A.D. 892), Abú Dá'úd (died A.H. 275 or A.D. 888), Ibn Májáh (died A.H. 273 or A.D. 886) and Nisá'i (died A.H. 303 or A.D. 915). They all worked independently of each other, so that the same tradition is often to be met with in more than one of their books, and the greater the number of collections in which a particular tradition finds a place, its authority is held to be proportionately strengthened. Bukhárí and Muslim and the others did a great service to the Muslim community by the care and assiduity with which they examined the traditions. Still it is not to be supposed, because a tradition is reported in one of these collections even in Bukhárí's or Muslim's, that it is always accepted as genuine by the followers of the Sunní Schools. Indeed nothing has been a more fruitful source of conflicting opinions in matters of law among the Sunní jurists than the question whether a particular tradition is to be regarded as genuine or not, although it may be one for whose authority one or more of these writers may have vouched.

Influence of traditionists on jurisprudence

It may be observed here that the influence which Bukhárí and Muslim have exercised on Muḥammadan jurisprudence, though not, perhaps, apparent at the

first sight, has been great. Their work has directly tended, as was to be expected, to strengthen the position of the jurists of Hijáz, or 'the upholders of traditions', especially of the Sháfi'í and Málikí Schools. Though indirectly and perhaps more or less imperceptibly it has also exercised considerable influence on the 'followers of private judgement', that is the 'Iráqi school of thought with which the name of Abú Ḥanífa is especially identified. In fact, it has served to draw both the schools of thought together, so that traditions reported in the six correct collections are constantly, and at every step, referred to in the most authoritative writings of the Ḥanafí jurists in support of their propositions. If we bear in mind that Abú Ḥanífa himself, who lived at a time when the precepts and usages of the Prophet were fresh in the memories of the successors of the Companions, and came into contact with almost all the great traditionists of the age, is reported to have accepted only seventeen or eighteen of them as genuine, and that the number of traditions, which his followers since his time have acted upon as authentic, may be counted by hundreds, one cannot help inferring that the stand-point of the Ḥanafí school of thought must have undergone great modification under the influence of Bukhárí and his collaborators. In fact, though Bukhárí was strongly opposed to the doctrines of Abú Ḥanífa, and laboured to show from the traditions which he collected that, on many questions, the view which found support of the latter's School was wrong, his name and his book stand high in the reverence of the Ḥanafís. At the same time, just as the Ḥanafís have made considerable advance towards the 'upholders of traditions' in making larger use of traditions in matters of law, the jurists of the latter school of thought have also shown an increasing inclination to use those methods of interpretation and deductions of which Abú Ḥanífa was the most eminent exponent. The result has been to hold them all together as 'followers of the middle course'. To what extent the latest phase of the doctrine of taqlíd will serve to stereotype the differences among the four Sunní schools by destroying

that spirit of compromise, which has been their most attractive feature, remains yet to be seen.

The study of the Qur'an and the science of its interpretation

It will not be out of place to mention here that the study of the Qur'án, the primary source of all laws, also occupied some of the best talents among the Muḥammadans and the science of its interpretation (tafsír تفسير) was naturally regarded as of the highest importance. Of the numerous commentaries that have been written, those by Ṭabari (died in A.H. 310 or A.D. 922), Zamakhsharí (died in A.H. 538 or A.D. 1143), Baiḍáwí (died in A.H. 685 or A.D. 1286), Ghazzálí (died in A.H. 504 or A.D. 1110), the two Jalálu'd-díns (one of whom died in 1459), and Fakhru'd-díni'r-Rázi are well known. To this list may be added 'Tafsír-i-Aḥmadí', a most useful commentary on those verses of the Qur'án, from which rules of law have been deduced, written by Aḥmád, commonly known as Mullá Ji'wán, who lived in the time of Aurangzeb. In this connexion it must be borne in mind that commentators of the Qur'án like traditionists, however distinguished in their own sphere, do not as such have a recognized place in the rank of jurists.

The legal science

To resume the narrative of jurists: the work which has been done by the foremost jurists of the third period, especially Abú Ḥanífa, Sháfi'í and Málik, is of twofold character. Not only are many rules of law traced to their dicta, but they were the first to formulate the principles of the science of Uṣúl. Uṣúl literally means roots and 'ilmu'l-Uṣúl, or the science of Uṣúl, is the name for the legal science which concerns itself mostly with a discussion of the sources of law, and matters, appertaining thereto as contradistinguished from 'ilmu'l-Farú' (Farú' literally means branches), which is the name for the material science of law among the Muḥammadans. The science of Uṣúl corresponds to European jurisprudence, though the two sciences cannot, as we shall see, be said to cover quite the same ground. Unlike European jurisprudence, particularly as conceived by Mr. Holland and jurists of his persuasion, Uṣúl is not a purely formal science. While it includes within its scope the discussion

of the theories and general properties of law, the application of law to men's actions through the media of rights and obligations, and the classification of legal concepts, the main object of this science is to discuss rules relating to the interpretation of texts of the Qurá'n and the Ḥadíth, the constitution of Ijmá', and analogical extension of the laws established by these three sources to cases not falling within the language of the texts, but coming within their intendment. The need for such a science in the Muḥammadan system is obvious. The only law-making that there has been among the Muḥammadans was during the lifetime of the Prophet. The principle of Ijmá' doubtless admits of what for all practical purposes may be called legislation, but for lack of a definite machinery for the purposes of collective deliberation, development of laws through the agency of Ijmá' has been slow, uncertain and fitful. The only other means left of expanding the laws has been juristic interpretation and deduction. A science of the nature of Uṣúl which is described as leading to Fiqh or the knowledge of laws, became, therefore, indispensable in the Muḥammadan system. The four principal teachers above mentioned agreed in the main theories and principles of this science, though they differed among themselves in certain details.

The fourth period

After the close of the third century of the Hijra, no one has succeeded in obtaining the recognition of the Muḥammadan world as an independent thinker in jurisprudence. A succession of jurists have, on the other hand, applied themselves to the task of completing the work done by the founders of the four Schools, especially the Ḥanafí, the Sháfi'í and the Málikí, both in the domain of material and theoretical science of law. As regards the former they devoted their attention to concrete questions, which had not been dealt with by the founders of different Schools and their immediate disciples, and to the collection and arrangement of the opinions of the masters. This work continued among the Ḥanafís until about the age of Qádí Khán, who died in the sixth century of the Hijra.

The jurists that succeeded took even a narrower view of their functions in this connexion. They occupied themselves in determining which of the conflicting versions of the views of the principal jurisconsults, that is, the founder of each School and his disciples, on a given question was correct, and in the event of difference of opinion among them, whose dictum was to be taken as representing the accepted law. One of the last of these lawyers among the Ḥanafís was Ṣadru'sh-Sharí'at, who lived in the eighth century of the Hijra (died A. H. 750 or A. D. 1349). I may observe here that a notion exists that henceforward there has been no further exposition of Muḥammadan law, the ancient doctors having anticipated every question and laid down a rule for its solution. Such a notion is prima facie untenable, nor is it founded in fact. It would be more accurate to say, as held by jurists of authority, that the principles that have been hitherto established would, if properly applied, furnish an answer in most cases.

At the close of the fourteenth century we arrive at the age of commentators and annotators. Though carrying on their work under a modest title, the contributions of these learned men to the science of law, at least of the more prominent among them, have been most valuable and important. It would be as much a fallacy to suppose that commentators merely explain their texts and add nothing to the law, as a similar assertion with respect to the judgements of judges in the English system. In fact, it is only in the writings of these commentators that it is possible to find the doctrines of the different Schools expounded in their fullness. It would be mere pedantry to deny, for instance, that the labours of such jurists as Ibn Hammán, Ibn Najím and Ibn 'Ábidín among others have largely helped to develop the Ḥanafí law. And, as a matter of fact, no Muḥammadan lawyer of the present day would undertake to answer a question of Ḥanafí law without consulting their writings. The contribution by the Muḥammadans of India to the legal literature has not been very considerable, but 'Fatáwá 'Álamgíri', compiled under the orders of Aurangzeb in the eleventh century of the Hijra, is as

great an achievement of learning, industry and research as perhaps any legal literature can boast of.

Writers on Usul or science of law

As regards the science of law or Uṣúl, Sháfi'í is reported to have written the first book on the subject, but it was not until the fourth century of the Hijra that Uṣúl began to be studied as a separate science. Among the writers on this subject a few of the more prominent names may be mentioned here; on Ḥanafí jurisprudence Abú Bakr Jaṣṣásu'r-Rázi (died A. H. 370), Fakhru'l-Islám Bazdawí (died A. H. 482), As-Sarakhsí, (died A. H. 483), Al-Kurdri (died A. H. 562), Hisámu'd-dín (died A. H. 710), Ṣadru'sh-Sharí'at (died A. H. 747), Sa'du'd-dín Taftázání, Ibn Hammám (died A. H. 861), and among the moderns Muḥibbu'lláh (died A. H. 119) and Baḥru'l-'Ulúm; on Sháfi'í jurisprudence Abú Bakr Muḥammad ibn 'Abdu'lláh (died A. H. 330), An-Nawá'i (died A. H. 676), Táju'd-dínu's-Subki (died A. H. 771), Al-Mahalli (died A. H. 864), and Aḥmad ibn Qásim; on Málikí jurisprudence Ibn Hájib (died A. H. 646), and Qáḍi 'Uḍud (died A. H. 756); and on Ḥanbali jurisprudence Qáḍi 'Alá'u'd-dín and Abú Bakr ibn Zaidini'l-Khárijí (died A. H. 836). Of their writings those that are ordinarily available and in vogue, Al-Uṣúl' by Fakhru'l-Islám Bazdawí, 'Tauḍíḥ' by Ṣadru'sh-Sharí'at with its commentary 'Talwíḥ' by Taftázání among the Ḥanafís; 'Jam'u'l-Jawámi'' by Táju'd-dínu's-Subki with its commentary by Al-Mahalli and an annotation by Aḥmad ibn Qásim called 'Al-Áyátu'l-Baiyinát' among the Sháfi'ís; and 'Mukhtaṣar' by Ibn Hájib, with its commentary by Qáḍi 'Uḍud in Málikí jurisprudence, are regarded as the most authoritative. It may be noted here that, though Taftázání was a follower of the Sháfi'í School of law, his commentary on 'Tauḍíḥ' is held in great esteem by the Ḥanafís. 'At-Taqrír wa't-Tahbír' by Ibn Hammám, the author of 'Fatḥu'l-Qadír', is also a book of high authority on Ḥanafí Uṣúl, and 'Núru'l-Anwár', a commentary on 'Al-Manar', by the author of 'Tafsír-i-Aḥmadí', and 'Musallamu'th-Thabút' and its commentary by Baḥru'l-'Ulúm are also commonly used in India. I have not come across any book on Uṣúl by a Ḥanbali jurist, and it is doubtful whether one is available.

SECTION III—MUHAMMADAN LAW IN BRITISH INDIA

Administration of Muhammadan law by the Anglo-Indian courts

With the establishment of the Anglo-Indian courts, the Muḥammadan law has entered upon a new and interesting phase in India. It is no longer the law of the land and is applicable to the Muḥammadans so far as its administration by the courts is concerned only by the declaration of the Sovereign power.

In the early days of the British Settlement the Muḥammadan Code was enforced in all its departments, but in the course of time Muḥammadan laws relating to the crimes and punishments, revenues, land tenures, procedure, evidence, and partly transfer of property have been gradually abandoned and replaced by the enactments of the Legislature. Questions relating to family relations and status, namely, marriage, divorce, maintenance and guardianship of minors, succession and inheritance, religious usages and institutions and dispositions of property by hiba, will and waqf are still governed by the Muḥammadan law so far as the Muḥammadans are concerned, and in some parts of India the Muḥammadan law of pre-emption, is also recognized. And if any sect of Muḥammadans has its own rule, that rule, generally speaking, should be followed with respect to litigants of that sect, as laid down by the Privy Council in *Rajah Deedar Husain's* case,[1] where the question related to the right of succession to the estate of a Shí'ah Muḥammadan.

Muhammadan law officers

The administration of the Muḥammadan, as well as Hindu laws, was for some time carried on with the help of Indian officers, who acted as expert advisers to the courts, the Muḥammadan law officers being called Muftís and Maulavís and the Hindu law officers Pundits. But for a long time the employment of such experts, being considered undesirable and unnecessary, has been abandoned. In *Hari Das Dabi* v. *The Secretary of State for India*,[2] it was observed by Mr. Justice Louis Jackson: 'I confess it seems to me to be among the advantages for which the people of this country have in these days to be thankful that their legal controversies, the determination of their

[1] 2 Moo. I.A., 441. [2] 5 Cal., 228.

rights and their status have passed into the domain of lawyers, instead of pundits and casuists; and in my opinion the case before us may very well be decided on the authority of cases without following Sreenath, Achyatanand and others through the mazes of their speculations on the origin and theory of gift.' These remarks were appropriated by Mr. Justice Trevelyan to the consideration of a question regarding the law of Waqfs which arose in the Full Bench case of *Bikani Mian* v. *Sukhlal Poddar*.[1] But whatever may have been the demerits of the condemned system, it should, in fairness, be admitted that the fatwás of the Maulavís so far as they can be found in the pages of the old law reports, are a faithful exposition of the Muḥammadan law on the points covered by them.

Means for ascertaining Muhammadan law

Since the services of the law officers were dispensed with, two features, one closely allied with the other, have been noticeable in the Anglo-Indian administration of Muḥammadan law. In the first place, the courts have experienced no small difficulty in ascertaining the Muḥammadan law. In the case of *Khajáh Ḥusain 'Ali* v. *Shazádih Ḥazari Begum*, Markby, J., observed: 'As I shall have to point out presently, the means of discovering the Muḥammadan law which this court possesses are so extremely limited that I am glad to avail myself of any mode of escaping a decision on any point connected therewith.'[2] And it is to be feared that generally speaking the courts and the profession do not, even at the present day, feel themselves on familiar and certain ground when a question of Muḥammadan law not settled by a course of decisions arises for discussion, although several more books on the subject are now available for reference than in the days of Markby, J., for instance, Mr. Syed Amír 'Alí's well-known work on Muḥammadan Law and Sir Roland Wilson's 'Anglo-Muḥammadan Code'.

Some would attribute the phenomenon to the 'complexity, uncertainty and artificiality' of the system itself. This is an important question and requires to be considered.

[1] 20 Cal., 116. [2] 12 W.R., 344-7.

Alleged complexity, uncertainty and artificiality of Muhammadan laws

The alleged complexity of the system, would, I apprehend, be mainly attributed to the fact that the Muḥammadan municipal laws are treated as part of the Muḥammadan religion; its uncertainty is generally imputed to the differences of opinion which undoubtedly exist on many questions among the jurists, and the charge of artificiality is made with reference to the character of many rules of Muḥammadan law and the reasoning by which rules in themselves reasonable are supported. So far as complexity of the system is concerned, it is one of the chief objects of the science of Muḥammadan jurisprudence to explain the principal concepts which connect the different parts of the system, and to enable a lawyer by the classification and analysis of different kinds of laws, of actions, rights and obligations to discriminate between purely religious and legal ideas. As for uncertainty, the description would hold good in the domain of such matters as are not covered by a plain text of the Qur'án or the Ḥadíth, and have not been settled by consensus of opinion, that is, in respect of laws which are based on juristic deduction. And there can be little doubt that a considerable body of legal rules belong to this category. I am not, however, sure that the recognition of a fairly wide area of legal questions on which difference of opinion is admissible, leaving as it does a large margin of discretion in the courts to adopt on such points rules, which are best suited to the exigencies of particular circumstances, and calculated to meet the requirements of substantial justice should not counterbalance the inconvenience arising from uncertainty. At all events, that is how the matter is regarded by the Muḥammadan jurists themselves, who apply in this connexion the well-known saying of the Prophet: 'difference of opinion among the people is the grace of God'.[1] As for the charge of artificiality the position seems to be this: according to the theory of Muḥammadan jurists not only do the texts of the Qur'án and authentic traditions contain

[1] 'Raddu'l-Muḥtár', vol. i, p. 50.

within them principles which are sufficient for religious guidance, as well as for the purposes of civil administration, and any rules which are not covered by the words of a text are deducible by the application of analogy to some rule expressly laid down by the texts, but the relation between an original rule and the deduction therefrom can always be expressed in the forms of syllogistic logic. An inevitable consequence of this theory has been that the paucity of express texts, added to the exigencies of dialectical controversy among rival jurists, often led them to hunt out analogy between questions quite unconnected with each other, such as a question relating to ablution and one relating to guardianship of minors. The form of reasoning in such cases, was bound to be more or less artificial. It must, however, be remembered that whatever the process of ratiocination, the soundness of the conclusion itself has always to be tested by its conformity to some broad principle and purpose of law, such as necessity or the needs of society. In this connexion the further fact is to be borne in mind that the Muḥammadan system has been developed by jurists, many of whom were not directly in touch with the practical needs of administration of justice. It must also be admitted that many of the rules of law enunciated by the jurists, whether based on a formal and literal interpretation of the texts, or on analogy, are narrow and artificial. This is mostly noticeable in the rules of evidence, and in the law relating to contracts and dispositions of property.

It is, in fact, a general feature of Muḥammadan juristic interpretation that questions, which in the modern systems of law are left for decision to the judgement and discretion of the court, are embodied into rigid rules of law leaving the court no discretion in the matter. For instance, on questions relating to assessment of damages arising either in cases of contract or of tort, very little is left to the discretion of the judge; a hard and fast scale of compensation being laid down in particular classes of cases. So also what in English law would be regarded as rebuttable presumptions of law or of fact are treated as conclusive presumptions of law,

and thus we find that rules of evidence are largely treated as part of the substantive law. Similarly freedom of contract and of disposition of property is much hampered by restrictions and limitations, the most far-reaching of which are traceable to the wide operation which has been accorded to the doctrine of reba, the principle of which is to secure a man from loss arising from hazardous and unequal bargains. These results are partly to be attributed to a tendency, which is observable in the earlier history of most legal systems, to attach more importance to the words of a text rather than to its sense, and partly to the age in which the Arab jurists lived, when disposition of property, in most legal systems, was not so free as in the modern times, and the procedure for trial of suits was only beginning to emerge from the test of ordeal, and the idea of ascertaining the truth in cases where the facts are in dispute, by weighing the evidence on both sides, was just finding a faint expression in juristic consciousness. It seems to me, therefore, that the difficulty in understanding and ascertaining the Muḥammadan law is mostly due to a more or less natural inclination of the mind of a lawyer of the present day to construe it by the light of modern theories and principles with which he is most familiar, more especially as few people have the time or opportunity to study the Muḥammadan laws as part of a comprehensive scientific system.

Difficulty of translating Muhammadan legal textbooks

There is another stumbling block in the way of a lawyer who has not studied Muḥammadan law in the original Arabic writings; it is not always possible for a person translating the ideas of Arab jurists into English to find words which will convey the exact legal significance of many technical Arabic expressions. That difficulty is enhanced when an attempt is made to translate a textbook like the 'Hedáya', which is written in the most concise language, and in which the author in discussing the various problems proceeds on the assumption that his reader is familiar with the principles of jurisprudence, the Qur'án and the Ḥádith, and with the exact significance of legal phraseology. It is less difficult, however, to translate a collection of opinions

like 'Fatáwa 'Alamgíri' and that is one main reason why Mr. Hamilton's 'Hedáya' has often to be critically compared with the original Arabic text, while Mr. Baille's digest is generally found to be a more reliable guide. But here I must not be understood in any way to depreciate either the high authority of 'Hedáya', or to deny that Mr. Hamilton has rendered valuable service to the administration of Muḥammadan law in India by his publication. As regards the Hedáya, it occupies the foremost place among text-books on Ḥanafí law and, there can be no doubt that the work deserves its high reputation; in fact, one feels at a loss whether to admire most the purity and lucidity of its diction, the scrupulous care and accuracy with which the legal propositions are discussed, the authorities weighed, and the conclusions stated or the profound learning of the author, who is reputed to have devoted forty years of his life to the compilation of the book. The terseness of its style, however, makes 'Hedáya' a most difficult book to translate, and that is apparently the reason why Mr. Hamilton did not attempt to translate the bare text, for his work as is well known is a translation of a Persian commentary of the 'Hedáya' especially prepared for him. On doubtful points, therefore, it often becomes necessary to refer to the original 'Hedáya', and its authoritative commentaries, in order to verify the statements in Mr. Hamilton's book, and I am further afraid that Mr. Hamilton's way of stating the arguments of jurists has at times led to the misapplication of their dicta.

Principles on which rules of Muhammadan juristic law are applied

The other result of the passing of the Muḥammadan law into the domain of lawyers and judges, trained in the modern English system, is manifest in a reluctance on the part of judges to adhere literally to the reported opinions of Arab jurists, when such rulings from their narrowness and inapplicability to modern conditions of life stand in the way of substantial justice and of the requirements of a progressive society. In a well-known passage in his judgement in *Mallick Abdool Gaffoor* v. *Mulika*,[1] Garth, C.J.,

[1] 10 Cal., 1123.

in dealing with the question how far the doctrine of mushá' is applicable to a gift of rents, málikana rights, and the like, observes: 'In dealing with these points we must not forget that the Muḥammadan law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Baghdad and other Muḥammadan countries under a very different state of laws and society from that which now prevails in India; and although we do our best here in suits between Muḥammadans to follow the rules of Muḥammadan law, it is often difficult to discover what these rules really were, and still more difficult to reconcile the differences, which so constantly arose between the great expounders of the Muḥammadan law ordinarily current in India, namely, Abú Ḥanífa and his two disciples. We must endeavour as far as we can to ascertain the true principles upon which that law was founded, and to administer it with a due regard to the rules of equity and good conscience, as well as to the laws and state of society and circumstances which now prevail in this country.' The doctrine thus enunciated, as far as it goes, is undoubtedly in accordance with the root ideas of the Muḥammadan system, the opinions of the most authoritative doctors, and the practice which prevailed, at least, as long as the writers on law still thought for themselves, and were not out of touch with the requirements of society. Necessity and the wants of social life are, as we shall see, the two all-important guiding principles recognized by Muḥammadan jurisprudence in conformity to which laws should be applied to actual cases, subject only to this reservation, that rules, which are covered by a clear text of the Qur'án, or a precept of indisputable authority, or have been settled by agreement among the learned, must be enforced as we find them. It seems to me beyond question that, so long as this condition is borne in mind, the court in administering Muḥammadan laws is entitled to take into account the circumstances of actual life, and the change in the people's habits and modes of living. Whether this principle, so far as it relates to

administration of justice, has been affected by the doctrine of taqlíd and, if so, to what extent is a question which we shall consider hereafter; but it must be borne in mind here that the Anglo-Indian courts administer Muḥammadan laws by virtue of power derived from the Sovereign and from the enactments of the Legislature, and neither the rules and conditions laid down by the Muḥammadan law relating to the qualifications of Qáḍis and Muftis, nor all the limitations on their authority and discretion in ascertaining and administering the Muḥammadan laws can be said consistently with principle to bind the modern judges. At the same time, however, it is obvious that the courts must have regard in determining questions of Muḥammadan law, to the sources and authorities of those laws, and to such interpretations of them as are regarded as binding by the Muḥammadans themselves.

This, in substance, is the spirit in which the courts have been administering Muḥammadan laws in India, though it may be that, in some particular instances, there has been a lapse from the principle. If we analyse the rulings, the results may be thus summarized. In the domain of law governing domestic relations and succession, the courts have allowed themselves a much narrower margin of freedom, if any freedom at all, in applying the rules laid down in books written by mediaeval writers to the altered circumstances of modern world than in matters relating to dispositions of property, such as by gift, waqf or will.

Administration of Muhammadan family laws

In the well-known case of *Bazloor Ruheem* v. *Shumsoon Nissa Begum*[1] the Judicial Committee, in dealing with a Muḥammadan husband's claim for restitution of conjugal rights observe, with reference to the argument that the question should be decided without reference to the Muḥammadan law, that 'they can conceive nothing more likely to give just alarm to the Muḥammadan community than to learn by a judicial decision that the law, the application of which has been secured to them, is to be overridden on

[1] 11 Moo. I. A., 551.

a question which so materially concerns their domestic relations. The judges were not dealing with a case in which the Muḥammadan law, was in plain conflict with the general Municipal law or with the requirements of a more advanced and civilized society—as for instance, if a Muḥammadan had insisted on the right to slay his wife taken in adultery'. In *Aga Mahomed* v. *Kulsun Bibi*[1], where the question related to the right of a Muḥammadan widow to maintenance, and reliance was placed on the language of a particular verse of the Qur'án to show that the widow was entitled to maintenance independently of her share in the estate of the husband, the Judicial Committee remark: 'They do not care to speculate on the mode in which the text quoted from the Qur'án which is to be found in Súra II, vv. 241–2 is to be reconciled with the law as laid down in the "Hedáya" and by the author of the passage quoted from Baillie's "Imámia". But it would be wrong for the court on *a point of this kind* to put their own construction on the Qur'án in opposition to express ruling of commentators of such great antiquity and high authority.'[2] The significance of the Board's emphasis on 'a point of this kind' has to be understood not only with reference to what has just been mentioned, but also to what it had laid down previously, with reference to the application of rules relating to certain forms of disposition of property in the Muḥammadan law. The extreme limit to which deference to the opinions of Muḥammadan jurists has been carried in determining the Muḥammadan law governing a question relating to family relations is illustrated in a case reported in 12 W.R., 460, where divorce pronounced upon compulsion from threats was held to be effective, Jackson, J., observing: 'We are not at liberty to substitute for the express rule of Muḥammadan law, as expounded by the best authorities, that which according to our opinion might be a more enlightened and proper rule of law.'

[1] 25 Cal., 9.

[2] It was apparently not brought to the notice of the Committee that the verse of the Qur'án which was relied on had been repealed by another verse.

Law relating to dispositions of property

As to the mode in which Muḥammadan law is to be applied in questions relating to alienation of property, there seems to be a gradually increasing tendency on the part of the courts, and notably of the Privy Council, to assert a greater freedom of interpretation. In one of the earlier cases—*Khajoorronissa* v. *Rowshan Jehan*,[1] Sir Robert Collier, in delivering the judgement of the Board, had observed, with reference to the question whether a hiba, or gift *inter vivos*, would be valid without delivery of seizin, (page 196): 'But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent on those who seek to set up a proceeding of this kind to show very clearly that the forms of the Muḥammadan law whereby its policy is defeated have been complied with.' But the extent to which such forms are to be complied with is more clearly enunciated in later rulings. In *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*,[2] the Judicial Committee held that the doctrine relating to gifts of mushá', or undivided share in property, is wholly unadapted to a progressive state of society, and ought to be confined within the narrowest limits, and in *Ibrahim Goolam Ariff* v. *Saiboo*,[3] in dealing with the same question, raised with reference to gifts of shares in joint-stock companies, their Lordships refer to the above observations with approval and add: 'The argument of the appellant was not that the law of mushá' did in fact embrace (in the sense of having been applied to) such property, but that if the same aspect of life and things were logically applied it involved the invalidity of gifts in dispute. But this is not the true criterion.' The principle embodied in this passage is, perhaps, even more clearly stated in *Baqar Ali Khan* v. *Anjuman Ara Begam*,[4] where the Judicial Committee make the following

[1] 2 Cal., 184.
[2] 11 All., 460.
[3] 35 Cal., 1.
[4] 25 All., 236.

observations with reference to the arguments of Mahmood, J., in support of his view that a valid waqf cannot be created by will under the Shí'ah law: 'In the judgement of this Committee delivered by Lord Hobhouse, the danger was pointed out of relying upon ancient texts of the Muḥammadan law and even on precepts of the Prophet himself, of taking them literally and deducing from them new rules of law, especially when such proposed rules do not conduce to substantial justice. That danger is equally great, whether reliance be placed upon fresh texts newly brought to light, or upon fresh logical inferences newly drawn from old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced, because they seem to lawyers of the present day to follow logically from ancient texts, however authoritative, when the ancient doctors of law have not themselves drawn those conclusions.' The judgement of Lord Hobhouse to which allusion is here made was delivered in the well-known case of *Abdul Fateh Muhammad Ishaq* v. *Rosomy Dhur Chowdly*,[1] where it was held that a waqf, created with the object mainly to benefit the donor's family and posterity is not authorized by the Muḥammadan law. It is not necessary in this place to consider how far the law in support of the validity of such waqfs could be said to be a new deduction; all that we are concerned with here is to indicate the principle on which Muḥammadan law is interpreted and applied by the Indian courts.

[1] 22 Cal., 619, p. 632.

CHAPTER II

SCIENCES OF LAW, LAW AND CLASSIFICATION OF LAWS

I HAVE described in a general way the nature and scope of Uṣúlu'l-Fiqh, also called 'Ilmu'l-Uṣúl, which, is the Muḥammadan science of jurisprudence, and of 'Ilmu'l-Farú', also called Fiqh, which is the science of the material law of the Muḥammadans. It is, however, necessary that we should try to follow the definitions of these sciences as given by the Arab jurists themselves.

Definition of Usulu'l-Fiqh

Uṣúlu'l-Fiqh, which literally means the roots or principles of Fiqh, is described as the 'knowledge or science of those rules which directly or proximately lead to the science of Fiqh; and hence it discusses the nature of the sources or authorities (i.e. of law) and what appertains thereto, and of the nature of what is established by those sources or authorities, namely, law and what appertains thereto.' As included in the last part of the definition the discussion relates to the lawgiver (ḥákim حاكم) the law (ḥukm حُكم) the objectives of law (maḥkúm bihi محكوم به) i.e. acts, rights, and obligations, and the subjects of law, that is those to whom the law applies (maḥkúm 'alaihí محكوم عليه) or persons.

Definition of Fiqh

The nature of the science of Fiqh is thus discussed by the Arab writers. Fiqh (literally, understanding or knowledge) according to Abú Ḥanífa, is 'the knowledge of what is for (لهم) a man's self, and what is against (عليه) a man's self.' Ṣadru'sh-Sharí'at in discussing this definition says that it may mean that the

science in question, in so far as it is concerned with man's acts, deals with their consequences in the sense of being spiritually profitable to or injurious to him, or in other words, that the object of Fiqh is the knowledge of spiritual rewards and punishments. If that be the meaning, the definition, the commentator goes on to observe, is apparently based on the well-known verse of the Qur'án, 'for every soul there will be (that is, on the day of judgement) whatever it has earned and against it whatever it has earned.' Ṣadru'sh-Sharí'at then urges that taking it in that sense the definition would be defective, as it would fail to cover acts which are spiritually indifferent, such as contracts to sell, lease and the like. But this difficulty, he goes on to suggest, would be obviated if Abú Ḥanífa, be taken to have meant by 'profitable' what does not entail punishment, and by 'injurious' what entails punishment. The definition in the above sense would also be complete, if by 'profitable' be understood what brings spiritual reward, and by 'injurious' what does not bring spiritual reward. There is another possible interpretation, the commentator observes, namely, that Fiqh is the knowledge of what is permissible for a man to do, and what he is under an obligation to do. But this again, he urges, would leave out from its purview the doing of acts which have been forbidden, and the omission of what has been made obligatory. The definition, he adds, is capable of a third meaning, namely, that Fiqh is the knowledge of things which are permissible for a man to do and of things that are forbidden to him, including both acts of commission and omission. In this sense it is a science which points out the extent and limits of a man's liberty, in other words, it is the science of rights and obligations.

The above discussion proceeds upon that aspect of Abú Ḥanífa's definition which relates to man's acts. The language of the definition, however, shows that in Abú Ḥanífa's conception of the science, which he called Fiqhu'l-Akbar, or the great science of Fiqh, it would comprehend within its scope pure questions of faith which, strictly speaking, are the subject of the

science of divinity, and also abstract questions of ethics. It would indeed appear that the object of Fiqh in the first era of Islám was to attain a knowledge of the affairs of the next world, and of the subtle dangers and trials which beset the human soul in this world. But as pointed out by Ghazzálí Fiqh in its current acceptation is confined to the science of the rules of law.[1]

The author of the 'Taudíḥ' gives the definition of Fiqh as the knowledge of the laws (ahkám) of the Sharí'at which are intended to be acted upon, and have been divulged to us by revelation or determined by concurrent decisions of the learned, such knowledge being derived from the sources of the laws with the power of making correct deductions therefrom.[2] The Sháfi'í jurists define Fiqh as 'the knowledge of the laws of the Sharí'at, relating to men's acts and derived from specific sources', and the Málikí jurists call it 'the science of the commands of the Sharí'at in particular matters deduced by the application of a process of reasoning'. Whatever be the wording of the different definitions the conception of this science is the same in all the four Sunní Schools. Let us now analyse the leading ideas in these definitions.

In the Sháfi'i definition, the restrictive words 'derived from specific sources' are intended to exclude from the science such knowledge of the sacred laws as the Prophet possessed, and which he derived from inspiration. By the use of the word Sharí'at it is intended to exclude mere concepts of the reason or of the senses, such as our knowledge that the world is liable to changes and that fire burns. Sharí'at, which may be translated as the Islámic code, means 'matters which would not have been known but for the communications made to us by the lawgiver'.

Definition of law and its postulates

Law, (ḥukm حكم), according to Muḥammadan jurists, is 'that which is established by a communication (khiṭab خطاب) from God with reference to men's

[1] 'Kashsháf fi iṣṭiláḥí'l-fanún', vol. i., p. 31.

[2] 'Taudíḥ' (Calcutta edition), p. 14.

acts, expressive either of demand or indifference on His part, or being merely declaratory.' The first postulate, therefore, of Muḥammadan jurisprudence is ímán (إيمان) or faith, the essential constituent of which is belief in God and acknowledgement (taṣdíq تصديق) of His authority over our actions.

Íman or faith

Belief in God is assumed to be inherent in man, arising from the promptings of his heart or conscience (tanbíhu'l-qalb تنبيه القلب), and acknowledgement of God's authority is classified by the jurists as a mental act (fi'lu'l-qalb فعل القلب), as contradistinguished from iqrár (إقرار) or declaration of faith, which is a physical act. Knowledge of the existence of God, which is the basis of faith, is classed as necessary (ḍarúrí ضروري) and manifest or intuitional (badíhi بديهي) knowledge. But maturity of reason is the condition for accession of such knowledge; for it is when reason illuminates a man's faculties, to use an imagery employed by the author of 'Taudíḥ', that he can perceive in sufficient clearness the proofs which are discernible in the Universe of the existence of One Supreme Intelligence, Creator and Ruler of life and things. Given, however, maturity of reason, knowledge of God is irresistibly and inevitably brought home to man. The generality of Muḥammadan jurists, therefore, hold that faith is founded on reason, and is not the creation of, although enjoined by, revealed religions. In fact, the contrary view would, according to them, lead to arguing in a circle, for the truth of all revealed religions necessarily depends on belief in God for its acceptance. Hence in Muḥammadan jurisprudence the ultimate basis of and justification for law must be sought in human reason (عقل).[1]

Faith founded on human reason

Human reason the ultimate basis of and justification for law

The attitude of the atheist, who does not believe in God and would not acknowledge His authority, is defined as that of a person who, to use the words of the Qur'án, has belied his own self; and those who believe in a multiplicity of gods or

[1] See 'Taudíḥ', p. 418.

impute to the Creator attributes implying imperfection, are described as men who have allowed themselves to be deluded by passions and desires (ahlu'l-hawá أهل الهوى) instead of being guided by the true voice of reason.

Acknowledgement of God's authority follows upon and is inseparable from belief in His existence; in other words, recognition of His authority to issue commands to us is also embedded in our constitutions. It is further urged that, granted a Supreme Being of perfect knowledge, and wisdom and of infinite power, who has created mankind and, for their use and benefit, the world and all that it contains, it would be ingratitude (the literal meaning of the word káfir is ungrateful), as well as folly on their part, not to obey His commands. In fact, the theory of some jurists is that the origin of law, as creative of obligations and rights, is to be found in a primordial covenant (mitháq-i-azali ميثاق ازلي) entered into between man and God at the beginning of creation, when the spirits of future humanity are supposed to have vowed allegiance to God, and God to have promised to create the world for their use and enjoyment. Other jurists regard the alleged covenant to be merely an allegory,[1] apparently understanding it to mean that men's recognition of God's authority over their actions is coeval with the life of the human species, and that it is in the design of the creation itself that life should have dominion over physical objects and the higher life over lower life. This theory, whether understood literally, or only as having a metaphysical significance, serves to explain some of the ideas of Muḥammadan jurisprudence. For instance, the doctrine that fitness or capacity for rights and obligations (ahliatu'l-wujúb اهلية الوجوب) exists in man, even before birth, manifesting itself first when the embryo quickens into life in the womb of its mother.

Origin of law, a covenant between man and God

According to some jurists the covenant is merely an allegory

The authority to enact laws primarily belongs to God, and He alone has supreme legislative power (شارع) in the Islámic system. And ever since the

Sources of law. God the only lawgiver

[1] 'Talwíḥ', p. 728.

days of Adam, God has promulgated His laws on this earth from time to time through His messengers (rasúl رسول) and prophets (anbiyá' انبيا). This succession of revelations was partly necessitated by changes in the needs and affairs of men, a concomitant of all created things, calling for the repeal or modification of previous laws. For instance, in the days of Adam and his immediate progeny, the closest relationship by blood was no bar to intermarriage, but when the female population sufficiently increased, marriage was prohibited within certain degrees of relationship. The main principle of law, namely, submission to the wishes of the One, Divine, Superior Power and Wisdom has, however, never been lost. But it often happened that men either tampered with the revealed laws or forgot them, and that furnished an additional reason for a fresh revelation. Before the birth of the Prophet of Arabia, the laws previously revealed had, according to the Muḥammadan religion, been considerably corrupted; even the very basis of such laws, namely, submission to the will of One God, had been obscured. It was because of this, that Muḥammad was charged with the mission of reviving the eternal principle of all laws, namely, submission to the Perfect Will, by preaching Islám. Hence belief in the truth of Muḥammad's mission is another constituent element of ímán.

Promulgation of laws through prophets

Belief in the truth of Muhammad's mission

Qur'án is the name of the book containing direct revelations from God to Muḥammad, and Ḥadíth or Traditions are the inspired precepts of Muḥammad in matters of law and religion.

Qur'an and Hadith

But as laws are needed for the benefit of the community, the Divine Legislator has delegated to it power to lay down laws by the resolution of those men in the community who are competent in that behalf, that is, the Mujtahids (مجتهدون) or jurists. The laws so laid down are presumed to be what God intended, and are thus covered by the definition of law as a communication from God. This source of laws is called Ijmá' or consensus of opinion. But though in strict theory the jurists acting in a body only expound the laws, the laws which they so lay down have most of the attributes of legislative enactments. Their validity

Ijma' or consensus of opinion

cannot be disputed, and is not affected by the reasons with which it may be supported. The presumption that such laws are in accord with the principles of the Qur'án and the Ḥadíth is conclusive, and they cannot, therefore, be treated as invalid on the ground of repugnancy to the revealed laws. Further a law resolved on by the Mujtahids can be repealed by a subsequent resolution of a similar body of men. Thus it would be substantially correct to say that the Muḥammadan jurisprudence concedes legislative powers to the jurists acting in a body. Such powers, though derived from the Divine Legislator, are practically unlimited, and since the Muḥammadan religion does not admit the possibility of further revelation after the death of the Prophet, the principle of Ijmá' may be regarded as the only authority for legislation now available in the Muḥammadan system.

Juristic deduction

The bulk of the Muḥammadan corpus juris, however, has been built up by the individual deductions of jurists as distinguished from their collective resolutions. But a jurist deducing a law by using the process of analogy, or otherwise, properly speaking, only expounds (مظهر) the law and does not establish it (lá muthbatun لا مثبتة). The validity of such a rule of law rests on its consonance with the principles established by the laws based on revelation or on Ijmá'. It is, therefore, merely an application or extension of the law established by a binding authority to a particular case, and not a new rule of law. And so the definition of law as the speech of God also holds good in the case of such deductions, as in the case of laws founded on consensus of opinion. With this important difference, the presumption that a rule of juristic deduction is in consonance with the principles of revealed law is not conclusive, as it is in the case of laws laid down by consensus of opinion. The essential characteristic of a rule of juristic law is that its authority is 'merely presumptive' (ẓanni ظني), and it is open to a judge or a jurist not to follow a particular ruling of this category if, in the exercise of his judgement, he holds it to be based on incorrect deduction.

It must not be acted upon, if it be found to be in conflict with the text of a revealed law or with Ijmá'. In other words, the juristic laws of the Muḥammadans occupy much the same place in their system as what are commonly called judge-made laws in the English system.

Customs and usages as a source of laws

The Muḥammadan system also recognizes the force of customs and usages (تعامل , عرف , عادات) in establishing rules of law. The validity of such laws rests on principles somewhat similar to those of Ijmá'. In the case of those customs and practices which prevailed in the time of the Prophet when revelation, the recognized primary source of laws, was still active, and which were not abrogated by any text of the Qur'án or Ḥadíth, the silence of the Divine Legislator is regarded as amounting to a recognition of their legal validity. And as to customs, which have sprung up since the Prophet's death, their validity is justified on the authority of the text, which lays down that whatever the people generally consider to be good for themselves is good in the eye of God. Thus the conception of law as an emanation from God is said to hold good in the case of customary laws as well. Custom as a source of laws resembles analogical deduction in one important respect, it has no legal force if it be repugnant to the revealed law, or to the law founded on Ijmá'. It resembles Ijmá' to this extent that the legal character of a custom has no relation to juristic reasoning, just as the authority of a law passed in Ijmá' is not affected in any way by the reasons which influenced the learned. But customary law is of inferior authority compared to Ijmá', inasmuch as it is based on the practice of the people generally, while Ijmá' implies deliberation on the part of men well versed in the principles of law. It is, however, of superior authority to a rule based merely on analogy.

The juristic basis of such laws

Function of law

The function of law, as is to be gathered from its definition, is to control and guide men's conscious actions by creating restraint on their freedom. This presupposes ability in man to choose to do or not to do an act, namely, the existence in him of will-power (ikhtiár إختيار). It is by this characteristic that laws,

which are the subject of jurisprudence, are distinguished from physical laws, by which the involuntary movements of men and of the physical world generally are regulated.

The scope and end of law

The scope of law, which is determined by the end it has in view, covers the entire field of man's actions. The end of law is to promote the welfare of men both individually and socially and not the glorification of the lawgiver, for God *ex-hypothesi* is above all wants and weaknesses. The welfare of men as individuals which the law seeks to promote is not in respect merely of life on this earth, but also of the future life, so that imperishability of human life is another postulate underlying the Muḥammadan conception of law.

indicated by our instincts

There are four main principles of action implanted in our natures, namely, the instincts of self-preservation, of self-multiplication and of self-development and the social instincts. These, in the language of Muḥammadan religion, are signs (áyát آيات), as it were in the pathway (shara' شرع) of life laid down by the Creator for our guidance. The instincts of self-preservation and self-multiplication mainly indicate the range of our freedom, and the social instincts and the instinct of self-development indicate chiefly the character and amount of control to which that freedom is subject. The control implied by the social instincts is the expression of the relation of the individual to the communal life, and the control necessitated by the instinct of self-development represents that side of our nature which impels us to strive after progress. With regard to man's spiritual welfare, the purpose of law is the discipline of human life, so that it may attain qurbat (قربة) or nearness to the Perfect Being. So far as the regulation of man's actions in their bearing on earthly existence is concerned, the aim of law is the preservation of the human species and the support and well-being of individual and social life.

Rights and obligations

The media through which the law exercises its function are rights (ḥaq حق) and obligations (wujúb وجوب). The two are generally speaking correlative

terms. Right means the authority recognized by the law to control in a particular way the action of the person against whom it exists, the latter being obliged or under an obligation to act as required. Rights are primarily the privilege of God, but inasmuch as men in their communal life are dependent on each other for their wants, God, having regard to such necessities, has authorized men individually to control each other's actions, though within limitations. That is to say, law permits one man to acquire rights against another, and thus to control the freedom of the latter to a certain extent. In so far, however, as there is no legal restraint on a man's actions by virtue of a right existing either in another individual or in God, his innate freedom of action remains unaffected, and hence according to many jurists ibáḥat (إباحة), or permissibility, is the original principle of human action.

It will have been noticed from the definition of law that the application of the term is not limited in the Muḥammadan system to mandatory commands, far less to commands enforceable by the courts. It comprehends all expressions of the lawgiver's will and wisdom, whether laying down what a man must do or must not do, what he may do and what he ought to do or ought not to do, or merely making a declaration. What constitutes law of the former class is what the lawgiver has said with reference to men's actions, whether his words be expressive of a desire that those to whom they are addressed should act in a particular way in certain matters, or that they should be left to act as they like in certain other matters. When the lawgiver expresses a desire of either kind, there is then the further but distinct question, whether the desire should be enforced or not, and this is provided for by another and additional expression of the lawgiver's will to that effect, though it is not necessary that such expression should be by a separate speech. For instance, the law says: 'every man is entitled to possess and enjoy as he pleases what he has acquired by his own labour', or putting it in the imperative form, 'possess and enjoy as you please what you have acquired by

The term law not confined to mandatory commands, or to commands enforceable by the courts

your own labour.' This pronouncement is law, and the lawgiver if he so chose might stop there. But if he further wished that the magistrate should protect the acquirer of property in the possession and enjoyment of it, he would say to the magistrate: 'whoever deprives a person of possession of his property, inflict on the delinquent such and such penalty, or compel him to restore the property or something equivalent thereto.' Take another illustration. Suppose the lawgiver says: 'educate your children', and instead of providing a penalty for failure to educate, he directs the magistrate to give a certain sum of money to the parents who may educate their children. The wishes expressed respectively to the parents and to the magistrate are both distinct commands, whether they happen to be expressed in one speech or more. Or suppose the legislator says: 'Do not tell a lie, but tell the truth', but prescribes no penalty for lying. The injunction, according to Muḥammadan jurists, would nevertheless create a legal obligation, as it is an obligation imposed by the lawgiver, and none the less so because no penalty awardable by the magistrate is attached to its violation. Similarly, when the lawgiver declares that a contract is concluded when the person to whom a proposal is addressed accepts the proposal, the declaration is law, though it is merely an affirmative proposition and not a mandatory command.

Enforceability by a distinct human tribunal is not, therefore, an essential attribute of law in Muḥammadan jurisprudence. Injunctions which are capable of being enforced are of a limited class. The question of the enforceability of laws forms the subject of the administrative branch of the law, while it is the function of law in its substantive side to define the character of men's acts, or to assign to such acts their legal effect and relation.

Sanctions The means by which compliance with the laws is secured are also of a wider character in the Muḥammadan system than the sanctions of modern European laws. Since Muḥammadan law has twofold objects, spiritual benefit and social good, its policy is to encourage obedience by offer of reward, and to discour-

age disobedience by imposition of penalty. Penalty may be awardable in this world ('iqáb عقاب) or in the next ('adháb عذاب), or in both, but reward (thawáb ثواب) is awardable only in the future life.

Application of law to Muhammadans, personal

In Muḥammadan jurisprudence, law is personal in its application to the Muḥammadans, that is to say, it is not affected by the constitution of a particular political society. This is because the authority of law, according to the Muḥammadan theory, is primarily based on men's conscience and not on political force. Thus, if a Muḥammadan goes from one State to another, he is bound by the same laws and, if he does not live within the jurisdiction of a Muslim State, the Muḥammadan law still applies to his conscience. Having regard to the theory of Muḥammadan jurisprudence, law is inherently inapplicable to those who do not believe in the one and only God. Not acknowledging the authority of the Lawgiver, such men are neither bound by the law, nor can they claim its protection and privileges. But it is nevertheless His pleasure that they should be allowed to live their own lives on this earth as they please, provided they are not hostile (ḥarábí) to the law, and are willing to submit to its authority in so far as it is necessary for its upholding. If, therefore, a non-Muslim lives under the protection of a Muslim State, the secular portion of the legal code would apply to him, that is, generally speaking, so much of it as is in substance common to all nations, and not such rules as are specially identified with the tenets of Islám. For instance, a non-Muslim drinking alcohol is not subjected to punishment and his transactions in wine and pigs are valid. The application of Muḥammadan law to non-Muslims is entirely territorial, and hence it does not apply to those among them who do not live within the jurisdiction of the Imám.

To non-Muslims, territorial

Administration of the State

The right to administer the laws, as well as the affairs generally of the community, belongs to the community itself which may exercise the right through its chosen representatives. The administration of the State in the olden days was entrusted to Imáms or Caliphs. The Imám or the Caliph was the executive

head or chief of the Muslim State. He was not vested with any legislative powers and was bound by the laws like any other person. He was subject to the ordinary jurisdiction of the courts though it may be that, as he was the chief of the executive and had thus the control of the administrative machinery, it practically depended upon his pleasure whether he would submit to the decrees and sentences of the courts or not. The Muḥammadan law does not concede to any individual any of those powers and prerogatives which are ordinarily the essential attributes of sovereignty.

Sovereignty

In the Muḥammadan system sovereignty primarily belongs to God, but as He has delegated to the people powers of legislation and of absolute control over the administration, it must be held that next to God the sovereign power resides in the people. It would also appear that the Muḥammadan law does not admit of the sovereign power being dissociated from the people however they might choose to exercise it.

The State

The law seems to contemplate that there should be a single Muslim State, and that the Caliph, as its chief representative, should administer the executive affairs of the community living within such State through his delegates and governors. But when there is no *de jure* Imám or Caliph, there seems to be nothing in the law which precludes the recognition of politically independent Muslim States. In fact since the extinction of the 'Abbáside Caliphate, different Muslim States have existed as entirely independent political units, without acknowledging a common over-chief as Imám or Caliph.

Classification of laws: defining and declaratory laws

Let us now see how laws are classified. That part of the definition of law which relates to the objectives of law or human acts, indicates one primary division of the laws into what I shall call 'defining' and 'declaratory'. When the communication from the Lawgiver assumes the form of a demand it may be absolute or not absolute. If the former, the demand may consist in requiring men to do something in which case the act demanded is regarded as obligatory (farḍ فرض), or it may require him to forbear or abstain from doing

something, in which case the act to be forborne or abstained from is said to be forbidden (ḥarám حرام), or in other words, such a speech imposes duties of commission or of omission. When the demand is not of an absolute character, the act to which it refers, if it be one of commission, is called commendable (mandúb مندوب), and if it be one to be forborne or abstained from it is called condemned, or abominable or improper (makrúh مكروه). An act with reference to the doing or omission of which there is no demand or, in other words, with respect to which the lawgiver is indifferent, is regarded as permissible (mubáh مُبَاح). All acts which are neither obligatory, nor forbidden, nor commended, nor condemned fall within the last category. Laws which thus define the characteristics of a man's acts, namely, whether they are obligatory, forbidden, condemned or permissible or indicate the legal effects of acts, for instance, that the rights of ownership arise from an act of purchase, the obligation to pay rent, from possession of another's land and the like are called in Arabic taklífi (تكليفي lit. controlling), which I have translated as 'defining,' since they define or indicate the extent of a man's liberty of action and the restraint imposed upon it. or in other words, his rights and obligations. The other class of laws indicated by the words of the definition are called in Arabic waḍ'aí (وضعي), which I have translated 'declaratory', as proximately conveying its meaning. Laws of this class indicate the component elements of a defining law, namely, whether certain facts or events are the cause, condition or constituents of a command. The function of a declaratory law is interpretive in relation to a defining law. For instance, it is by means of a declaratory law that we know that proposal and acceptance, in a transaction of sale, are the cause originating proprietary rights in the thing sold in the buyer, and extinguishing those of the vendor; that the pronouncement of the formula of divorce is the cause of extinction of the marital rights and obligations of the

husband and the wife; that the death of a person is the cause of the rights of the heirs to the inheritance; and that usurpation of a man's property is the cause of obligation on the part of the usurper to restore the property to its owner or to pay its value. Similarly a declaratory law tells us that maturity of understanding is the condition of a voluntary disposition such as by hiba, will or waqf.

Laws of perfect and imperfect obligation

Laws having regard to the question of their enforceability are broadly divisible into three classes: (1) Those which concern men in their social and individual existence in this world, their object being to regulate men's relations to and dealings among one another. Since observance of laws of this class is necessary to the preservation of humanity, their enforcement has been delegated to and is made incumbent on the community. (2) Laws which solely concern the spiritual aspect of individual life, though some of them may relate to worldly transactions; these are enforced by God alone by means of spiritual rewards and punishments. (3) Laws which mainly concern the spiritual aspect of individual life, but also affect the Muḥammadan communal life in its religious aspect; the enforcement of these is not incumbent on the State, but is left to its discretion. Belonging to the first class are laws relating to contracts, transfer of property, succession, domestic relations, wrongs, crimes, and the like. As an instance of the second class may be mentioned laws enjoining commendable acts, such as alms, supererogatory prayers, and fasting, or prohibiting condemned acts, such as sale during call to prayers, and laws imposing the duty of making atonement. To the third class belong laws enjoining the duties of saying the five daily prayers, of paying the poor-rate, and of fasting during the Ramaḍán: these duties the State may enforce by means of disciplinary measures.

Religious laws and secular laws

The jurists broadly divide laws having regard to their purpose into religious and secular. In summing up his discussion of the scope of Fiqh, Taftázání says: 'it (i.e. Fiqh) is the knowledge of such laws of the Sharí'at as are intended to be acted upon, as

already stated. These laws relate to matters appertaining to the next world, namely, acts of worship ('ibádat عبادات) or to matters appertaining to this world. Of laws of the latter class, some have in view the continued existence of men as individuals, and are called laws relating to mu'ámalát (معاملات), that is, dealings among men, while the others, namely, laws relating to domestic relations (munákaḥát مناكحات) and to punishments ('uqúbát عقوبات), have in view the continued existence of men as a species, having regard respectively to their natural place in the scheme of life and as members of organized society.[1]

Revealed and unrevealed laws

Having regard to the sources of our knowledge of the laws, some laws are revealed and others are unrevealed. Laws, which are to be found in a Qur'ánic or an authentic traditionary text are revealed, and those determined by agreement of the learned, or deduced by individual jurists, are unrevealed.

Certain and presumptive or discretionary laws

In this connexion there is another classification of laws of greater practical significance, based on the nature of the proof as to their divine source, namely, that into certain (yaqíni يقيني) and presumptive or discretionary (ẓanni ظني). The theory being that all laws are of divine origin, unrevealed laws are laws by presumption, being based on revealed laws which are the original authorities or sources of the knowledge of law. In the case of a conclusion arrived at by the learned as a body, the presumption is conclusive that it is what God intended, while in the case of deductions made by individual jurists, the presumption is not conclusive, but of sufficient force to justify a Muḥammadan to act upon such rules. A deduction of the latter class may be correct or incorrect and, therefore, does not compel certainty of belief, while revealed laws and laws founded on Ijmá' must be correct and compel certainty of belief. Hence, a Muḥammadan acting upon a rule of law juristically deduced, incurs no spiritual liability if it happens to be wrong. A jurist or a

[1] 'Talwíḥ', p. 693.

Qáḍí is free to make his own deductions in matters of juristic (اجتهاديّة) law, while so far as laws based on a text, or on Ijmá', are concerned, he is absolutely bound to follow them. If a Qáḍí or judge goes wrong on a question covered by an express text or by Ijmá', his decree must be set aside either by himself when he discovers his error, or by the succeeding Qáḍí. But his decision in a matter of analogical law may not be reversed, because with respect to it, it cannot be said with certainty that his view is wrong. As for proof of the divine origin of Qur'ánic and traditionary texts, the Qur'ánic texts are accepted as proved, beyond a possibility of doubt, to be of divine origin; they are in the very words of God, which were preserved with so much care that all chances of mistake or error are excluded. The precepts of the Prophet on questions of law are also revelations from God, but expressed in the Prophet's own language. With respect, however, to a few only of the precepts can it be said that they are proved for certain to be what the Prophet enunciated. Those that are so proved rank as high as a Qur'ánic text, and demand implicit faith and obedience. There are a few more, the proof of the genuineness of which is regarded as of a high order though not absolutely conclusive. The authority of laws based on such traditions is held by some to be as absolute as of the other class. As regards the rest of the precepts, that is, those which are proved by isolated testimony,[1] a jurist must satisfy himself as to their genuineness. If he is so satisfied, he is bound to accept the law as laid down by it but not otherwise. Laws based on traditions of this class cannot, therefore, be said to be certain, for it is open to a jurist to contest their genuineness. In that sense, laws based on isolated traditions may be said to be discretionary like laws based on juristic reasoning.

Strict and modified laws

Another fundamental division of the Muḥammadan laws is into strict ('azímat عزيمة) and modified (rukhṣat رُخصة). The two are relative terms. The former class

[1] See Post, Chapter III.

consists of laws in their original theoretical rigour and of rules in strict adherence to the letter of the texts, and the latter class consists of rules with their rigour modified and relaxed in the application of the principles to particular circumstances so as to obviate hardships and inconveniences. This division runs through the entire range of the Muḥammadan laws, whether based on texts or on analogy, and bears resemblance to the common law and equity law of the English system. Sometimes one text relaxes a rule previously enunciated in another text, and sometimes a rule, strictly deducible by the application of analogy, is relaxed by the exercise of what is called juristic equity, or preference, having regard to the needs, habits and usages of men. For example, according to the strict law a sale is valid only of an article which is in existence at the time of the contract, and of which it is in the power of the vendor to give possession to the buyer. But the rule is relaxed in the case of a salam (سلم) sale, which is a contract for sale of goods of a specific description, which are not in existence at the time of the contract, but which the vendor has promised to deliver at a future date, in consideration of the price paid to him in advance. This modification of the rigour of the law in its original form is perceptible in all the departments, and has both a spiritual and a secular aspect. From a spiritual standpoint it is considered more meritorious for a man to conform to all the strict conditions of the law, and in its secular aspect an act does not cease to be valid and operative, because it does not conform to such conditions.

Interpretive laws

I have already adverted to the division of laws into defining and declaratory, and I have said that the function of the latter is in one sense interpretive. But declaratory laws must be distinguished from interpretive laws properly so called. It is doubtful whether in Muḥammadan jurisprudence rules of interpretation which have been devised by human reason, for the purpose of understanding the texts by applying our knowledge of the language and grammar

to their words, can be called laws properly so called. Interpretation by means of such rules is, however, to be distinguished from authentic interpretation, that is, interpretation of a Qur'ánic, or traditionary text by another such text. The object of an interpretive text may either be to explain the meaning, or to indicate the limit and the extent of the application of another text. What is laid down by such interpretive texts is undoubtedly law.

Repealing and amending laws

There are some texts of the Qur'án, and the Traditions which have either been totally repealed, or their application limited or modified by subsequent texts. Many jurists hold that repealing and amending laws belong to the category of interpretive laws. They argue that when certain laws have been promulgated, and the time within which they are to have operation has not been specified, and the Lawgiver afterwards repeals them, he must be taken to mean thereby that the laws previously enacted were intended to have force until the time when the repealing laws were passed and not thereafter. Similarly, when one text is modified by a subsequent text what is meant is that, when the amending text comes into operation, the original text is to have a modified or limited application. Only a revealed law can be repealed, limited or modified by another law of the same class. One juristic deduction cannot be said to be repealed or modified by another, because of neither of them can it be affirmed with certainty that it is correct.

Public and private laws

Laws having regard to the classification of rights as made by the Muḥammadan jurists, divide themselves broadly into public and private. They divide rights into rights of God (حقوق الله) and rights of men (حقوق العباد); the former corresponding to rights of the public and the latter to private rights. Rights of the former class reside in God, but since they exist for the benefit of the community, they are described as rights of the community or public rights; private rights reside in individuals. For instance, the right to levy revenues belongs to the community, and is exercised on its behalf by the Imám, as contrasted

with the right of a private owner of a house to receive rent from the tenants. The punishment of crimes is a right of the community, as distinguished from the right of an individual affected by a wrong to exact restitution or satisfaction. That is to say, there are some wrongs which the State thinks fit to punish without consulting the wishes of the person wronged, and these come within the purview of public law; other wrongs are regarded as a matter for redress, which it is for the individual wronged to seek and to enforce, and these are the subject of private law.

Law of persons

What is called law of persons relates, according to Muḥammadan jurists, to the question of the application of law, having regard to the fitness (ahliyat اهليت) of men for the inherance and the exercise of rights and the discharge of obligations. Under this head they discuss the legal capacity of infants, lunatics, infidels, slaves, sick persons and the like.

Law of things not a separate division

The Muḥammadan jurists do not recognize laws of things as forming a separate and independent juristic division. Laws, according to them, are concerned with the acts of men through the juridical medium of rights and obligations. Often such acts have reference to physical objects but not always; and the law does not deal with such objects except as 'property', that is, things over which men exercise acts of possession and enjoyment.

Law of evidence

The law of evidence in the Muḥammadan system falls partly within the scope of substantive law and partly of adjective law. The right to give shahádat (شهادة) or oral testimony, is a question of capacity of the witness to create liability. On the other hand, the object of evidence generally (bayyanát بيّنات), including oral testimony, is to enable the court to ascertain the truth with a view to enforce rights and obligations. The Law of Procedure is dealt with in Muḥammadan jurisprudence as law appertaining to ádábu'l-Qáḍí (آداب القاضي) or the duties of the magistrate.

Law of Procedure

Constitutional law

Constitutional law of the Muḥammadans, which is generally dealt with in the textbooks in the chapter on Siyar (السّير), defines the duties and rights of the executive head of the community.

International law

What approaches nearest to international law in this system is the law defining the relations of the Muslim State and of the Muslims towards non-Muslim States and the non-Muslims. But the rules under this department of law bind only the Muslim State and the Muslims, and are not based on any international arrangement or comity. This branch of the law is also discussed in most legal treatises chiefly under the heading of As-Siyar.

CHAPTER III

SOURCES OF LAW

PART I—THE QUR'AN AND THE TRADITIONS

SECTION I—GENERAL

Revelation

THE primary source of laws in the Muḥammadan system is revelation (waḥi وحي). Revelation has been of two kinds—manifest (ẓáhir ظاهر) and internal (báṭin باطن). Manifest revelation consisted of the communications which were made by the angel Gabriel, under the direction of God, to Muḥammad either (1) in the very words of God, or (2) by hints, and (3) of such knowledge as occurred in the mind of the Prophet through the inspiration (ilhám الهام) of God. Internal revelation consisted of the opinions of the Prophet embodied in the form of ratiocination, and delivered from time to time on questions that happened to be raised before him. The Qur'án is composed of such manifest revelations as were made in the very words of God. Matters, which formed the subject of manifest revelation by hints from Gabriel, or by inspiration, or of internal revelation, are known as aḥádíth (plural of ḥadíth) i.e., precepts or traditions.

The Qur'an and the Traditions

Some jurists would not accord to the opinions of the Prophet delivered in the form of ratiocination the rank of revelation, and would place them on no higher basis than the opinions of other persons. But the accepted Sunni doctrine is that they are to be regarded as authoritative, until there has been a manifest revelation to the contrary. In fact, it often happened that there was no revelation for some time, and, if any question had to be decided in the meantime, the

Prophet would exercise his own judgement and frequently consult his Companions. If the decision he arrived at in this way happened to be wrong, God would then send a manifest revelation to set it right. After the death of the Prophet, the presumption as to the soundness of such of his decisions and dicta belonging to this category, as were not displaced during his lifetime, became conclusive, because he being the last of the prophets, there could be no further revelation after his death.

Not only were the dicta of the Prophet inspired, but also his acts or practice (af'ál افعال) in all matters coming within the purview of law. Hence precedents furnished by his practice are a binding authority. They are part of the Sunna or traditions, which comprehend such precedents as well as the precepts of the Prophet.

Revealed laws before Islam

According to some jurists, laws revealed previously to the promulgation of Islám are binding on the Muslims, except such of them as have been abrogated by the Islámic religion; while according to others they have no longer any authority. The Ḥanafí doctrine is that only such laws of the previous revealed religions are binding, as have been mentioned in the Qur'án without disapproval. This restriction is necessitated, according to the jurists, by the fact that the previous religions have not been correctly transmitted to us, and have undergone considerable corruption.

Qur'an as a source of laws

The Qur'án, which is not only of divine origin but has existed from eternity, was revealed in parts to the Prophet of Arabia during a space of twenty or twenty-five years. It is divided into súras (سورة) or chapters, each having a separate designation, and is composed of áyáts (آيات) or verses. The arrangement of the verses is not in the order in which they were revealed, but is believed to be in accordance with a plan sanctioned by the Prophet himself. Most of the verses, which embody rules of law, were revealed to settle questions that actually arose for decision; some in order to repeal objectionable customs like infanticide, gambling, usury and unlimited polygamy; some for effecting social

reforms such as by raising the legal status of women, settling the question of succession and inheritance on an equitable basis, providing protection for the rights of minors and other persons under disability; and some lay down the principles of punishment for the purpose of securing peace and order. These rules principally occur in the Súratu'l-Baqara, Súratu'n-Nisá', Súratu Áli 'Imrán, Súratu'l-Má'ida, Súratu'n-Núr, Súratu'ṭ-Ṭaláq and Súratu Baní-Isrá'íl. The Qur'án also contains general injunctions which have formed the basis of important juristic inferences.

Difference between the Qur'an and the Traditions

The difference between the Qur'án and the precepts lies in the fact that the former contains the very words of God, while the precepts were delivered in the Prophet's own language. One result of this difference is that the words (نظم) of the Qur'án have a spiritual value and significance apart from what they lay down. Abú Ḥanífa, however, is reported to have said that the words are not a necessary constituent of the Qur'án, and, therefore, if in saying his prayers a Muslim used Persian words to convey the same meaning as certain verses of the Qur'án, such prayers would be valid. But it appears that he subsequently changed his opinion, and the accepted Sunní view is what I have indicated.

Further, no doubt can reasonably be entertained as to the authenticity of any verse of the Qur'án, the whole of which is held to be mutawátir (متواتر), that is, proved by universally accepted testimony. Such testimony according to Muḥammadan jurisprudence ensures certainty of belief, as it precludes all possibility of concoction or error. There are but a few precepts—some say five or six—which can be said to be so proved. The reason for this is that, while the texts of the Qur'án were collected by the authority of the State soon after the death of the Prophet, the traditions were not so collected.

Rules for ascertaining the authenticity of a tradition

The first and most important question, therefore, which arises in connexion with a tradition is, whether it is genuine. The Muḥammadan jurists assign a certain limit of time, counting from the

The age in which the reporter lived

death of the Prophet, within which, if a tradition is narrated for the first time, the law would raise a presumption, more or less strong in favour of its genuineness and accuracy. This space of time is divided into three periods (qaran قرن), the people living in the first of which are regarded as more righteous and reliable than those in the second, and the people of the second period are regarded as more righteous and reliable than those living in the third period. The first is the period ending with the lives of those Muslims who had lived during the lifetime of the Prophet, and of these men, those who had the privilege of meeting and coming into contact with him, are known as Companions of the Prophet or, briefly speaking, Companions. The second age covers the lives of persons who, not being Companions themselves, lived during the lifetime of and came into contact with any of the Companions. These men are known as successors of the Companions or, briefly speaking, successors (tába'ún تابعون). The third age is conterminous with the lives of persons who, not being successors themselves, lived during the lifetime of and came into contact with any of the successors; these men are called successors of the successors of the Companions or, shortly speaking, successors of successors (taba' tába'ín تبع تابعين).

Classification of traditions according to their proofs, continuous, well-known and isolated

Traditions are grouped into three classes according to the nature of their proof. Such of them as, have received universal publicity and acceptance, having been related by an indefinite number of men in each one of the three ages and of different places, are called continuous (متواتر). Traditions of this class, like a verse of the Qur'án, ensure absolute certainty as to their authenticity and demand implicit belief. The next class of traditions are regarded in law as carrying conviction of their genuineness into a man's mind, though not absolute certainty like the first. These were reported by a limited number of Companions in the first instance, and thereafter, i. e. in the two successive periods, fulfilled the conditions of a continuous tradition. They are called well-known traditions (mashhúr مشهور). The third class are desig-

nated 'isolated' traditions (aḥád احاد). These latter neither ensure certainty of belief like the continuous, nor carry conviction like the well-known traditions, but their genuineness in the opinion of generality of jurists is so far guaranteed, that it would be justifiable to base a rule of law thereupon. Traditions, which rest upon the testimony of one or more narrators, limited in numbers and not fulfilling the conditions of either of the other two classes, fall within this category. Some jurists of eminence do not recognize isolated traditions as having any authority in law.

Qualifications of a narrator

The narration of traditions being a juristic act of the kind known as information or testimony, the narrator (راوي) must fulfil the essential conditions of eligibility which are laid down with respect to witnesses. Firstly, he must have understanding so that the report of an infant, a lunatic, or an idiot cannot be accepted. Secondly, he must possess the power of retention (ḍabṭ ضبط), which implies that he should have properly heard the words of the speaker, being able to understand their meaning, and that he should be able to retain them in his memory, and to reproduce them with accuracy at the time of narration. But most jurists do not regard such power of retention as a condition of eligibility, but only as a reason for giving preference. Thirdly, he must be a Muslim; and fourthly, of righteous conduct (عدالة), that is to say, he must be a man who generally in his life and conduct prefers to follow the injunctions of religion and reason, rather than the dictates of desires and passion. A report by an infidel is regarded as unworthy of reliance by reason of his bias against Islám. A woman's, a slave's and a blind man's narration is accepted, though they labour under certain disabilities in the matter of giving evidence in a court of law. The reason for the distinction is that on evidence in a cause depends the rights and liabilities of others, and the conditions regarding judicial testimony are therefore stricter.

But the higher the qualifications of a narrator, the greater the authority of a tradition reported by

Narrators may be well-known, or obscure, learned in law, or otherwise

him. For instance, a man narrating a tradition may be 'well-known' in that connexion (ma'rúf معروف), having reported many traditions, or he may be 'obscure' (majhúl مجهول), not having reported more than one or two. A well-known reporter of traditions may be further possessed of legal learning and acumen, or he may not. If the former, then the Ḥanafís would accept the law based on his tradition in preference to any deduction to the contrary to which analogy might point. But some Málikís would in such a case follow the analogical deduction in preference. If a well-known reporter is not reputed to be a jurist, his traditions will not be accepted if opposed to a rule of analogy. Among traditionists who were also famous as jurists, the names of the first four Caliphs, especially Abú Bakr, 'Umar and 'Alí, and of 'Abdu'lláh ibn Mas'úd, 'Abdu'lláh ibn 'Umar, 'Abdu'lláh ibn 'Abbás, 'Áyesha, wife of the Prophet, Zaid, Mu'ádh and Abú Músá'u'l-Ash'arí are the most prominent. Of the other class, namely, well-known traditionists who did not possess the qualifications of a jurist, Abú Huraira's is the most conspicuous name and next to him perhaps that of Anas. As regards an obscure reporter, if it happens that the Companions narrated a tradition on his authority, or vouched for the accuracy of his report, he would be regarded as having the same status as a well-known reporter. If the Companions generally repudiated an obscure reporter's traditions, his traditions will not be accepted at all. If some Companions rejected a tradition narrated by an obscure reporter and others accepted it, it will be accepted if the law laid down thereby is found to harmonize with the result of analogical deduction. If a tradition of an obscure reporter did not receive publicity during the age of the Companions or of the successors, but came to light during the age of Abú Ḥanífa, that is the third period, it will be accepted by the Ḥanafís if found to accord with analogy, but not otherwise. If, on the other hand, such a tradition did not see the light until after the expiry of the third period, it will not be accepted at all.

Connected and disconnected traditions

It is also an important matter for consideration, whether the chain of narration is complete and reaches the Prophet or not. Sometimes the absence of such connexion, is apparent on the face of the report itself, for instance, when a narrator not being a Companion says: 'The Prophet said this' without mentioning his authorities. A proper report ought to mention the successive persons by whom the tradition is transmitted, the usual form of such report being, 'so and so reported to me from so and so, etc., and the last person reported from the Prophet, that he said this . . . .' A report which is defective in not setting out the authorities is called mursal (مُرسل) or disconnected. A disconnected narration of a Companion is accepted by all the Schools, because of the presumption in favour of its authenticity, arising from the high character of the Companions and their regard for accuracy, as well as from their close proximity to the Prophet. The Ḥanafís and Málikís would also accept disconnected reports of successors and of successors of successors, but not so the Sháfi'ís. A disconnected tradition narrated after the expiry of the third period is not accepted except by some Ḥanafí doctors.

Other objections to a tradition

Sometimes on the face of the report itself the chain of authorities may be completely set out, and yet the law may consider it disconnected and refuse to accept it as authentic because of certain infirmative circumstances. For instance, the narrator may not possess the necessary qualifications, or the tradition itself being of the class of isolated may be contradictory of a text of the Qur'án, or of a continuous or well-known tradition, or it may have been repudiated by the Companions, or it may be one relating to a matter of such common occurrence that the paucity of its reporters cannot be explained. In any of these cases such a tradition is not to be accepted.

There may again be other objections to a report called in Arabic ṭa'n (طعن) literally, imputations. Such objection may sometimes arise from the narrator's own conduct. For instance, if he has been acting

in violation of the precept narrated by himself, or if he subsequently denies having reported it, such a tradition would be unworthy of acceptance. Similarly, a tradition is not to be relied on if it has been rejected by the leading traditionists, or if its knowledge has been denied by the Companions, provided the tradition itself be of such a character that, if genuine, the Companions would be presumed to have known of it. The fact that a tradition was not known to the Companions would not be a sufficient objection to its validity, if the tradition be one relating to a matter of rare occurrence.

Mode of transmission

The next point to be borne in mind is the mode of transmission (روايۃ). The accepted mode of transmission is for the traditionist to recite a tradition to the person, who is to narrate it from him, so that the latter may be in a position to say, 'so and so related to me (ḥaddathaná حدثنا) such and such', or he may write it down, in which case the proper form of narration would be 'so and so informed me (akhbarana اخبرنا).' The way in which traditions are nowadays preserved and handed down is by means of writing, while in the earlier ages they were mostly preserved in men's memories.

Traditions which report the very words of the Prophet and those that do not

What is of great importance with reference to the mode of transmission is the question, whether the very words of the Prophet have been reported, or only their sense and substance. If the very words are reported such a tradition, the other conditions being satisfied, will be accepted by all the jurists, even if its narrator was not versed in law. If the language of the Prophet has not been preserved, some jurists would not accept such a tradition at all. The majority of jurists, however, are for accepting it, provided its meaning is not open to any doubt; and in their opinion it would make no difference, whether the narrator of such a tradition was a jurist or not, provided he understood the language. When a tradition of this sort is reported in language which requires construction; for instance, if words of general import ('ám عام) are used and they are capable of a limited

application (khás خاص), or words of primary meaning (ḥaqíqi حقيقي) are used and they are capable of a secondary meaning (majázi مجازي), then, if the reporter was well versed in law, it would be accepted, but not otherwise. When the language of a tradition, which is not reported in the words of a Prophet, is of an equivocal character, it is not to be accepted at all.

Prophet's practice

When a tradition reports the practice of the Prophet, the principal question is whether it relates to a matter in which such practice is a binding authority. So far as it is a source of laws, the practice of the Prophet is relevant when it involves decision of a question submitted to his judgement. Generally speaking, however, whatever the Prophet did, a Muslim would be justified in doing, unless the act had special reference to his mission.

Traditions, with reference to their subject-matter

Traditions are lastly grouped with respect to their subject. As to matters which are the right of God, an isolated tradition cannot create an offence entailing punishment, but a continuous or well-known tradition may. As regards matters which are the right of man, if a precept imposes liability pure and simple, its reporter must possess all the qualifications of a witness, both as to fitness for giving information and for fixing liability on others. Besides, the form of narration must conform to the requirements of judicial evidence.

Some jurists like Abú Sa'ídu'l-Barda'í hold that the dicta of the Companions of the Prophet are also binding authority. But the accepted Sunní view is that such dicta are binding only when they have the force of Ijmá', and the individual juristic deductions of the Companions have no higher authority than such deductions by other jurists, though they are received with greater respect.

SECTION II—INTERPRETATION

The function and scope of interpretation

I now propose to consider the rules of interpretation which in the Muḥammadan system are treated as a subject of jurisprudence. According to Muslim jurists interpretation of a legal text is governed substantially by the same principles as other questions of

interpretation. The function of interpretation is to discover the intention of a person, whether he be the lawgiver, or an expounder of the law, or any other person, either from his words or his conduct. The object of interpretation of conduct, which is called 'interpretation by necessity' (bayánu'dh-dharúrat), is in the case of the lawgiver and the expounders of law to ascertain their intention with regard to what has been left unexpressed as a matter of necessary inference from the surrounding circumstances as furnishing an index to their minds. For instance, when the lawgiver sees certain customs prevailing among the people and does not promulgate any laws prohibiting them, it is presumed that such customs have his sanction, or, if a Companion of the Prophet narrates a tradition from an obscure narrator without impugning its correctness, it is presumed that he considered the tradition to be genuine. Interpretation of the conduct of a private individual is nothing but the application of the doctrine of estoppel. We are at present, however, mainly concerned with interpretation of the Qur'ánic and traditionary texts.

Words classified with reference to their application to convey meaning

Words with reference to their application to convey a certain meaning are susceptible of fourfold divisions, having regard to (1) their grammatical application, for instance, whether a word is a homonym or of a specific or general import; (2) their actual use, such as whether a word is used in its primary or secondary, plain or allusive, in its dictionary, technical or customary sense; (3) the extent to which their meaning is made clear or left ambiguous or doubtful, that is to say, whether the meaning of the proposition which they embody is manifest, explicit, explained, and so on; and (4) the different ways in which the meaning of words is indicated.

Homonyms, general and specific words

(1) A word which is applied by several applications to many things is called a homonym (mushtarak مشترك). For instance, the word 'spring' may mean a spring of water, or the spring of a clock, or the spring of a tiger. If a word is applied by a single application to many things not limited in numbers, and

includes everything to which it is applicable, it is called a general word (عام). A word may be general either by its form and its meaning, such as men, or by its meaning only such as people, community, or by way of substitution such as the pronoun 'whoever' in the sentence, 'whoever will come to me first will have a dirham.' When a word is applied by a single application to many things not limited in numbers, but not inclusive of everything to which it is applicable, it is called an indeterminate plural (jama' munakkar, جمع مُنكر), such as the word 'men' in the sentence, 'I saw men in the street.' When a word is applied by a single application to a limited number of things, including everything to which it can be applied, say one or two or a hundred and so on, it is called a specific word (khás خاص). A specific word is opposed to a general word. If a specific word is used to denote an individual, it may mean a particular individual, such as Zaid or 'Umar, or an individual as belonging to a certain species, as a horse, or a man, or an individual as belonging to a certain genus as a human being.

Derivative, proper and generic nouns

If the meaning of a noun be exactly that to which the root word from which it is derived is applied, while retaining the original form, it is called a derivative noun (ṣifat صفة), such as the word murderer which is derived from murder. If it be not so and its meaning is individualized, it is called a proper noun ('alam علَم); otherwise, it is called a generic noun (اِسم جنس).

Absolute and limited words

If by a derivative or generic noun is meant the thing named without any limitation, it is called absolute (muṭlaq مطلق), otherwise it is called limited (muqayyad مُقيّد). If all the things to which it is applicable are included, it is called a common noun ('ám عام). If it is applied to only some determinate things, it is called particular (ma'húd معهود), and if it is applied to some of the things but not determinate, it is called indeterminate (nakara نكرة).

Specific words

They establish an absolute proposition

A specific word (خاص) in its application as such establishes an absolute proposition. By the phrase 'as such' it is intended to exclude from present consideration the effect of the context, or of extrinsic facts on such a proposition. When it is said, for instance, 'Zaid is learned', learning is predicated for certain of Zaid, and similarly the word 'learned' being specific, learning and nothing else is predicated of Zaid.

Force of then in a Qur'anic text relating to divorce

Take another illustration. The word *then* (al-fá الفا) is specific in signifying sequence. A text of the Qur'án, for instance, lays down: 'Divorce may be by two sentences, *then* you may detain them (meaning the divorced wives) in a proper manner, or let them go with kindness. It is not lawful for you to take from them anything out of what you have given them, unless you are both afraid that you will not be able to keep within the bounds of law, that is, if they lived together. If both of you are afraid that you will not be able to keep within the bounds of law, *then* it will not be wrong if she (meaning the wife) ransoms herself. These are the limits of law laid down by God and so do you not transgress them; those who transgress these injunctions are wrong-doers. *Then* if the husband divorces her, she will not be lawful to him thereafter, until she marries another husband and *then*, if he (meaning the last husband) divorces her, there is nothing to prevent her and the first husband to return to each other again (i. e. to marry each other), provided they think they will be able to observe the limits laid down by God. These are the injunctions of God revealed for the benefit of the people who know (what is right from wrong).'[1] Here we find that divorce by the husband by two sentences is first mentioned, followed by the mention of ransom, by which it would be lawful for the parties to agree that the wife shall be released from the marriage tie, in consideration of money or other property to be given by her to the husband. Next, it is laid down that if *then* the

[1] Súratu'l-Baqara; Tafsír-i-Aḥmadí, p. 130.

husband pronounces another divorce, it will not be lawful for him to live with her afterwards. Sháfi'í holds that the word *then*, which comes immediately after the mention of ransom, does not refer to ransom but refers to revocable divorce by the husband. He treats the passage regarding ransom as a parenthetical speech. Hence according to him, if a husband confers the power of khula' on his wife, it operates as faskh and not as ṭaláq and the husband ceases thereafter to have any further power of pronouncing a ṭaláq. The Ḥanafís differ from him arguing that such a construction would deprive the word *then* of the force of sequence, which they say is not permissible as that is its specific meaning. They hold that khula' operates as ṭaláq.[1]

Force of for in a Qur'anic text relating to dower

Let us take another illustration, the word *for* (اللام) is specific as denoting the idea of exchange. Therefore in the verse of the Qur'án, 'seek (meaning a wife) for your property', the word *for* being specific settlement of property by way of dower on the wife cannot be dissociated from a marriage. Hence, if marriage is contracted on condition that there shall be no dower, the wife according to the Ḥanafís will still be entitled to proper dower. Sháfi'í holds, however, that in such a case if the husband died before consummation of the marriage, the wife would not be entitled to any dower.[2]

General words

According to the Hanafis general words include for certain all things to which they are applicable

When a general word is used its application, according to the Ḥanafís, covers for certain everything to which it is applicable. Hence according to them a general text of absolute authority cannot be limited, except by another such text. The Sháfi'ís say that a general word includes everything to which it is applicable, but not for certain, so that its application in a text of the Qur'án or a continuous tradition may, according to them, be limited by a tradition of isolated origin or by analogy. According to some jurists, when a general word is used one should wait to see, if there be any authority to show whether everything to which it is

[1] 'Tauḍíḥ', pp. 31–2; 'Tafsír-i-Aḥmadí', pp. 130, et seq.
[2] 'Tauḍíḥ', p. 32.

applicable is included, or only some among them, because a general word is sometimes used to denote an individual. Other jurists hold that a general word is to be construed as meaning at least one, and if plural it is to be taken to mean at least three, for that is the least number of plurality, and then one must pause and ascertain from the context whether it applies to any other cases. The argument in support of the Ḥanafí doctrine is that usually the language of a rule of law is general in its terms and, if its application were held to be confined to a few only of the cases covered by the words, without there being any particular reason or authority for such limited application, the intention of the lawgiver would be frustrated.

Interpretation of conflicting texts

When two speeches of a general character conflict, one of them sanctioning a certain thing in general words and another prohibiting it, the prohibitive speech will prevail. It is laid down in the Qur'án: 'or you may have such (women) as your right hand has acquired (meaning slave girls)', and in another verse it lays down; 'do not bring together under you two sisters'. 'Alí was of opinion that the restriction with respect to combining two sisters did not apply to slave girls, but only to the case of a person marrying two sisters at the same time. The Ḥanafís, on the other hand, hold the contrary view on the ground that the prohibitive text must prevail over the affirmative text.[1]

Two apparently conflicting propositions ought to be reconciled if possible

Sometimes it may be possible to reconcile two apparently conflicting propositions. In the Súratu'l-Baqara it is laid down: 'Those women whose husbands are dead should restrain themselves (from marrying again) for four months and ten days', while in the Súratu'n-Nisá'u'l-qásira it is laid down that the period of probation for pregnant women is until delivery. 'Alí would reconcile the two texts, holding that the period of probation for a widow who is *enceinte* is the remotest of the two periods, namely, four months and ten days mentioned in the first text, and the period ending with delivery as laid down in the second.

Texts relating to 'iddat

[1] 'Tauḍíḥ', p. 33.

Ibn Ma'súd, on the other hand, is of opinion that the last text repeals the first to the extent to which they are in conflict, and therefore holds that the 'iddat of a widow in expectation of a child, is completed on delivery, even if the event takes place before the expiry of four months and ten days.[1]

Rule of construction, where a general and a limited proposition conflict

When two propositions, one of general and the other of specific import, conflict with each other and it cannot be ascertained which of them is later in date, both should be presumed to have been delivered at the same time and, as in the case last mentioned, an attempt should be made to reconcile them as far as possible. According to Sháfi'ís the general proposition is to be accepted, subject to the limitation imposed by the special proposition. According to Ḥanafís, if they cannot be reconciled then the rule as to contradictory propositions will apply. If the general proposition be later in date than the special, the latter will be held to have been repealed. When the specific or particular proposition is subsequent to the general, then according to the Ḥanafís, if they are connected with each other in point of time, the latter in its application will be limited to the cases not covered by the former, and, if they are not so connected with each other, the particular proposition will be held to repeal so much of what is laid down by the other as is inconsistent therewith. The difference between the two cases is thus expressed: in the first, the general proposition, as limited by the particular, still retains its general character, that is to say, it will not be considered as absolute (qaṭa'i قطعي), while in the second so much of it as still holds good will be treated as absolute and certain.[2]

Qualification of a general proposition

A general proposition may be qualified in its operation, either by a clause which is not independent of it (غير المستقل), or by an independent speech (مستقل). If by the latter, the qualification is called limitation or specification (takhṣíṣ تخصيص) When the qualifying

[1] 'Taudíḥ', p. 34.
[2] 'Talwíḥ', p. 79.

words are such that they relate to what has preceded, and do not by themselves form a complete speech, such qualifying words will not be regarded as an independent proposition. When it is otherwise the qualification is said to be by an independent speech.

Qualification by a dependent clause

A qualifying dependent clause either introduces an exception (استثناء), a condition (شرط) or a quality (صفة) into, or indicates the extent (غاية) of application of, the original proposition. An exceptive clause has the effect of confining the operation of the original proposition to some among the cases to which the latter applies; a conditional clause restricts its operation to certain contingencies; a qualitative clause limits its application to things possessing a certain quality, and a clause indicative of extent serves to show the limit of the operation of the main proposition.

Qualification by an independent speech

When the application of a general proposition is narrowed down, not by a clause which is part of the general speech itself, but by an independent speech, the limitation may be expressed, or is to be inferred, by the application of human reason or experience, or by the light of custom, or from the fact that the general word is less appropriately applicable to some things than to others. Examples: the exclusion of infants and lunatics from the scope of the law imposing certain obligations is dictated by our reason as a matter of necessary implication; when it is stated in the Qur'án: 'thou hast been given everything', the pronouncement must be taken to refer to things, the possession of which is valued by men; when a man says: 'I will not eat meat', he must be taken to mean only meat of such animals as is habitually eaten; and if a man says: 'all my slaves are free' the speech will not include mukátabs (i.e. slaves who are entitled to freedom on certain contingencies) for the use of the word 'slave' is not altogether appropriate in connexion with mukátabs.

Effect of a qualifying dependent clause

When a general proposition is qualified by a dependent clause, then, so far as it is not so qualified, it retains its characteristics as a legal authority. That is to say, if what is excepted from its purview is something

definite, the rest of the proposition will be regarded as an authority inadmissible of doubt; it will be otherwise if the things excluded are of an indefinite nature.

Effect of an independent limiting speech

When the qualifying speech is independent, then, the original proposition, in so far as it is still operative, will be regarded as general only in a secondary sense, and would not be treated as absolute. There is, however, one exception to this; when the limitation is introduced by our reason as, for instance, in excluding infants from the purview of certain obligatory commands, the general law in its application to other cases is still of absolute authority, so that any one disputing it would be guilty of unbelief. A general text independently limited, though not of absolute authority, in the above sense is still binding.

If what is excluded by an independent limiting text is not ascertainable, the limitation would fail, and the original text would remain operative, though not free from doubt. When what is thus excluded is ascertainable, the application of the limiting text may be extended by analogy. But if the limiting text be subsequent in date, it, being according to Ḥanafís partially repealing, would not be so extendible. The reason is that, if a partially repealing text were to be extended by analogy, the effect would be the repeal of a text, or part of a text, by analogy which is not allowed. In the case of a text which is merely qualificative, the same question does not arise, because it is simultaneous with the text itself.[1] Let us take an illustration. A man says: 'I sell two slaves of mine for a thousand dirhems, and I shall have the option to revoke the sale with respect to one of them.' Here both the sale and the option would be valid, if the slave who is the subject of option and his price be ascertainable, the limitation being treated as having the effect of a partial repeal. If, in the above case, either the slave, the subject of option, or the price be unascertained, the whole transaction will be invalid and the limitation will be treated as an exceptive

[1] 'Talwiḥ', p. 88.

clause of unascertained operation. Similarly, if a person sells two slaves and one of them dies before delivery, the transaction will hold good in respect of the survivor for a proportion of the consideration money, death repealing as it were the sale of the other.

Examples of general words

A word may be general in its grammatical form (ṣígha صيغة) and application (ma'na معنى), such as the word 'men' or only in its application. If the latter, then it may apply as meaning the entire body as a whole, e. g. the word 'community', or as inclusive of each one in respect of whom the proposition is applicable, e. g. whoever will come to me for him there is a 'dirhem', or by way of substitution (badl بدل), e. g. 'whoever will come to me first he shall have a dirhem'.

Plural number denotes at least three

Whenever a word in the plural form or a word general in its meaning though not in form is used, it must mean at least three, because in Arabic there are three numbers singular, dual and plural. But there are two exceptions to this rule, namely, in the texts relating to inheritance, and in the construction of wills. For instance, in the Qur'ánic verse: 'if he has brothers', brothers mean two or more as reducing the share of the mother to one-third. Similarly, two sisters take two-thirds between them, in the same way as three or more. If a testator gives a legacy to his relations and there are only two of them they will take the whole.[1]

Force of a plural word preceded by the

When a word in the plural form is preceded by 'the' (al), and it is not intended to indicate thereby any specific objects, it will have the force of a general term, including in its application everything to which it is applicable. For instance, a traditionary text says: 'the Imáms (are to be selected) from the tribe of Quraish.' Here the article 'the' before 'Imams' indicates that all the Imáms must be selected from that tribe. It was on this ground that the demand put forward by the Anṣár (i. e. those people of Madína, who gave shelter to the Prophet and his followers

[1] 'Talwíḥ', p. 95.

when he retreated to that city) at the time of election of Abú Bakr to the Caliphate that there should be one Imám or Caliph from the tribe of Quraish, and another from among themselves was held to be contrary to the law.[1] The plural number when preceded by the article 'the' also denotes genus according to Abú Ḥanífa. For instance, if there be a bequest to A and the poor men, A would take half and the poor as a body would take the other half. A determinate (mu'arraf معرف) plural form, without the definite article preceding it, is in its legal effect like a general term. Thus, if a person were to say: 'my slaves are free men', all his slaves would be emancipated. There is some difference of opinion as to whether an indefinite plural has the effect of a general term; according to the majority of jurists it has not.

Determinate and indeterminate plural

A singular number preceded by the definite article (اَل), if it be not intended to indicate a specific object, produces the same legal effect as a general term. For instance, the verse which lays down punishment for thieves, namely, 'the male and the female thief, etc.', is construed to apply to all thieves.

Effect of a singular preceded by the

An indeterminate word when used to convey the negative is also generic in its import. For instance, in the Qur'ánic verse: 'say (i.e. ask them) "Who sent down the book which Moses taught"', the word 'who' negatives all but the speaker, namely, God.

Indeterminate words

Similarly if an indefinite word be used in connection with a condition in a case where the proposition dependent on such condition is of an affirmative character, that word will be construed as a word of general import so far as it implies negation. For instance, the sentence, 'if I beat a man then so and so', means 'I shall not beat any man and if I do so then so and so.' Likewise when an indefinite term is clothed with a generic quality, it is treated as a general term in its effect. Example, when a man says: 'I will not keep company except of learned men', he would be entitled to associate with all learned men.

[1] 'Tauḍíḥ', p. 46.

Whoever

The word aiyyun (أَيٌّ) or 'whoever' when it is clothed with a quality, becomes generic; for example, a man says: 'whoever among my servants will beat you, is free', if all the servants beat the person addressed they will all be emancipated.

He who

The word 'man' (من) or 'he who' is specific in its application, but when used in a conditional speech it has the effect of a general word. Example, 'He who enters the house of Abú Súfyan is safe', all persons who seek refuge in his house will be safe.

That which

The word má (ما) or 'that which' is properly speaking intended to indicate inanimate objects, but it is sometimes used in a secondary sense, as meaning 'he who'. Example, a master of a slave girl says to her: 'if that which is in thy womb be a boy thou art free', and the woman thus addressed gives birth to twins, one male and the other female, she will not be emancipated, for by 'that which' the speaker meant 'all that'.

All of them and all

The words jamí' (جميع) or 'all of them' and kull (كل) or 'all' are generic in their effect, so that their application will not be limited to some only of the things to which they are applicable. If the word kull or all is used in connexion with an indeterminate word, it means every one of the individuals to whom the word is applicable and, if it be used in connexion with a determinate word, it would mean the whole body. A man says: 'all who (كُلُّ مَن) enter the fort first, for them is so much money', and ten men enter it together, each one of them will be entitled severally to the amount mentioned. But, if, in the above case, the word jamí' or 'all of them' had been used instead of kull or 'all', all the ten persons would share the amount mentioned between them.

Inference from a man's acts

When a man's act is reported, no general inference is to be drawn therefrom, for it is possible that the act had reference to particular circumstances. For instance, it is reported that the Prophet said his prayers in the Ka'ba (the sacred house of Mecca).

From this fact it cannot be inferred that he said his prayers generally there, whether obligatory, supererogatory and the like. On the other hand, it has to be ascertained from other sources, such as by analogy, whether all kinds of prayer were meant or only those of a particular kind.

Interpretation of a statement made in answer to an inquiry, or with reference to a particular occurrence

When a statement is made in answer to an inquiry, or with reference to an occurrence, the question whether such statement is to be regarded as of general applicability, or is to be confined to the particular facts embodied in the question or the occurrence, has several aspects. In the first place, the statement may not be independent of the inquiry or occurrence, or it may be so. If the former, it may be absolutely connected with the particular facts, or may be apparently connected with them, but admitting of the possibility of its being an independent statement or the reverse. For instance, if a man inquires: 'Is not there owing from you to me, one hundred rupees', and the answer is 'certainly'; in such a case the statement in answer is clearly connected with the inquiry. On the other hand, when it is stated: 'Mu'ádh committed whoredom, so he was stoned to death', the proposition is in its form independent, but in fact it has reference to a particular occurrence. Suppose a man says: 'Come and have breakfast with me', and the addressee answers: 'If I take breakfast with you, then so and so'. The last statement, though it is in fact an answer to a particular question, is absolute in form. On the other hand, when a man says: 'If I take breakfast with you to-day then such and such', the statement on the face of it is independent, but admits of the possibility of its having been made in connexion with an inquiry. In the first three of the above illustrations the proposition must be construed as relating to the facts involved in the particular inquiry or occurrence, and in the last it will be presumed to be absolute, but, if the man, whose statement it is, says that he meant it to be otherwise, his word will be accepted. According to Sháfi'í, the proposition even in the last case will be presumed to have reference to some particular occurrence or inquiry.

It is laid down by Ṣadru'sh-Sharí'at that, according to the general rule as accepted by consensus of opinion among the learned, that which is taken into account is the generality of the expression used in a proposition, and not the particularity of the cause or circumstance which led to it. And he goes on to add that the Companions and their successors accepted, and acted upon rules of a general applicability, though laid down with reference to the facts of a particular occurrence.[1] Possible objections to this important principle of interpretation have been thus answered by way of anticipation.[2] It may be urged that. if a proposition occasioned by the facts of a particular case were to be considered as a rule of general import, then its application to that case itself should be capable of being limited by analogy, because a general proposition covers equally all the cases to which it applies, including the one in question, and a general proposition is capable of being limited. To this it is replied that there is no reason why, with respect to some of the cases included within a general proposition, its application should not be a matter of certainty and therefore incapable of any limitation. Another objection which may be urged is that, if the wording of a proposition is alone to be taken into account, the statement of the facts of the case would be superfluous. But it is pointed out that a statement of the circumstances under which a text was revealed might be useful as furnishing historical information. It may also be urged that an answer should be held to be in concordance with the question, and this it would not be if the former is allowed to be of a general nature while the facts to which the inquiry relates are specific. In reply, it is stated that concordance between the two need not be in the nature of coincidence. All that is necessary is that the answer should solve the question.

It may be pointed out here that the interpretation by the Muḥammadan jurists, in accordance with this

[1] 'Tauḍíḥ', p. 55.
[2] 'Talwíḥ,' pp. 121-2.

rule of the traditions relating to Ṣadaqa or charity, by which a waqf intended mainly for the donor's family is supported, was condemned by the Privy Council as extravagant.[1]

An absolute and a qualified proposition with reference to the same matter

The principle of interpretation applicable in a case where there are two propositions, one absolute (مُطلق) and the other qualified (مقيد), is as follows. If what is laid down by one of them be distinct from what is laid down by the other, effect should be given to both. For instance, a man says: 'Feed a man,' and also says: 'Clothe a naked man.' In the first case there is no qualification with respect to the man to be fed, while in the latter case the person to be clothed must be naked, and since what is intended by each of the two commands is distinct, both should be complied with. When two such speeches convey the same injunction, but with reference to two different matters, in that case also according to the Ḥanafís, both of them should be given effect to. But according to the Sháfi'ís the absolute proposition must be read as subject to the qualified proposition. In the last case, that is, where the two propositions convey the same injunction, if the propositions refer to the same cause, effect must be given to both according to the Ḥanafís differing from the Sháfi'ís. For instance, regarding the alms to be given at 'Ídu'l-Fiṭr, there are two traditions, one of which says: 'Give alms for each freeman and slave', and the other: 'Give alms for each Muḥammadan freeman and slave'; here both the injunctions relate to the same cause for the distribution of alms, that is to say, each member of the household is the cause for alms to be given on his behalf. The Ḥanafís hold according to their doctrine that such alms should be given equally for the Muslim and the non-Muslim members of the household. Sháfi'í, according to whom the qualifying text controls the absolute text, holds that alms are to be distributed only for such members of the household as are Muḥammadans. If two texts relate to a single injunction of law with reference to the same facts,

[1] See 22, Cal., 632.

then according to all the one absolute in its terms will be read subject to the qualified text. For instance, it is laid down that in a certain event 'one must fast for three days', and it is also laid down with reference to the same event 'one must fast for three successive days'. The result is that the fast must be for three successive days. This rule, however, holds good only in the case of affirmative commands. When there are two prohibitive commands, one absolute and the other qualified, such as a man says: 'Do not emancipate a slave' and again says: 'Do not emancipate a non-muslim slave', there is no real conflict and each is to be given effect to, that is to say, no slave is to be emancipated at all. The general rule is that texts should be reconciled with each other as far as possible.[1]

Construction of homonyms

A homonym when used in a proposition is to be given only one of its several meanings, for it cannot be held to have been used in more than one of its senses. When, therefore, such a word occurs in a text one must pause to ascertain in which sense it is used.

Use of words to convey meaning

II. If a word is used in its original or primary application, it is regarded as a proper word (ḥaqiqat حقيقة) in connexion with such application, e.g. the use of the word bai' (بيع) to denote sale, of the word nikáḥ (نكاح) to mean marriage, of the word ṭaláq (طلاق) to mean divorce, of the word hibá (هبة) to mean a gift, of the word waqf (وقف) to mean endowment and so on, and if it is used in a sense other than the original by reason of some connexion between the two meanings, it is regarded as a tropical or secondary word (majáz مجاز) in connexion with its original application. Some writers apply the designations proper and secondary or tropical not to the words themselves, but to their meanings. Ṣadru'sh-sharí'at says that this is wrong.

Proper and secondary or tropical use of words

Dictionary, legal, conventional, and technical meanings

The application of a word may be in its dictionary, legal, customary, conventional, or technical sense. If a word is generally used in its dictionary sense

[1] 'Tauḍíḥ,' p. 57.

(لغوي), it is regarded as proper in connexion with such application and, if that word be used in another sense connected with it, that is, to convey a legal (شرعي), conventional (عرفي) or technical (اصطلاحي) meaning, it will be regarded as a trope with reference to such application and vice versa. The tropical or secondary application of a word, therefore, consists in its transference from its original to a connected sense. When a word is transferred from its dictionary meaning to a legal or technical meaning, it shows that preference is given to the latter, although it may be by reason of the connexion which subsists between it and the former. After such transference has taken place, it is the new meaning which generally dominates its application, and both the meanings cannot be assigned to it at one and the same time. For instance, the word khamr in its transferred legal sense denotes a particular kind of intoxicating liquor, though its root meaning, namely, 'something which covers or clouds the senses', may have induced such application. Therefore in legal phraseology the word khamr must be taken to denote the specific drink to which it is particularly applied and not to every intoxicant that clouds the senses. Words used in a secondary sense, having regard to the connexion between such application and their primary application, are divided into several classes. Here it has to be pointed out that, if the application of a word be what is intended thereby, it is called its meaning (ma'na معني); if it be what is to be inferred therefrom, it is called its sense (mafhúm مفهوم). If a noun be used to denote the thing for which it was invented, it is called its name (musammà مُسمّي).[1]

Different kinds of tropical use

Sometimes a word may be tropical with reference to a particular point of time and proper with reference to another. For instance, when it is said: 'Give the orphans their property when they become majors', at the time of the speech the persons indicated were orphans, that is minors without parents, but they

[1] 'Talwíḥ', p. 141.

would not be so when the property is to be made over to them, because it is assumed that they must then be majors. Sometimes a word is used as a trope as expressive of the potentiality of a thing for the thing itself, as when the word muskir (مُسكِر) or intoxicant is used to denote khamr. It sometimes happens that the connexion actuating the use of a word in a tropical sense is altogether mental (dhahní ذهني), as when the name of a thing is applied to denote its reverse. Usage also determines at times the tropical use of a word. Sometimes the connexion by reason of which a word is used figuratively may be of an outward (kháriji خارجي) character, as when the name of the whole is applied to a part or vice versa such as the use of the plural for the singular, or the use of the word raqaba (رقبة), which literally means neck, for a slave, or when a word denoting cause is used for the effect or the reverse, or a word meaning the condition of a thing is used to denote the thing itself, or a word denoting a thing is used for its quality. In the last case the secondary application is called a figure of speech (استعارة). In the text which says, 'He (God) sends down from the heavens your food', what is meant is rain which is the cause of production of food. Similarly when another text says: 'God will not allow your faith to go for nothing', by faith is meant acts of piety of which faith is the condition. When a brave man is called a lion, the latter word is used to denote the most conspicuous quality of that well-known animal.

Legal expressions used in a proper or secondary sense

A legal expression is also sometimes used in its proper sense and sometimes in a tropical sense. In such cases also, there is a common element connecting the two meanings. That common element may be the reason underlying the two transactions in connexion with which a legal term is used in its proper and secondary applications. A contract of sale, for instance, has been legalized for the exchange of property for property, and a lease or hire for the exchange of property for usufruct or services. Hence

a contract for hire of the services of freemen may be expressed as a sale in a secondary sense. Sometimes a word expressive of the cause may be used to denote the legal effect. For instance, according to the Ḥanafís, marriage creates a sort of ownership in the husband over the wife, as is shown by the fact that the husband is to pay the dower, which is the consideration for marital relationship, and has the power to dissolve the marriage. Therefore, if a contract of marriage is expressed in the form of sale, it would be valid, for instance, the woman saying: 'I have sold myself to thee for so much as dower', and the man saying: 'I accept'. Similarly a valid marriage would, according to them, be constituted, if the word importing gift is used, for gift is the cause or means of acquisition of proprietary rights. Here the words sale and gift are to be understood in a tropical sense, for in their primary sense they mean transfer of property. The Sháfi'ís, on the other hand, hold that since marriage is a contract which has been legalized for reasons of a specific character, namely, preservation of the species, the fixing of descent, restraining men from debauchery, encouragement of chastity, love and union between the husband and the wife, and of mutual help in earning livelihood, the word marriage, or its equivalent (nikáḥ نكاح or tazwíj تزويج) alone can constitute such relations.[1]

Use of figurative expressions in a contract of marriage

Shafi'i view

Sometimes a word expressive of a legal effect may be used in a secondary sense to denote the cause, but only when the latter is the effective cause designed to produce that effect, but not otherwise. For instance, the word sale is designed to denote the acquisition of ownership by the buyer and, therefore, a man making a vow to emancipate a particular slave if he buys him may say: 'If I own or acquire the slave I shall emancipate him'.

A word expressive of a legal effect may be used to denote the cause

When a statement is made in a secondary or tropical sense, it will have no legal effect in the opinion of Abú Yúsuf and Muḥammad, unless such statement understood in its proper sense could be

Conditions as to giving effect to the secondary meaning

[1] 'Tauḍíḥ', p. 71.

true, but Abú Ḥanífa does not take this restricted view. A master says of his slave older than himself in age, 'this is my son', the slave will be emancipated according to Abú Ḥanífa, because a person cannot own his own son as slave, and words importing manumission once used, their legal effect follows irresistibly and as a matter of course. His two disciples, however, differ from him on the ground that the statement could have no legal operation, because, if understood in its proper sense, it could not, possibly, be correct. It is not allowable to use a word both in primary and secondary senses at one and the same time. The Ḥanafís say that the Sháfi'ís in applying the text prohibiting the drinking of khamr to intoxicants other than the liquor known as khamr have violated this rule.

Whether a word is used in its proper or tropical sense to be ascertained from the context and surrounding circumstances

Whether a word or an expression is used in a secondary and not its primary sense is to be ascertained from the context or the surrounding circumstances, by the application of our judgement, or experience, or by the light of usage or law. For instance, the verse of the Qur'án, which says: 'Whoever so wishes ought to accept the faith', if interpreted in its primary sense, namely, as giving liberty of choice in the matter, would involve conflict with other verses of the Qur'án, which make unbelief punishable in the next life, and hence the expression 'whoever so wishes' is construed in a secondary sense, namely, that God has decreed that some would believe and others would not. Similarly, the tradition: 'All (devotional) acts are so by the sincerity of intention' cannot, our reason tells us, be construed in its primary sense, namely, as meaning that the physical existence of acts of worship, such as prayers, fasts, etc., when actually performed, is negatived if not accompanied with sincerity of intentions, but that it must be understood in a secondary sense, namely, that no spiritual benefits would, in the absence of sincerity of purpose, result from such acts. Similarly, when a man says to another: 'Divorce my wife if thou art a man', here by usage the phrase 'if thou art a man' should be understood in a secondary sense, namely, as an emphatic expression. A statement to the effect: 'I shall not eat out of this date tree' would, from physical

necessity, mean that he would not eat of its fruits. Similarly, when an agent is appointed for the purposes of khuṣumaṭ, the word khuṣumaṭ which primarily means dispute or quarrel is to be understood in a secondary sense, namely, a suit in court.

It need hardly be pointed out that not only a single word or phrase, but a sentence or speech may be used in a proper or tropical sense. For instance, if a person who believes in a creator says: 'The spring has brought forth grass', the speech would be regarded as a trope, for it is really God who has brought it into existence.

Plain and allusive words

If the application of a word be such that the intention of the speaker is disclosed thereby, it is called plain (ṣarīḥ صريح), otherwise it is called a metonym or allusive word (kināya كناية). A proper word, the original application of which has not been lost or impaired, is regarded as plain with reference to such application; but, if the original application has been lost or impaired, it is held to be allusive with reference thereto. Similarly, if a word, the tropical application of which preponderates, is used, it will be regarded as plain reference to such application, and allusive with reference to its original application.

When plain words are used, the intention of the person using them is to be gathered from the words themselves and is not a matter for any further inquiry. Such expressions operate much in the same way as estoppel by deed in the English law. But, in the case of an allusive expression, one has to ascertain what the speaker meant thereby, and this may be done by inquiring of the speaker himself, or by consideration of the surrounding circumstances.[1] The reason is that when a person uses an expression of the latter kind, he fails to disclose, and to make clear what he meant, while this does not hold good when he has made use of a plain expression. Legal matters requiring certainty in their proof, such as offences entailing the punishment of ḥadd (حد), cannot be established by language which is not plain, for instance,

[1] 'Talwīḥ', p. 233.

a person making an admission of such offences in words, which are not plain, would not make himself liable to such punishment.

It may be noted here that writings (kitábat كتابة) are grouped into three classes in this connexion:

(1) Writings, which are legible and in the customary and regular form (mustabínun mursúmun مستبين مرسوم), such as writings on paper with proper superscriptions, as 'from so and so to so and so'. Such formal documents stand on the same footing as a plain speech.

When used in writings

(2) Writings, which are legible but not in the customary and regular form (mustabínun ghairu marsúmin مستبين غير مرسوم), such as engravings on a wall or a leaf of a tree, and apparently also writings on paper, if not in the customary and regular form, that is, informal documents. These inscriptions and writings are to be regarded as an allusive speech admitting of inquiry as to what the writer meant.

(3) Delineations, which are not inscriptions or writings in a perceptible and lasting form (ghairu mustabínin غير مستبين), such as delineations of words in the air or water. They are not taken into account at all, any more than a speech which is not heard.

Gestures or signs (ishárát إشارات) of the deaf and dumb are treated on the same footing as an allusive speech, and, according to the accepted opinion, it makes no difference whether such a person is able to write or not.[1]

The meaning of words may be manifest, explicit, unequivocal, or fixed

III. The meaning of a word in a passage or sentence may be disclosed or concealed. When it is disclosed the word is said to be apparent or manifest of meaning (záhir ظاهر); if it is still further disclosed by means of the context, it is regarded as clear or explicit (nass نص); if it is so clear that there is no room for exposition and does not admit of limitation, it is regarded as explained or unequivocal (mufassar مفسر); and if it is made still clearer so that the

[1] 'Fatáwa Alamgiri' (Calcutta edition), vol. i, pp. 533 4; 'Hedáya', vol. ix, pp. 447-9; 'Kifáya', vol. ix, pp. 447-9.

possibility of repeal is precluded, it is said to be settled or unalterably fixed (muḥkam محكم). For instance, the meaning of the Qur'ánic text, 'God has made sale lawful and forbidden' (riba), is manifest so far as the legality and illegality respectively of the two transactions are concerned, and is regarded as explicit in distinguishing riba from a sale. Similarly of another verse of the Qur'án, namely, . . . 'two, three and four', the meaning is manifest so far as the legality of marriage is concerned, and is explicit as regards the number of permissible wives. In the verse, 'Verily, God knows everything', the meaning is regarded as unalterably fixed, because there is no possibility of repeal of what is so laid down. Of the verse in the Qur'án, 'so the angels prostrated themselves all of them', the meaning is regarded as unequivocal. A text, the meaning of which is unequivocal, is not capable of being restricted or limited in its application though it may be repealed.

The meaning may be obscure, difficult, vague or unintelligible

If the meaning of a word be concealed by reason of an extraneous circumstance, it is called obscure (khafí خفي). If a word be obscure of meaning in itself, but is capable of being understood by the application of our judgement, it is regarded as difficult (mushkil مُشكل); if the meaning of a word cannot be discovered except with the help of another text, it is called vague (mujmal مُجمل); and if its meaning cannot be discovered at all, it is called unintelligible (mutashábahi مُتشابه).

Examples: In the verse relating to punishment of a thief (sáriq), the meaning is obscure so far as its application to persons stealing shroud cloths, and to pickpockets is concerned, because in Arabic there are separate words for such malefactors, namely, nabbásh and ṭarrár. If, in a case like this, the separate name is due to some circumstances in addition to those to which the word in the text applies, the former will be held to be covered by the latter, but not if the new word imports some deficiency. The verse of the Qur'án, 'and God has prohibited riba', is vague,

The text regarding riba

because the dictionary meaning of riba is increase, and by consensus of opinion every increase or profit is not unlawful, and it is not disclosed what sort of increase or profit is prohibited. But the Prophet has mentioned six things as coming within the prohibition, and hence it is necessary to reflect and inquire what is the effective cause of the text, so that it may be applied to other things coming within its scope. Examples of unintelligible words are furnished by the letters at the beginning of certain chapters of the Qur'án, such as Alíf, Lám, Mím.

When the meaning of a word is undisclosed, it calls for inquiry, when it is difficult, both inquiry and reflection, and if it is vague, then one should first of all seek for its explanation, then inquire and then reflect, as we have just seen in the case of the Qur'ánic text regarding riba. If the words of a text are unintelligible, all inquiry must be stopped.

Words to be interpreted in their ordinary sense unless the context requires a different interpretation

Men possessed of understanding do not ordinarily use language in any but its ordinary sense and, therefore, words must be understood in the ordinary sense unless the context shows that they are used in some other sense. Sometimes the context serves to make it certain that the language of a text has been used in its ordinary sense.

Absolute or certain text

A text is said to be absolute (qaṭa'í قطعي) in two senses: first, when it precludes all possibility of doubt with regard to its proof or its meaning, e. g. a continuous tradition or a text of fixed or unalterable meaning; secondly, when it precludes the possibility of any doubt being cast on its proof or meaning by authoritative reasoning. If a text is absolute in the first sense, it conveys certain knowledge ('ilmu'l-yaqín علم اليقين), and if in the latter sense it conveys knowledge satisfactory to one's mind ('ilmu'ṭ-ṭamániyata علم الطمانينة).

The different ways in which the meaning of a word is indicated in a sentence

IV. A word conveys its meaning either by denoting the thing to which it is originally applied (mauḍú' lahu موضوع له) or some part of it (juz جزء), or that which it necessarily implies as a consequence of its application in the text (lázimuhu'l-mutákhkhar

لازمہ المتاخر). Such expression of meaning may be directly by the language of the text ('ibáratun عبارۃ) or indirectly by way of connotation or suggestion (isháratun إشارۃ). Sometimes a word may indicate something which its application in the text necessarily implies as a condition precedent (iqtaḍá'an إقتضاءً); sometimes from what is expressed in a text, it may appear that it applies to some other matter which comes within its intendment by the implication of language (dalálatan دلالۃ). These modes of interpretation are called istidlál (استدلال) by some Ḥanafí writers.

Denotation and connotation of meaning

The text of the Qur'án, which says: 'For the destitute who have retreated. . .' denotes by its language that what is meant for them is a share in the property acquired in war. It also suggests that the right of such persons to what they have left behind is lost, because the word 'destitute' is applied only in respect of men who possess nothing, and this could not be predicated of the men alluded to in the text, unless their right to what they have left behind had ceased to exist. In the verse, 'and the maintenance of women is (incumbent) on him for whom she has given birth to children', the language understood in its original application means that the maintenance of the wife is obligatory on the husband. It also connotes that the maintenance of a child is obligatory on the father, for its descent is imputed to him. Again, as the child is imputed to the father, and the text shows that the mother gives birth to the child for the father, the text also suggests that the latter has a right to the child. But as it is not possible for the father to own the child itself, the law gives the father right to the possession of the child's property as guardian.

Necessary implication

A man says: 'Emancipate your slave on my behalf for one thousand rupees'; it necessarily implies as a condition precedent that the owner should sell the slave first to the speaker for a thousand rupees, and then emancipate it as his agent, because a man cannot emancipate a slave who is not his own property. In these cases the law only implies such things as are absolutely necessary. Hence conditions which are

capable of being dropped may be ignored, but not those conditions that may not be dropped. In the above illustration, for instance, the owner of the slave need not go through the formality of making the proposal to sell and the intending emancipator of accepting the offer, but it will be sufficient if, on the latter paying the consideration money, the former should emancipate the slave on his behalf. But supposing there was to be no payment to the master of the slave, in other words, if what was meant was that he should make a gift of the slave to the speaker, and then emancipate him on behalf of the donee, delivery of possession by the donor would be necessary, because delivery of possession is an indispensable condition of a gift. On the other hand, in a transaction of sale proposal and acceptance in so many words are not necessary.

Therefore, what is established by such necessary implication cannot have the effect of a general proposition, nor would it be capable of specification. If a man says to his wife: 'Thou art divorced' or 'I have divorced thee', intending thereby to mean triple divorce, it will nevertheless have the effect of a single or revocable divorce. Here the argument is that the wife not having, in fact, been divorced at the time the words were uttered, the legal result, namely, divorce of a revocable character, must be the creation of law, since the words actually used were in the past tense, and not in the future, and, therefore, so far as such words are concerned, the divorce is established by them by implication, and hence the speaker cannot be heard to say that what he intended was triple divorce. On the other hand, if a man were to say to his wife: 'divorce thyself', the result, namely divorce, is attributable to his words, and hence he would be entitled to declare whether he meant thereby a single or triple divorce.

Intendment or mischief of a text

Let us take an illustration of what comes within the intendment or mischief of a text (فحوى الخطاب). The Qur'ánic verse, inculcating the duties of children towards their parents, which says: 'Do not say to them uf' (أف an Arabic exclamation of anger or contempt),

is interpreted as prohibiting the beating of parents, because the saying of 'uf' causes pain to the person to whom it is addressed and *a fortiori* so does striking. What is established as falling within the intendment of a text, stands on the same footing as what is laid down by it directly or by suggestion. The law derived by such interpretation is of a higher authority than that established by an analogical deduction, because the latter is not based on the words of the text, but on its effective cause ascertained by the exercise of judgement. Therefore, matters like punishment of ḥadd and retaliation, which require absolute certainty in the law imposing them, can be established by interpretation of the intendment of a text though not by analogy. It is, however, urged that, in fact, this is not interpretation properly so called, but analogical deduction of a manifest and absolute nature, but Taftázáni observes that this is quarrelling over words.[1]

Affirmation with respect to a particular matter does not imply negation of the proposition with respect to other matters

When an affirmation is made with respect to a particular matter, it does not, according to the Ḥanafís, imply negation of the proposition with respect to other matters; for instance, when it is said that Muḥammad was a prophet, it does not follow that there was no other prophet. Indeed, if it were otherwise, there could be no analogical deduction. Nor does a prohibitive command imply that an obligation is imposed with respect to the contrary. But according to Sháfi'ís, when a text refers to a thing specified by a certain quality, it would not apply to anything which does not possess that quality. The Ḥanafís, however, do not take that view.

How words in their application give rise to commands of law

The next subject for inquiry is how words in their application give rise to commands of law, such as, declaring an act to be obligatory, forbidden, permissible, and so on. A law may be expressed in such a form that truth or falsehood cannot be asserted with respect to it, as when the lawgiver says: 'do this', or 'do not do that', or in the form of information or narration (akhbár اخبار), so

[1] 'Talwíḥ', pp. 257–9.

that truth or falsehood may be asserted with respect to it having regard to such form and not to any extrinsic fact, such as the truthfulness or otherwise of the lawgiver. A proposition of law stated in the form of narration is regarded as even more authoritative than what is expressed in the ordinary form of a command. The reason given is that the former assumes the existence of a certain state of things which must be legally correct; because otherwise the Lawgiver, namely, God, would be liable to an imputation of falsehood, a supposition which obviously cannot be entertained. For instance, when a Qur'ánic text says: 'the mothers suckle their children', it must be assumed that mothers are bound in law to suckle their children, or otherwise God would not have stated as a fact that they do so. When a law is laid down in the other form, it is called originating (inshá' انشاء). A law enunciated in the originating form may be either affirmative as when a superior says to his inferior: 'do this' or prohibitive as when the former says to the latter: 'do not do this'.

Imperative words

According to the Ḥanafís when an imperative is used it prima facie imposes an obligation to do the act to which it refers. But it may appear from the context or other relevant circumstances, that what was meant was that the person addressed would be commended for doing the act, or that he was simply permitted to do it, and not that it was made obligatory (wájib واجب) on him. For instance the verse of the Qur'án in which God says: 'When you enter into transactions with one another reduce them into writing' is construed to recommend the recording of transactions and not to make it obligatory, in other words, as being directory and not mandatory. So also when it is laid down by a text: 'so you hunt for game', hunting is intended thereby to be permissive. Some jurists say that the mere use of an imperative does not prima facie convey a mandatory command, because the imperative form is used in other connexions as well. But it is pointed out that, if that were so, there could be no law. Some jurists, on

the other hand, hold that an imperative word must at least mean recommendation and according to some, it means only permission. The Ḥanafís say that permission is always implied by the imperative form, and that prima facie it tends to impose obligation. Whether a speech of the lawgiver expressed in the imperative form has in a particular case the effect of making the act obligatory, or merely commendable, or permissible is to be determined by the context. Similarly, interpretation of the words of a prohibitive text, so far as its legal effect is concerned, must in most cases be governed by the context.

Goodness and badness of acts

But there are certain general principles by which the legal effect of both imperative and prohibitive texts is determined. The operation of these principles depends to a large extent on the character of the act to which a particular command may relate, namely, whether it is good (ḥusanun حسن) or bad (qubḥun قبح), or, in other words, right or wrong.

This matter is discussed at some length in the books, but I do not think it necessary to enter upon a consideration of the metaphysical and scholastic arguments adduced in support of the different views. I shall satisfy myself with stating the more important doctrines on the point, in so far as they bear upon the question relating to the respective function of law and reason in determining the goodness and badness of acts, and the exact relations which such attributes bear to the legality or illegality of acts. Goodness and badness are used in three different senses. First, that of an act being pleasing or repellent to a man's mind; secondly, as indicative of the quality of perfection or imperfection; and thirdly, in the sense of an act being deserving in the estimation of law of praise in this world and of reward in the next, or of censure in this world and punishment in the next world. There is no question but that in the first two senses, the goodness and badness of acts are discerned by our reason. But there is a difference of opinion with reference to the third sense, the Ash'arís representing the extreme view of one school of thought and the Mu'tazilís representing the other extreme. The

Matridi doctrine which on this subject may be said to represent the opinions of the bulk of the Sunnís agrees with that of the Mu'tazilís with certain reservations.[1] It is undisputed that what the law enjoins must be good and what the law forbids must be bad. But the Ash'arís go further, and hold that a good act is what is enjoined by the law and a bad act is what is prohibited by it, that is to say, goodness or badness of an act is established solely by the injunctions of the law. The Mu'tazilís, on the other hand, hold that an act which our reason tells us is good must be enjoined by the law, and what is so ascertained to be bad must be forbidden by the law. In the result it amounts to this, that our notions of right and wrong must, according to the latter, decide what the law is; but according to the former, they are altogether irrelevant in such an inquiry. The Matridis differing from the Ash'arís hold with the Mu'tazilís that the goodness and badness of acts in the legal sense is in most cases ascertainable by our reason independently of the law. They do not, however, agree with the Mu'tazilís that the lawgiver is bound to enjoin what is good and to forbid what is bad, for the lawgiver can be under no obligation. At the same time according to them it is not possible for the lawgiver to enjoin what is bad according to our reason, and to forbid what is good. The difference between the Mu'tazilís and the bulk of the Sunnís would thus seem to be more verbal than substantial.

Acts good or bad per se, or with reference to something else

An act may be good or bad *per se*, or it may be good or bad with reference to something else, which again is good or bad *per se*. If the latter, that something to which the act in question refers, may be either a part of it or extrinsic to it. When it is part of the act, it may be such that the juristic name for the latter should be applicable to the former, as the term 'Ibádat, or act of devotion, is applicable to ṣalát or prayer though it is but a part of it; or it may not be; for instance, the word prayer is not appliable to the act of prostrating, though it is part of prayer.

[1] Baḥru'l-'Ulúm's Commentary on 'Musallumu'th-Thabút', p. 13, et seq.

Jihád, or religious war, is an example of an act which is deemed to be good with reference to something extraneous, for it consists in fighting the hostile non-Muslims, and fighting is not good in itself, but is regarded as good, only so far as the authority of Islám is upheld thereby.[1] Hence if such non-Muslims embrace Islám there is no further ground for jihád.

Good acts

Of acts which are good in themselves, some may not be omitted, such as mental acknowledgement of faith (taṣdíq تصديق), and some may be omitted such as expression of such acknowledgement in words (iqrár اقرار). Omission of an act good in itself is not allowed, except when there is sufficient excuse for it. Therefore, if a man refrains from acknowledging the faith, he will not be called mu'min, unless such abstention be for a valid excuse, such as duress. Sometimes an act good in itself may bear resemblance to what is good with reference to something else. For instance, payment of the poor-rate, fasting and pilgrimage have reference respectively to removal of the wants of the poor, the discipline of a man's soul and a visit to the sacred house at Mecca.[2] But since the poor have no right to the payment of the poor-rate, and there is no reason why one should visit the house at Mecca, and fasting is doing violence to one's nature, all extraneous considerations are discarded, and the law considers such acts as pure acts of devotion. Hence full legal capacity is a condition for the discharge or performance of these acts.

Prohibitive words

When physical acts such as killing, whoredom, drinking alcohol, and the like are subject of a prohibitive law (nahí نهي), they are to be regarded prima facie as bad *per se*. It may, however, appear that such prohibition is due to the badness of something else. And if that something be part of the act itself, the effect is the same as if such act was bad *per se*, but it would be otherwise if it is merely a concomitant circumstance. In the first case the prohibited act is legally void and of no effect, but not in the second.

[1] 'Tauḍíḥ' (Calcutta edition), p. 189.
[2] Ibid., p. 190.

When a juristic act is the subject of a prohibitive command, it is affected according to Sháfi'í in the same way as a physical act. But according to the Ḥanafís, prohibition of a juristic act prima facie means that it is not bad *per se*, but by reason of something else, unless it appears to be otherwise.

Void, vitiated and abominable acts

When an act is found to be prohibited as being bad *per se*, it is legally void (باطل) according to all. If it is prohibited by reason of something which is a quality of the act itself, or because of some concomitant circumstance, the act is regarded as legally correct (ṣaḥíḥ صحيح) in its essence, and the prohibition is taken to apply to that quality or circumstance. When the prohibition refers to a quality of the act, the act is vitiated or faulty (fásid فاسد), and if to a concomitant circumstance it is abominable (makrúh مكروه). Examples: sale with an invalid condition, a transaction involving riba, sale of wine, sale during call to prayers. A vitiated or abominable act is valid in law, but involves sin, and is not, therefore, called mubáḥ, which means spiritually indifferent. It is in this sense that a vitiated contract of sale is said to be contrary to the injunctions of religion.[1] And further, because a vitiated transaction entails sin in not conforming to a particular injunction, the law permits the parties to withdraw from it until the rights of third persons have intervened.

The reason why the Ḥanafís hold that a prohibitive injunction with reference to a juristic act should be presumed not to refer to the act itself, but to some adventitious circumstance connected with it, is thus stated. A juristic act is formed of certain elements as its constituents, and depends for its operation on the conditions imposed by law in that behalf; hence if it fulfils these requirements, any prohibition with reference to it must necessarily be taken not to affect its essential legal character. Some jurists have objected to this doctrine of the Ḥanafís on the ground that its plain effect is to permit as legal acts which

[1] 'Raddu'l-Muḥtár', vol. iv, p. 110.

entail sin. Whatever the force of the objection from a strictly religious point of view, the principle of law in its secular aspect necessitates, in such cases, the distinction between the legal operativeness of a transaction and the religious responsibility of the persons entering into it.

The presumption that a juristic act does not lose its essential validity because of a prohibitive injunction with reference to it, is, however, capable of being rebutted in particular cases. If it be shown that the prohibition was intended to declare a juristic act, or its constituent part, to be bad *per se*, then, according to all, it would be void altogether as if it were repealed. For instance, the text prohibiting sale of a foetus in the womb of an animal has the effect of making such a sale void, because it declares the subject-matter of it to be unfit for the purpose, and when the subject-matter is wanting the juristic act of sale is not constituted. Similarly by the precept of the Prophet 'there is no marriage except with two witnesses'; a marriage, which is not contracted in the presence of two witnesses, is negatived and becomes void.

Authentic interpretation

We now proceed to the question of authentic interpretation (بیان), that is, interpretation of one text by another. Most of the principles applicable to this matter have been considered in connexion with the question of interpretation of words and speeches generally. I shall here briefly mention certain rules appertaining more specially to the present subject.

When interpretation of this kind is of the language used in a text, it relates either to its meaning, as distinguished from the interpretation of the intention of the lawgiver from his conduct, or to what appertains to it, such as the duration of the law laid down by the text under interpretation. Interpretation of the latter kind serves to indicate whether there has been alteration of the law by way of repeal (نسخ). That is how Ṣadru'sh-Sharí'at, following Fakhru'l-Islám, brings in repealing laws under the heading of interpretive laws. Their theory is that, when a revealed law is abrogated by another revealed law, it means

that the former is to have operation until the revelation of the latter. But other jurists object to this doctrine on the ground that the repealing law deprives the repealed law of all its effect, and, therefore, to say that the one interprets the other is an artificial use of the term. Taftázání points out that, if interpretation be taken to mean discovery of the intention of the lawgiver with respect to the operation of a text, and not merely of what he meant to convey by it, Ṣadru'sh-Sharí'at's theory would be well founded.[1]

Explanatory texts

When interpretation relates to the meaning of a text, it may involve a change in its application or it may not. When interpretation involves no change in the application of a text, its object, when its meaning is ascertainable, is to make it still clearer by fixing it (taqrír تقرير) beyond the possibility of its being misunderstood, and when it is obscure or vague, then to explain it (tafsír تفسير). In this sense a text of the Qur'án may be interpreted by a tradition whether isolated, continuous, or well known and vice versa. An interpretive text of this character may, according to all the jurists, be either simultaneous with the original text or subsequent thereto.

Amending and repealing texts

Interpretation involving a change in the application of a text may introduce an exception, a condition, or a quality, or indicate the extent of such application. Such amending laws may be embodied in a text of the Qur'án, or of a continuous or well-known tradition, but not in a tradition of isolated origin. An interpretive text of this category must, except in the opinion of 'Abdu'lláh ibn 'Abbás, follow close upon the original text, and be connected with it, so that both may be read together as one. This, according to them, is the very nature of an exceptive, conditional, or qualitative clause as already explained.

When one independent text modifies another text by limiting the application of words of general import in the latter, the two texts may be simultaneous or not. If the limiting text be of a later date, it will be regarded by the Ḥanafís as partially repealing

[1] 'Talwiḥ' p. 456.

the first text. The Sháfi'ís, however, differ on this point from the Ḥanafís. According to the latter a text of general applicability is an authority not altogether free from doubt, as it might be understood to include all the cases that fall within the scope of its language, or only some of them. Hence, if a subsequent text shows that the application of the original text is limited, they would regard it as explanatory of the latter. In their opinion, therefore, a limiting text is really in the nature of an exceptive clause. The Ḥanafís hold that, as a subsequent modifying text effects a change in the law of the original text and is not part of it, it must be regarded as repealing in its effect.

The result of the difference of opinion is this. The Sháfi'ís, contrary to the Ḥanafís, would allow such modification and limitation to be made by an isolated tradition. Thus we find that relying on such a tradition they permit the addition of twenty stripes to the number prescribed for the offence of slander imputing unchastity, and hold that the testimony in support of a plaintiff's case may either be that of two men, or of one man and two women, and they also similarly hold that the testimony of one man plus the oath of the plaintiff is sufficient in law.

Rules as to repealing texts

One text is said to be repealed by another when the two are in conflict. Two texts are held to be in conflict, if one of them imports the negation of what the other lays down, provided that both refer to the same subject with reference to the same point of time, and both are of equal rank, or if one of them is of a higher rank than the other, it is by reason only of a subsidiary circumstance. When there are two isolated traditions, for instance, one of which rests on the authority of a narrator who is also a jurist, while the narrator of the other is not a jurist, the former is said to have an advantage over the latter of a subsidiary nature. When two texts are really in conflict, the one earlier in date is taken to have been repealed by the one later in date, as it cannot be conceived that God intended that two inconsistent laws should be in force at the same time. If their dates be not

known, attempts should be made to reconcile them, as far as possible, by means of interpretation. It is permissible to act upon the law so interpreted, though its soundness may not be free from doubt. If two conflicting texts, the dates of which are not known, cannot be reconciled with each other, then such conflicting texts must be disregarded, and one must look to other authorities for guidance. For instance, if there are two such Qur'ánic texts then one must refer to the traditions for guidance and if that fails, to analogical deduction and to the dicta of the companions. The *raison d'être* of the repeal of laws is that what may be good for men of a particular time may not be good for men thereafter. An important precedent for this is to be found in the repeal of one revealed religion generally by its successor.

Both the repealing and repealed laws must be revealed

Both the repealed and the repealing texts must be revealed. Repeal, according to the Ḥanafís and most of the Sháfi'í and Málikí jurists may be (1) of one Qur'ánic text by another, (2) of one traditionary text by another, (3) of a Qur'ánic text by a traditionary text, and (4) of a traditionary text by a Qur'ánic text. There are some Sháfi'ís and Málikís who agree so far as (1), (2) and (4) are concerned, but not as to (3) that is to say, they do not admit that a Qur'ánic text can be repealed by a traditionary text. There are several instances of (1), and it will be sufficient here to cite a case or two by way of illustration. In Súratu'l-Baqara it is laid down that one should make provision by will for his parents, and other relatives but so far as it sanctions bequests in favour of a man's heirs the verse in question has been abrogated by implication by a verse in Súratu'n-Nisá' by which the parents and certain other near relatives of a deceased person are allotted certain shares in the inheritance as heirs.[1] By a verse in Súratu'l-Baqara it is laid down that widows are entitled to maintenance for a year but this has been repealed[2] by a verse of another

Examples of repealed laws

[1] See 'Tafsír-i-Kashshaf', p. 124.

[2] See 'Tafsír-i-Aḥmadí', pp. 154, 242–3; 'Tafsír-i-Jalálain', p. 35; 'Tafsír-i-Kashshaf', p. 163.

Súra, namely an-Nisá'. It may be observed here that in *Aga Mahomed Jaffer Bindanim* v. *Koolsom Beebee*[1], in which it was contended on the authority of the verse in Súratu'l-Baqara that a widow is entitled to maintenance for a year, the fact that this verse had been repealed was not brought to the notice of the Committee which disallowed the contention on the authority of 'Hedaya' and 'Fatáwá Álamgírí'. There are also many instances of repeal of one traditionary text by another, for example, the Prophet in one of his earlier precepts condemned the practice of visiting the tombs of deceased persons, but afterwards permitted it by another precept. The repeal of a Qur'ánic text by a tradition has been of rare occurrence. Of repeal of a traditionary injunction by a verse of the Qur'án, one instance at least is well known. The Prophet had enjoined by his precept that a Muslim, while saying his prayers, should turn his face in the direction of Jerusalem, and this practice prevailed for some time, until a Qur'ánic text was revealed, directing the Muslims to turn their faces towards the Ka'ba.[2] As the repealing law must be a text of the Qur'án or tradition, there could be no repeal of Islámic laws after the death of Muḥammad, who, it is believed, was the last of the prophets.

A Qur'ánic or traditionary law cannot be repealed by Ijmá' or analogy, as both the latter are of a subordinate rank to the Qur'án and Ḥadíth. A rule based on analogy may, no doubt, be superseded by another analogical deduction, which having the concurrence of the entire body of the learned, amounts to Ijmá' or a rule based on one Ijmá' may be superseded by a subsequent Ijmá'. In the latter case, but not in the former, the rule subsequently resolved upon may well be said to repeal the rule which was at first laid down, but the terms 'repealing' and 'repealed' are more generally used in connexion with Quar'ánic and traditionary texts. One analogical deduction cannot be said to repeal another, because it cannot be said

[1] 25 Cal., p. 9.

[2] The sacred House in Mecca.

with reference to either of such deductions that it is correct beyond any doubt.

In this connexion we must remember that a Qur'ánic text has twofold aspects; its words (naẓm نظم), which by themselves have a spiritual significance and the legal injunction which the text lays down; in other words, repetition of the words of a Qur'ánic text, though without understanding them, secures spiritual reward, and any disrespect shown to such words entails sin, apart from the question of obeying or violating the injunction of the text. Sometimes a Qur'ánic text may be repealed so far as its language is concerned (naskhu'l-qirá'at نسخ القراءة) and sometimes only the law which it enunciates (naskhu'l-hukm نسخ الحكم), and sometimes both. If merely the injunction of a Qur'ánic verse has been repealed, its words would still be regarded as part of the Qur'án, so that their recitation during prayers would bring spiritual benefit. When both the words and the law of a text are repealed, that text no longer forms part of the Qur'án. Repeals of this kind were brought about by God making the reciters of the Qur'án forget the words of the texts so repealed, at the time of its collection. Instances of such total repeal have been very few.

Authentic interpretation by way of necessary implication

Authentic interpretation by the lawgiver may also be in the nature of necessary implication (bayan ḍarúratin بيان ضرورة) of what is left unsaid from what has been said. For instance, it is laid down in the Qur'án '. . . and his heirs are his parents, so the mother will have one-third.' Here the case supposed being of a deceased person leaving only his parents, and no other preferential heirs, the necessary implication is that the remaining two-thirds will go to the father. Or the necessary implication may arise from the conduct of the lawgiver, for instance, when the lawgiver sees men practising certain things, but reveals no law prohibiting such acts, the inference to be drawn is that he does not disapprove of these acts. This is the principle on which the validity of customs and usages, as already mentioned, is based in Muḥammadan jurisprudence.

In connexion with the rules of interpretation, the jurists also discuss matters relating to the nature and classification of obligations, the performance of acts the subject of a command (الايتان بالمامور به) or, in other words, the discharge of duties and obligations, and the question of applicability of laws to non-Muslims. But I have ventured to transpose these topics under other heads, as it seemed to me that such rearrangement would be more convenient in dealing with the subject of this discourse.

PART II—IJMA' AND CUSTOMS

SECTION 1—IJMA' OR CONSENSUS OF JURISTIC OPINION

Definition of Ijma'. Texts in its support

Ijmá' is defined as agreement of the jurists among the followers of Muḥammad in a particular age on a question of law.[1] Its authority as a source of laws is founded on certain Qur'ánic and traditional texts. The principle underlying these texts is expressed in especially apt terms in one of them which says: 'Whatever the Muslims hold to be good is good before God.'[2] The other texts relied on in this connexion are the following:—

'My followers will never agree upon what is wrong.'[3]

'It is incumbent upon you to follow the most numerous body.'[4]

'The (protecting) hand of God is over the entire body and no account will be taken of those who separate themselves.'[5]

'Whoever separates himself (from the main body) will go to hell.'[6]

'He who opposes the people to the extent of a span will die the death of men who died in the days of ignorance.'[7]

[1] 'Tauḍíḥ', p. 498; 'Mukhtaṣar', vol. ii, p. 29; 'Jam'u'l-Jawámi'', vol. iii, p. 288.

[2] A tradition, see 'Tauḍíḥ', p. 298; 'Kashfu'l-Isrár', vol. iii, p. 258.

[3] Uḍdi's Commentary, vol. ii, p. 31.

[4] A tradition, see Kashfu'l-Isrár, vol. iii, p. 258.

[5] Ibid, p. 258.

[6] A tradition, see Uḍdi's Commentary, vol. ii, p. 34; 'Taqrír', vol. iii, p. 85.

[7] A tradition, see 'Tauḍíḥ' on the margin of Talwíḥ, p. 515.

'God does not allow the people to go astray after He has shown them the right path.'[1]

'Do not be like those who separated and divided after they had received clear proofs.'[2]

'To-day we have completed your religion.'[3]

'What lies outside the truth is an error.'[4]

'Obey God and obey the Prophet and those amongst you who have authority.'[5]

'If you yourself do not know, then question those who do.'[6]

'You are the best of men, and it is your duty to order men to do what is right and to forbid them from practising what is wrong.'[7]

'We have made you followers of the middle course so that you may be witnesses (of truth) to others.'[8]

'He who breaks away from the Prophet after he has been shown the right path and follows the ways of men other than Muslims, we shall give him what he has chosen and relegate him to hell.'[9]

The four Sunní Schools of law hold Ijmá' to be a valid source of laws not only upon the authority of the above texts, but also on the unanimity of opinion to that effect among the Companions.[10] The Sháfi'ís and the Málikís recognize the authority of Ijmá' not merely in matters of law and religion but also in other matters such as organization of the army, preparations for war and other questions of executive administration.[11] Ijmá' is an essential and characteristic principle of Sunní jurisprudence, one upon which the Muḥammadan community acted as soon as they were left to their own resources and were called

Ijma' is an essential principle of Sunni jurisprudence

[1] 'Tauḍíḥ', p. 300.

[2] A Qur'ánic verse, see 'Tauḍíḥ', p. 299.

[3] Ibid., p. 299.

[4] Ibid., p. 294.

[5] A Qur'ánic verse, see 'Súratu'n-Nisá'.

[6] Ibid. see 'Tauḍíḥ' on margin of 'Talwíḥ', p. 514.

[7] Ibid. see 'Bazdawí', vol. iii, p. 255.

[8] Ibid., p. 256.

[9] Ibid. see 'Tauḍíḥ' on the margin of 'Talwíḥ', p. 508.

[10] 'Bazdawí', p. 253; 'Tauḍíḥ', p. 283; 'Mukhtaṣar', vol. ii, p. 30; 'Jam'u'l-Jawámi'', vol. iii, p. 308.

[11] 'Jam'u'l-Jawámi'', vol. iii, pp. 288, 305-7; 'Mukhtaṣar', vol. ii, p. 29.

upon to solve the first and most important constitutional problem that arose on the Prophet's death, namely, the selection of the spiritual and executive head of the community. The election of Abú Bakr to the Caliphate by the votes of the people was based, as is well known, on the principle of Ijmá'.

Among the Shí'ahs some jurists hold that questions relating to the Sharí'at cannot be authoritatively determined by mere consensus of opinion, while other Shí'ah jurists, though admitting the authority of Ijmá', base it on a presumption that, when the Mujtahids agree in a certain view, they voice the opinion of the invisible Imám. Nazzám and some among the Khárijis also dispute the validity of the doctrine.[1]

Some Shi'ahs Kharijis and Nazzam do not recognize this source of law

It is not necessary to set out all the arguments on which the Sunní doctors rely in support of Ijmá', but one principal argument of theirs may be thus stated. In a Qur'ánic text already cited, it is laid down that God has completed the Islámic religion, and it is also laid down that it will last for ever, and that Muḥammad was the last of the Prophets. In the Qur'án, however, only a few rules of law have been enunciated, and these are by no means sufficient to cover the numerous questions that arise from day to day. If we add to this the fact that the Prophet is dead, and we can no longer have his guidance, it necessarily follows that any rule of law, which is not found to be explicitly laid down in the Qur'án or by the precepts of the Prophet, must be capable of being deduced from them. It further follows that, as the learned alone are competent to make such deductions, their concurrent opinion on any question must be of valid authority and it must also be infallible, since truth is one according to Islám and all besides is error.[2]

Argument in support of Ijma'

Ijmá' is of several grades in point of authority. Absolute Ijmá' insures certainty of belief so that any one not believing in the validity of a rule based on such Ijmá' becomes chargeable with unbelief. An Ijmá'

Ijma' of different kinds

[1] 'Mukhtaṣar', vol. ii, p. 29.

[2] 'Tauḍíḥ', on the margin of 'Talwíḥ', p. 510; 'Kashfu'l-Isrár', 'Bazdawí', vol. iii, pp. 226–7.

is said to belong to this category if it be one in strict conformity with the requirements of law and proved by infallible testimony. Then there are other Ijmá's which impart binding authority to the rulings founded upon them, but do not ensure certainty of belief. These are Ijmá's which are either not constituted in strict accordance with the law or not proved by universal testimony. Again Ijmá's of the Companions have in some respects a higher authority than Ijmá's of other jurists.

Who may participate in Ijma'

According to accepted Sunní opinion Muslim Mujtahids or jurists alone have a voice in Ijmá'. The non-Muslims are excluded from such juristic deliberations because the power is held to be vested by the texts in the Muslims alone, since the non-believers, being misguided as to the very authority of the lawgiver, cannot be presumed to arrive at the truth in matters of law and religion. Minors and lunatics are excluded on account of their immature or defective understanding.

The power is confined to Mujtahids, or men learned in law

Those who are not learned in the law so as to be considered fit for ijtíhád, or exposition of the laws, are debarred from participation in Ijmá' properly so called, that is, when the object of such collective decision is to settle questions, the determination of which depends upon the exercise of judgement and the power of making analogical deductions.[1] It is only in certain matters, which are regarded as the fundamental pillars of Islám, namely, the duties of saying the five daily prayers, paying the poor-rate, fasting during the Ramaḍán, and performing pilgrimage, that the law has been established by Ijmá' of the entire body of Muslims.[2] Apart from these, the masses are to follow the learned in the exposition of the laws since God has said as already noticed 'Obey God and obey the Prophet and those amongst you who are in authority'. The words 'men in author-

[1] 'Talwíḥ', p. 498; 'Mukhtaṣar', vol. ii, pp. 29, 33; 'Jam'u'l-Jawámi'', vol. iv, pp. 288-9.

[2] 'Kashfu'l-Isrár', vol. iii, p. 240. This is founded on the opinion of Abú Bakru'l-Buláqání, which has been accepted by Jaṣṣáṣ and Fukhru'l-Islám and followed by Ibn Ḥammám.

ity' have been construed to refer to the learned; they cannot in this connexion, it is said, be taken to mean rulers and governors since they are themselves enjoined in all matters appertaining to the Sharí'at to act upon the advice of the learned as is clear from the text, 'if you yourself do not know then question those who do'. This is the doctrine of the four Sunní Schools. Abú Bakru'l-Buláqání, however, would not exclude any but infants, lunatics and non-Muslims from such collective law-making, but Imám Ghazzáli points out in support of the Sunní view that, if agreement of all the Muslims were essential, Ijmá' would become impossible.[1]

Some jurists would include the general body of Muslims

The question then arises as to what are the qualifications required of a Mujtahid, that is, a person who is deemed to be competent to expound the law, so as to be entitled to participate in collective juristic deliberation. Fakhru'l-Islám lays down generally that he must be conversant with the science of law in both the branches, namely, the principles of jurisprudence (Uṣúl) and the rules of law in the different departments (Farú'). Some, however, would consider it sufficient qualification for a person to know either the theoretical or the applied laws. It is necessary for a jurist that he should have a knowledge of the Qur'án and be able not only to read it, but also to understand it and interpret its meaning. He should be familiar with the traditions reported from the Prophet and be able to distinguish the authentic from the non-authentic, the universally known and the well known from traditions of isolated origin, and should also know the nature of authority attached to each class of traditions. He must be conversant with the rules and methods of analogical deduction.[2] The mere fact of a man being a competent commentator of the Qur'án or a traditionist does not qualify him to take part in Ijmá'.[3] The question relating to the qualifications of a Mujtahid is one of importance and will be considered more fully hereafter. But what has to be

Qualifications of a Mujtahid

1 'Taqrír, vol. iii, p. 82; 'Mukhtaṣar', vol. ii, p. 33.
2 'Talwíḥ', p. 639.
3 'Kashfu'l-Isrár', vol. iii, p. 240.

observed here is that the matter is left to be determined by public opinion and not by any definite authority in the State.

How far is heresy a disqualification

According to Ṣadru'sh-Sharí'at and many other Ḥanafí jurists, Ijmá' is confined to the orthodox sects so that in their opinion heretics generally have no voice in Ijmá', while according to other authoritative Ḥanafí jurists, such heretics alone are to be excluded whose heretical doctrines amount to infidelity or who actively propagate their views. The Sháfi'ís and Málikís would only exclude those heretics whose doctrines amount to infidelity.[1]

Orthodox sects

The orthodox sects are called Ahlu's-Sunnat wa'l-Jamá'at (اهل السنة والجماعة), i.e. followers of the traditionary religion and the main body, a name which is appropriated by men belonging to the four Schools of law with whose jurisprudence we are concerned. They also describe themselves as Ummatu'l-Mútába't (أمة المتابعة), i.e. men who follow, as distinguished from Ummatu'd-Da'wat (أمة الدعوة), or Ṣáḥibu'l-bid'at (صاحب البدعة), that is, men of innovation. Those who exclude the latter from the benefits of Ijmá', rely upon the texts which impose on Muslims the duty of adhering together, and lay down that division and separation lead to eternal punishment. The reasons for excluding those heretics whose doctrines involve unbelief are substantially the same as those for excluding non-Muslims. As regards those heretics, who attempt to convert men to their own doctrines and preach against the rest of the Muslims, this very fact, which shows that their minds are biased, disqualifies them from joining in Ijmá', because a prejudiced mind cannot arrive at the truth.[2] It is only the main body of Muslims, or rather the learned among them, who are held to be incapable of erring, since God says that He has made them followers of the middle course, so that they might be witnesses of truth to others. Followers of the middle course mean persons possessing the cardi-

[1] 'Taqrír', vol. iii, p. 96; 'Mukhtaṣar', vol. ii, p. 33; 'Jam'u'l-Jawámi'', vol. iv, p. 289.

[2] 'Talwíḥ', p. 506.

nal virtues, all of which lie in moderation, and it is also clear that they, having been spoken of as witnesses of truth, must also be presumed to be men of rectitude of character ('adálat), which is an indispensable qualification for a witness. We also have it on the express authority of another text that the Muḥammadans as a body are presumed to do what is right and to prevent others from going wrong.

Examples of different forms of heresy

The Khárijís who did not accept the Caliphate of 'Alí, and also held the view that the commission of any sin however trivial turned a Muslim into a non-believer, and those Shí'ahs who disputed the right of 'Umar and 'Uthmán to the Caliphate are classed as heretics, whose doctrines indicate biased minds. As belonging to the class of heretics who are excluded from Ijmá', because of holding doctrines involving unbelief, may be mentioned men who profess that God's knowledge extends only to the actual creation and not beyond it, and those Shí'ahs who say that it was 'Alí whom God originally intended to vest with the mission of the Prophet, and that it was through a mistake of the angel Gabriel that Muḥammad received his high office. Among the heretics who are disqualified there are also men whose conduct and doctrines indicate not only bias but a hardened conscience, for instance, that class of Shí'ahs who scoff at the Companions of the Prophet like Abú Bakr, 'Umar and 'Uthmán and invent slanderous stories regarding them. Some jurists like Fakhru'l-Islám would generally exclude such heretics as propagate their doctrines and attempt to convert others, and as to the rest they would debar them from co-operation in such doctrinal matters as come within the scope of their heresy.[1] In Imám Sarakhsí's opinion, only such heretics are disqualified whose heresy is notorious, and he would admit those who do not publish their heretical doctrines, but if any particular opinion of the latter be opposed to a clear text, it will not be taken into account.[2]

[1] 'Taqrír', vol. iii, p. 96.

[2] 'Kashfu'l-Isrár', vol. iii, pp. 338-9.

Transgression of the law whether a disqualification

According to accepted Ḥanafí opinion, a fásiq (فاسق) or transgressor of the religious injunctions is excluded from these deliberations. The argument of those who hold this view is that the opinion of a man who does not act up to his doctrines is liable to distrust.[1] Further they rely in this connexion on some of the texts already cited. Such an eminent Ḥanafí jurist as Imám Sarakhsí is however of opinion that unless a man openly and flagrantly violates the law he will not be excluded. According to the accepted Sháfi'ís opinion and probably also Málikí opinion, mere transgression is no disqualificat on.[2]

Ijma' not confined to jurists of any particular age or country

According to the accepted opinion of all the four Sunní Schools, Ijmá' is not confined to any particular age or country.[3] The Málikís recognize the validity of Ijmá' of the Companions and their successors residing at Madína, without reference to the opinion of others.[4] According to one reported version of Imám Ḥanbal's opinion, which is also said to be the opinion of some other jurists, Ijmá' is confined to the Companions.

Opinion of the jurists of Madina

Málik says that sacred learning, if not confined to Madína, was mostly to be found there, meaning during the time of the Companions and their successors, and that special sanctity attached to that sacred city, as it was the place where the Prophet took refuge and carried out the greater part of his mission. Against this claim, it is urged that men, learned in the Qur'án, the Ḥadíth, and the law, dispersed to all parts of Arabia, some during the Prophet's lifetime, and others after his death. They further point out that Mecca is no less sacred than Madína.[5] Two traditions are also relied upon in support of the Málikí view. 'Madína throws out its dross as fire the dross of metal', and 'Islám will stick to Madína as a

1 'Kashfu'l-Isrár', 'Bazdawí', pp. 237-8.

2 'Jam'u'l-Jawámi'', vol. iv, p. 250; 'Mukhtaṣar', vol. ii, p. 33; 'Taqrír', vol. iii, p. 95.

3 'Mukhtaṣar', vol. ii, p. 35; 'Jam'u'l-Jawámi'', vol. iii, p. 291; 'Taqrír', vol. iii.

4 'Mukhtaṣar', vol. ii, p. 35.

5 Ibid., vol. ii, pp. 29, 35; 'Taqrír', vol. iii, p. 100.

serpent to its hole'. These traditions are, however, interpreted by other jurists as being merely indicative of the sacred character of the city. It may be mentioned that, according to Ibn Bukair and Ibn Ya'qúbu'r-Raḍa, it was the opinion of Málik that Ijmá' is confined to the men of Madína. But this is not the accepted Málikí doctrine.

Opinion of the Companions of the Prophet

Those jurists who would restrict Ijmá' exclusively to the Companions, contend that most of the texts relied upon as authority, such as: 'You are the best of men', 'My followers will never agree upon an error', and the like refer to the Companions alone. But the generality of jurists say that the words are of general application, and there is no reason why a limited meaning should be put upon them. It is also stated that Imám Ḥanbal, in confining Ijmá' to the Companions, was influenced by considerations of practical difficulties in the way of its being realized in any other age.[1] There can, however, be no doubt that not only has greater authority been attached to consensus of opinion among the Companions, but many of the cases under this head are traceable to their age. The followers of Dá'úd'ẓ-Ẓáhirí the literalist also took the same limited view of this doctrine.

Opinion of the descendants of the Prophet

The Shí'ahs, specially the Imámiyas and the Zaidiyas, admit the authority of collective decision of the descendants of the Prophet alone. They point in support of their contention to a verse of the Qur'án in which it is laid down: 'God wishes to cleanse the people of the house (of the Prophet) of impurities', and also to a precept of the Prophet to the effect: 'I am leaving among you two sheet anchors, if you hold by them, you will not go wrong, the Book and my descendants.' The Sunnís explain the Qur'ánic verse as having reference not to the Prophet's descendants, but to his wives, and say further that it means no more than that they had been purged of unbelief. As regards the tradition, they argue that its proof rests on isolated testimony, and cannot, therefore, support a doctrine of absolute authority like Ijmá'.

[1] 'Kashfu'l-Isrár', vol. iii, p. 240.

Further it is said that the descendants alone are not mentioned in the tradition as the source of guidance, but also the Qur'án.

Opinion of the first four Caliphs

There have been some Ḥanafí doctors such as Qáḍi Abú Khazim in the reign of Mu'taḍid Billáh, who held that concurrent decision of the first four Caliphs has the effect of Ijmá', and this, according to one version, was the opinion of Ḥanbal.[1] Some have even been of opinion that agreement of the first two Caliphs was sufficient to constitute Ijmá'.[2]

Conditions relating to constitution of Ijma'

Let us now see what are the conditions relating to constitution of Ijmá'. According to the accepted doctrine of the four Sunní Schools, there must be unanimity of opinion among all the jurists of the age, in which the decision in question is arrived at, in order that such decision may have the force of Ijmá' in the absolute form. But, if the majority of jurists who agree in a certain conclusion do not admit that those who dissent from them possess the qualifications of a jurist, such dissent will not preclude the formation of absolute Ijmá'. Some doctors go further and hold that Ijmá' of the majority of jurists is of absolute authority, even though they do not question the qualifications of the dissentient minority. Ibn Jarír, Abú Bakaire-Rázi and some Mu'tazilís like Abu'l-Ḥasan Khayyat, master of Ká'bí, are said to have held this view. The Ḥanafís, the Sháfi'ís, and the Málikís hold that, if the number of dissentients be not large, the view of the majority will be a valid and binding authority, though not absolute in the sense that a person disputing it would become an infidel.[3]

How far is unanimity of opinion a necessary condition

The reason, why unanimity is insisted on for Ijmá' in the absolute form is thus stated: every jurist individually is liable to err, and the texts, it is urged, raise a presumption of infallibility only in favour of the entire body. The jurists, who hold that the opinion of the majority is sufficient for the purposes of absolute Ijmá', interpret the texts in question as

[1] 'Taqrír', vol. iii, p. 98.

[2] 'Mukhtaṣar', vol. ii, p. 36.

[3] 'Kashfu'l-Isrár', vol. iii, p. 262; 'Mukhtaṣar', vol. ii, p. 35; Jam'u'l-Jawámi' ', vol. iii, p. 291; 'Taqrír', vol. iii, p. 93.

meaning most and not all. They contend, that if it were otherwise, the doctrine would be practically impossible of realization.

In answer to this objection, it is stated by Abú Isḥáqu'l-Asfíríní that he knew of twenty thousand rules of law based on unanimity. Ibn Hammám goes further and says that such cases amount to no less than a hundred thousand.[1] The difficulty in the way of unanimity of opinion among all the Muḥammadan jurists of different countries at the present age is not denied; but it is said that it should not be impossible. It is, on the other hand, remarked by Ispaháni that no instances of Ijmá' are to be met with other than those mentioned in the books, which apparently occurred in the time of the Companions and their immediate successors.[2] It may be observed that, though Ijmá' in the absolute sense is difficult of realization at the present day, the value of the doctrine in its practical aspect cannot be materially affected by that fact once it is conceded that the opinion of the majority is of binding authority.

When is Ijma' completed

According to the Ḥanafís the Málikís and most Sháfi'ís an Ijmá' is completed as soon as the jurists of the age in which the question arose has come to an agreement thereon, after they have had sufficient time to mature their deliberations. But according to one version of Ḥanbal's opinion and some Sháfi'í doctors, it is necessary to wait until the age in which the jurists who were parties to the Ijmá' have come to an end, or, in other words, until all of them have died without any one having withdrawn his assent or changed his opinion. According to another report of Ḥanbal's opinion he was in favour of such suspension of Ijmá' only in matters of analogical deduction, but not when it was founded on texts of the Qur'án or Ḥadíth.[3] The Mu'tazilís, Ash'arís, Ibn Fárúq and Salímu'r-Raḍa also held that expiry of the age of the concurring jurists is a necessary condition.

[1] 'Taqrír', vol. iii, p. 83.

[2] Ibid., vol. iii, p. 83.

[3] Ibid., vol. iii, p. 86; 'Mukhtaṣar', vol. ii, p. 38; 'Jam'u'l-Jawámi'', vol. iii, p. 294.

Imámu'l-Ḥaramain, on the other hand, thinks that the Ijmá' which ensures absolute certainty is at once effective, but it is otherwise when it merely raises a probability.[1]

There are again some lawyers who are of opinion that a rule of law cannot be said to be validly determined by consensus of opinion unless not only the age of the jurists who originally took part in it has expired without any of them changing his views in the meantime, but that no other jurists born during that age should subsequently have expressed a contrary opinion. It is, however, pointed out that if that were so, no Ijmá' would ever be constituted.[2] The argument in favour of Ijmá' being completed immediately is this, once an unanimous declaration is made it is binding on every Muslim, including the Mujtahids who took part in it, and hence it is no longer open to any one of them to express dissent. On the other side it is urged that, if unanimity of opinion be essential to the formation of absolute Ijmá', it should also be necessary for its continuance as authority. Therefore, according to the latter view, until all who voted in such deliberations have died the possibility of their changing their opinion is not removed, and consequently the matter remains open to doubt. In answer to this contention it is pointed out that the language of the texts, which are authority for this source of laws, does not warrant such a condition, and as sufficient time is allowed for deliberation the possibility of the jurists arriving at a hasty conclusion is negatived. Two precedents are cited in support of the above view. Abú Bakr during his Caliphate used to divide the property acquired by conquest equally among the Muslims, without giving preference to any one on account either of his learning, or of his having accepted the faith earlier than the others, and to this no one among the other Companions offered opposition. When, however, 'Umar succeeded in the Caliphate he gave to men of learning, and

[1] 'Jam'u'l-Jawámi' ', vol. iii, p. 295; 'Kashfu'l-Isrár', vol. iii, p. 243.

[2] 'Kashfu'l-Isrár', vol. iii, p. 243.

to those who had embraced Islám earlier, more than to the others and no one questioned his action. The inference is drawn that, although in Abú Bakr's time, the learned accepted his view of the law without dissent still that was not deemed to have the authority of Ijmá' so as to bind his successor. Another case is also cited. 'Umar during his caliphate allowed sale of an ummi walad (a female slave girl who has borne a child to her master) without any opposition from the other Mujtahids. But afterwards 'Alí, when he became the Caliph, forbade such sales without any expression of dissent on the part of other Companions. With reference to the first case, it is alleged that 'Umar had expressed dissent from Abú Bakr regarding division of the spoils of war, and similarly in the second case, 'Alí is said to have disapproved of 'Umar's view regarding the sale of ummi walad. Therefore, in none of these instances was there a previous consensus of opinion.[1]

Once a question is concurrently decided, it cannot be reopened by individual jurists

According to the generally received Sunní view, when a question is determined by consensus of opinion, it is not open to individual jurists of the same or subsequent age to come to a different conclusion, except when the matter is one in which some jurist, before the formation of the Ijmá', was known to have entertained a different view, or a jurist a party to the Ijmá' happened afterwards to change his view.[2] For instance, if the Companions of the Prophet agreed in laying down a certain law, some among them along with the successors might not subsequently come to a different conclusion, unless the matter was one in which before such agreement some of the Companions had expressed a different view.[3]

One Ijma' may be reversed by a subsequent Ijma'

Ijmá' of one age may be reversed by subsequent Ijmá' of the same age, in which case the first resolution ceases to have operation. Similarly Ijmá' of one age may be repealed by Ijmá' of a subsequent age with one exception,[4] namely, an Ijmá' arrived at by the

1 'Kashfu'l-Isrár', vol.iii, p. 243.

2 'Taudíḥ' in the margin of 'Talwíḥ', p. 515; Jam'u'l-Jawámi'', vol. iii, p. 313.

3 'Talwíḥ', p. 515.

4 'Kashfu'l-Isrár', vol. iii, p. 262.

Companions of the Prophet is incapable of being repealed afterwards. It should be noted here that there could be no law laid down by agreement of the learned during the Prophet's lifetime, as he was the medium of promulgation of laws by God.[1] In the opinion of Sháfi'ís, which is also reported to be the view of Ḥanbal, consensus of opinion has no force in determining the law in a matter on which the Companions of the Prophet had expressed conflicting views. The accepted doctrine of the Ḥanafí School is that the existence of such disagreement among the Companions does not debar the formation of a valid Ijmá'. This is in accordance with the opinion of Imám Muḥammad, while Abú Ḥanífa is reported to have held otherwise.[2] The Málikís agree with Imám Muḥammad on this point, but say that such cases have been of rare occurrence.[3] Sarakhsí, however, observes that all the Ḥanafí Imáms agree in holding that absence of difference of opinion among the Companions on a particular question is not a condition precedent for the validity of Ijmá' on that question. On the other hand, it is stated in 'Maḥṣúl' that the absence of such previous conflict of opinion is an essential condition according to the Ḥanafís generally, as it is according to the Sháfi'ís.[4] In support of the Sháfi'í view it is urged that, if Ijmá' be allowed in a matter in which some of the Companions had previously expressed a different opinion, then it would follow that those Companions were misled, because a law established by consensus of opinion is regarded as so indisputably right, that any one disputing it makes himself liable to a charge of infidelity. Such a reflection on a Companion of the Prophet is not allowed. The Ḥanafís answer that every Mujtahid is liable to err, so is a Companion. They, however, concede that Ijmá' in such circumstances would not be absolute, so that any one disputing the decision would not incur the guilt of infidelity.

1 'Taqrír', vol. iii, p. 71.
2 'Talwíḥ', p. 507.
3 'Mukhtaṣar', vol. ii, p. 47.
4 'Taqrír', vol. iii, pp. 88-9.

When the jurists of an age have expressed only two views on a particular question a third view is precluded

If some of the jurists of an age have expressed one view, and the rest have expressed a second view with reference to a particular question, this has the effect of consensus of opinion in so far as to exclude a third view. Some Ḥanafí doctors would confine the rule to Ijmá' of the Companions, but others hold that there is no ground for making such a distinction. The Málikís, the Sháfi'ís and some Ḥanafí doctors limit the application of the rule to cases in which the third view would be in conflict with some common principle, underlying the other two. Fakhru'l-Islám and Ṣadru'sh-Sharí'at, however, are not in favour of this qualification.[1] The following examples will be useful in understanding the above rule. On the question as to what is the period of 'iddat of a widow pregnant at the time of her husband's death, some jurists were of opinion that it is the longest of the two periods, namely, the period ending with the delivery of the child, or the expiry of four months and ten days from the death of the husband, while other jurists held that in such a case 'iddat would expire on delivery taking place. A third view, namely, that the 'iddat is for four months and ten days, even if such period expired before delivery is inadmissible as being opposed to Ijmá'.[2] Another example is furnished by the case of a deceased person leaving behind him his grandfather and brothers. According to some jurists the grandfather would take the entire inheritance to the exclusion of the brothers; while others hold that the estate should be divided between the grandfather and the brothers. A third proposition that the grandfather is not to take at all should be negatived as being contrary to implied Ijmá'.[3] In these two cases the third view is held to be inconsistent with the common principle underlying the other two. In the following cases, a third view is precluded merely on the ground that only two views were known to be held by the jurists.

[1] 'Tauḍíḥ', on margin of 'Talwíḥ', vol. iii, pp. 50-6; 'Kashfu'l-Isrár', vol. iii, pp. 234-5; 'Talwíḥ', p. 501; 'Mukhtaṣar', vol. ii, p. 39; 'Jam'u'l-Jawámí'', vol. iii, pp. 296-8.

[2] 'Tauḍíḥ', p. 285.

[3] Ibid., on the margin of 'Talwíḥ', p. 500.

A woman dies leaving her husband and her parents as her heirs, or a man dies leaving his widow and his parents as his heirs. According to some jurists the mother in either case would take one-third of the entire inheritance, and according to others she would get one-third of what remains, after paying the share of the husband or the wife.[1] A third course was adopted by Ibn Shírín, namely, that in the first case the mother is to get one-third of the whole, but not in the second case. This according to Ṣadru'sh-Sharí'at would be opposed to Ijmá' and therefore inadmissble.[2] According to some jurists a marriage may be annulled by reason of any one of five enumerated physical defects in the husband or the wife, namely, leprosy, insanity, impotency and other incapacity for sexual intercourse in the husband or the wife. Others hold that none of these grounds are sufficient. A third proposition that marriage may be dissolved on some of these grounds and not the others is regarded as inadmissible. The author of 'Talwíḥ', however, disputes the correctness of this opinion.[3]

Modes of constitution of Ijma'

Ijmá' may be constituted by decision expressed in words (قولي) or by practice of the jurists (فعلي), and in either case it may be regular (عزيمة) or irregular (رخصة). It is said to be constituted by words if the Mujtahids, either at one meeting or on information of a question being under consideration reaching them, within a reasonable limit of time, severally declare their opinion in so many words, or if some one or more among the prominent Mujtahids state their view and the others, on hearing this at the meeting or on receiving information thereof, observe silence, expressing no dissent. In the first case Ijmá' will be regarded as regular and in the second case as irregular. An Ijmá' is constituted by practice, if all the Mujtahids in their practice adopt a particular view of the law, or if some of them in practice adopt a particular view, and the others

1 'Taudíḥ' on the margin of 'Talwíḥ', p. 500.
2 Ibid., p. 501.
3 'Talwíḥ', p. 501.

do not indicate dissent by acting to the contrary. If the former, the Ijmá' would be regular, and, if the latter, it would be irregular. Ijmá' by words and Ijmá' by practice are equally authoritative. The Ḥanafís, the Málikís generally, and some Sháfi'í jurists consider both regular and irregular Ijmá' as valid in law and binding, though they assign a higher canonical value to the former. Some Ḥanafí doctors would make no distinction between the two kinds of Ijmá'. On the other hand some Sháfi'ís, some Málikís, some Mu'tazilís and the Ẓáhirís do not recognize the validity of irregular Ijmá' at all.[1]

It is also laid down by Fakhru'l-Islám that if a Caliph among the Companions of the Prophet expounded the law on a particular question in his sermon without the audience disputing its validity, Ijmá' will be presumed with respect to it. The commentator observes that this rule is not confined to the first four Caliphs or to the Caliphs at all, but extends to other heads of the State[2] provided they are jurists.

The arguments in support of the authority of irregular Ijmá's are, firstly, that if it were necessary that all the Mujtahids should expressly declare their opinion, then Ijmá' would be impossible of realization and the law never imposes an impossible condition. Secondly, it is a duty imposed by law on every Mujtahid to express his dissent, and not to keep quiet when he finds others going wrong on a question of law and hence silence, or non-expression of disagreement, should be presumed to be approval. Against these contentions several cases are urged to show that silence in such a matter is not always equivalent to assent. When 'Umar, at a meeting of his fellow Companions, inquired of them whether it was lawful to delay distribution of the property acquired in war, all present answered him in the affirmative, except 'Alí who remained silent. Thereupon 'Umar questioned 'Alí, who replied in the negative and his opinion was accepted. This, it is

[1] 'Tauḍíḥ' on the margin of 'Talwíḥ', p. 499; 'Mukhtaṣar', vol. i, p. 37; 'Talwíḥ', p. 500; 'Taqrír', vol. iii, p. 102; 'Kashfu'l-Isrár', vol. iii, pp. 228–9; 'Jam'u'l-Jawámi'', vol. iii, pp. 295–300.

[2] 'Kashfu'l-Isrár', vol. iii, p. 235.

said, shows that 'Alí did not deem it to be his duty to express disagreement without being asked for his opinion. In another instance it was reported to 'Umar that a woman whose husband was missing was seen in the company of other men and talking to them in a familiar way. The woman who was enceinte, on being admonished by 'Umar, miscarried through fear. 'Umar consulted his Companions whether under the circumstances he must make her compensation. All the Companions, except 'Alí who kept quiet, said that 'Umar was not liable, as he acted in good faith for the woman's spiritual welfare. 'Alí however on being questioned advised that 'Umar was bound to make compensation, and this view was approved. With reference to these cases, however, the Ḥanafí writers observe that the acceptance of 'Alí's opinion did not show that his was the only correct view of the law; but that it was preferable to the other views. It is said that silence of a jurist may sometimes be due to fear, and in support of this it is stated that Ibn'Abbás, during the time of 'Umar, did not oppose the doctrine of increase ('aul عول) in matters of inheritance, owing to the awe of the second Caliph who held a different view. But the authenticity of this report is denied.

As regards exposition of law by the Imám in his sermon, which is apparently an illustration of the irregular form of Ijmá', a number of cases are cited to show that the Companions of the Prophet deemed it their duty to express their opinions whenever they thought that the head of the State, was going wrong. Hence in such cases also silence is presumed to be indicative of consent. This being so in the case of Companions, it is argued by some jurists, that there is no valid reason why the rule should not apply in the case of other Caliphs and rulers. It is, however, pointed out that, although much objection would be obviated, if the application of the doctrine were confined to the Companions, having regard to the smallness of their number and the sense of equality and freedom of speech which prevailed among them, the presumption would be artificial and weak, if applied in

the case of the latter-day Caliphs or rulers, whose audience during a sermon could not be supposed to include all the learned Muslims of the world, nor would one expect the same freedom of speech on the part of the people.

Abú 'Alí ibn Abú Huraira says that, if a fatwá of a Mujtahid is published and is not opposed, it will have the force of Ijmá'. He however thinks that the decree of a Qáḍí published in a similar way will not have that effect. Abú Isḥáqu'l-Maruzí, on the other hand, holds the reverse. It is pointed out by Bazdawí apparently in support of Ibn Abú Huraira's view that the decree of a Qáḍí is always binding, and cannot be opposed, even though based on a wrong view of the law which is not the case with a Mujtahid's fatwá.[1] If the fact that a particular question of law is under consideration be not fully published, in that case also opinions differ whether an Ijmá' would be properly constituted with respect to it.[2]

The number of jurists participating in Ijma' need not be large

In order that a valid Ijmá' may be arrived at, it is not necessary according to the Ḥanafís and the Málikís that the number of jurists participating in the deliberation should be large. But their number must not, according to some, be less than three, according to others not less than two.[3] One jurist, however, namely, Ibn Juraij, thought that, if in any particular age there happened to be only one jurist, his opinion would have the authority of Ijmá'.[4]

Ijma' may be based on Qur'an, Hadith, or Analogy

Ijmá' may be based on a text of the Qur'án or of Ḥadíth or on analogy. This is the view of all the Sunní Schools.[5]

The Mu'tazilís and the Ẓáhirites, on the other hand, do not admit the validity of an Ijmá' which is based on an isolated tradition, or on analogical reasoning. They say that, since a concurrent decision is

[1] 'Kashfu'l-Isrár', vol. iii, p. 229.

[2] Ibid., p. 229.

[3] 'Kashfu'l-Isrár', vol. iii, p. 229.

[4] 'Jam'u'l-Jawámí'', vol. iii, p. 305; 'Mukhtaṣar', vol. ii, pp. 36-7; 'Jam'u'l-Jawámí'', vol. iii, p. 294; 'Taqrír', vol. iii, p. 593.

[5] 'Talwíḥ', pp. 516-7; 'Kashfu'l-Isrár', vol. iii, pp. 263-5; 'Mukhtaṣar', vol. ii, p. 39; 'Jam'u'l-Jawámí'', vol. iii, p. 296.

absolute in its legal effect, the authority on which it is supported must also be of a conclusive nature. The answer to that is that the authority of this source of laws is derived from the fact of agreement, and not from the character of the reasons or text on which it is founded. Further, if the authority on which it is based be of an absolutely binding nature, concurrence of opinion could not add to its legal effect and would be superfluous. The election of Abú Bakr to the Caliphate is a well-known instance of Ijmá' based on analogy. The Companions held that he was the fittest person for the office, on the analogy of the fact that during his lifetime the Prophet himself once permitted him to lead the prayers, the argument being that the man who was considered a proper leader of the Muslims in matters of religion was so *a fortiori* in the rest of their affairs. Another instance of Ijmá', based on analogy is the law laying down a sentence of eighty stripes for the offence of drunkenness. The analogy is based on the sentence for slander, because a drunken man having no control over his tongue is likely, it is said, to utter words of slander. The law prohibiting sale of wheat, or other similar article by a person not in possession of it is an instance of Ijmá' based on an isolated tradition.

Proof of Ijma'

The next question relates to the nature of evidence by which the fact that a particular question has been determined by consensus of opinion may be proved. It may be proved, either as a matter of universal or continuous notoriety, or as being well known among the people. There is no difference so far among the four Sunní Schools. But the Ḥanafís add that it may also be proved by isolated information.[1] Imám Ghazzálí among the Sháfi'í jurists is of opinion that Ijmá' resting upon isolated testimony is of no authority, and there are some Ḥanafís who take the same view. We have it on the authority of Bazdawí that most of the learned agree that a collective decision so proved is binding, though it does not ensure certainty of belief, an Ijmá' so proved being like a tradition

[1] 'Kashfu'l-Israr, vol. iii, p. 265;' Talwíḥ', p. 517.

based on single information. Ijmá', which is proved as a matter of universal knowledge, or as being well known, corresponds, on the other hand, to traditions proved in a similar way.

Legal effect of Ijmá'

The law laid down by consensus of opinion is authoritative and binding. In its theological aspect, however, according to the Ḥanafís, it is only when such collective determination conforms in its constitution and proof strictly to the requirements of the law that it can be said to be absolute in the sense that it would ensure certainty of belief, so that any one disputing its authority would be guilty of infidelity. According to the accepted Sháfi'í and Málikí doctrines, a man disputing the authority of Ijmá' does not become guilty of infidelity, except when the decision is in respect of matters, which are established by clear authority and universally accepted as such, such as the obligation to observe the daily prayers, to fast during the Ramaḍán, to pay zakát and to perform pilgrimage, the unlawfulness of whoredom, of drinking intoxicating liquor, of dealing in usury, and the lawfulness, of marriage, sale, lease and the like.[1]

According to the Ḥanafí view a decision of Ijmá' would be of absolute authority in the theological sense, only if it conforms to the following conditions:—

(1) no opinion to the contrary should have been expressed on the question by any of the Companions, or by other Mujtahids before the formation of the Ijmá';

(2) none of the Mujtahids taking part in the decision should have afterwards changed his opinion;

(3) the decision must be proved as being either universally known, or at least as well known;

(4) it should be based on an express text of the Qur'án, or a tradition of a continuous or well-known character, and

(5) it must be regularly constituted.

Before leaving the subject I may observe that there is one serious defect in the rules regarding this important source of laws, namely, the omission to provide a definite and workable machinery for the selection of

1 'Mukhtaṣar', vol. ii, p. 44; 'Jam'u'l-Jawámí'', vol. iii, p. 315.

the jurists who are qualified to take part in Ijmá' and for ascertaining, collecting and preserving the results of their deliberations in an authoritative form. But this is perhaps due to the political conditions which have prevailed in the Muḥammadan world ever since the days of the first four Caliphs. It would seem as if the doctrine of Ijmá' was too far in advance of the habit of thought and action of the people to find a practical and permanent expression in the age in which it was expounded.

SECTION II—CUSTOMS AND USAGES

Customs and Usages

Those customs and usages of the people of Arabia, which were not expressly repealed during the life-time of the Prophet, are held to have been sanctioned by the Lawgiver by His silence. Customs ('urf, ta'ámul, 'ádat عادة , تعامل , عرف) generally as a source of laws are spoken of as having the force of Ijmá', and their validity is based on the same texts as the validity of the latter. It is laid down in 'Hedáya' that custom holds the same rank as Ijmá' in the absence of an express text,[1] and in another place in the same book, custom is spoken of as being the arbiter of analogy.

Custom does not command any spiritual authority like Ijmá' of the learned, but a transaction sanctioned by custom is legally operative, even if it be in violation of a rule of law derived from analogy; it must not, however, be opposed to a clear text of the Qur'án or of an authentic tradition. There is agreement of opinion among the Sunnís, that custom overrides analogical law, and a student of Muḥammadan law cannot help noticing that custom played no small part in its growth, especially during the time of the Companions and their successors. The Ḥanafí writers on jurisprudence include custom as a source of law, under the principle of istiḥsan or juristic preference.

Custom properly so called should be distinguished from the usage of a particular trade or business. The latter from its very nature need not be prevalent among the people generally.

[1] 'Hedáya', vol. vi, pp. 177–8.

Custom which is recognized as having the force of law must be generally prevalent in a country. It is not necessary that it should have had its origin in the time of the Companions of the Prophet; but it does not appear what time if any must elapse before a custom will be accepted by the court. It may be that even a custom, which has sprung up within living memory, will be enforced if it be found to be generally prevalent among the Muḥammadans of the country in which the question of its validity has arisen. The author of Raddu'l-Muḥtár defines ta'ámul or custom as what is more often practised than not.[1]

The practice of a few individuals or of a limited class of men will not, however, be recognized. Nor would a usage have the force of law, so long as it is confined to a particular locality, such as a village, or a town, and has not found general vogue in the country in which the question arises.[2] Practice on a few occasions will not be recognized as a valid custom.

It is of the very essence of a custom that it should be territorial, so that custom of one country cannot affect the general law of other countries. Further it has authority only so long as it prevails, so that the custom of one age has no force in another age.[3] In India in the Punjab and among the Khojas of Bombay, Muḥammadan law has on many points been superseded, or considerably modified by customs adopted from the Hindus and sanctioned by the legislature and the courts. But some of these customs, such as those relating to succession and inheritance, would, according to the principles of Muḥammadan jurisprudence, be illegal being opposed to the text law.

PART III—JURISTIC DEDUCTION

SECTION I—ANALOGY

Analogy

Its definition

All the four Schools of Jurisprudence agree that, in matters which have not been provided for by a

[1] 'Raddu'l-Muḥtár', vol. iii, p. 408.
[2] 'Fatḥu'l-Qadír', vol. vi, p. 65.
[3] 'Raddu'l-Muḥtár', vol. iii, pp. 408–9.

Qur'ánic or traditionary text, nor determined by consensus of opinion, the law may be deduced from what has been laid down by any of these three authorities, by the use of Qiyás, which is generally translated as analogy.

The root meaning of the word Qiyás is 'measuring', 'accord', 'equality'.[1] As a source of laws it is defined by the Ḥanafís as 'an extension of law from the original text to which the process is applied to a particular case by means of a common 'íllat (علّة) or effective cause, which cannot be ascertained merely by interpretation of the language of the text',[2] by the Málikís as 'the accord of a deduction with the original text in respect of the 'íllat or effective cause of its law'[3] and by the Sháfi'ís as 'the accord of a known thing with a known thing by reason of the equality of the one with the other in respect of the effective cause of its law'.[4] In plain language Qiyás is a process of deduction by which the law of a text is applied to cases which, though not covered by the language, are governed by the reason of the text. The reason of the text, which is technically called 'íllat or effective cause, is the rukn (رُكن), i. e. constituent of analogy and the extension of the law of the text to which the process is applied is its legal effect (hukm حُكم). Analogy as a source of laws being subordinate and subsidiary to the Qur'án, the traditions and the Ijmá', these latter in the language of Muḥammadan lawyers are called its authorities (aṣl اصل) or texts (naṣṣ نصّ).

It will be seen from its definition that analogical deduction is to be distinguished from interpretation of a text.

Scope of Analogy

By means of interpretation properly so-called a text is applied to cases covered by its language, while the function of analogy is to extend the law of the text,

1 'Mukhtaṣar', vol. ii, p. 204.
2 'Taudíḥ', p. 302.
3 'Mukhtaṣar', vol. ii, p. 204.
4 'Jam'u'l-Jawámi'', vol. iv, p. 1.

to cases not falling within the purview of its terms. The writers on jurisprudence do not admit that extension of law by process of analogy amounts to establishing a new rule of law. On the other hand, as we have seen, their theory is that analogy merely helps us to discover the law and not to establish a new law.

By application of analogy the law embodied in a text may be widened generally, though there are some jurists who take a narrower view holding that analogy can be used only to extend the actual command contained in a text, and not the cause or condition of its operation.[1] Analogy has no application to pure inferences of facts which are to be made by the light of observation helped by science.[2]

The nature of its authority as a source of law

Rules of law analogically deduced do not rank so high as authority, as those laid down by a text of the Qur'án, or Ḥadíth, or by consensus of opinion. The reason is that with respect to analogical deductions one cannot be certain that they are what the Lawgiver intended, such deductions resting as they do upon the application of human reason which is always liable to err. In fact it is a maxim of the Sunní jurisprudence that a jurist may be right or may be wrong. A Qáḍí in deciding a case is not, therefore, bound by a particular rule of juristic law merely because it has the approval of certain doctors, but may follow his own view. An analogical deduction, if agreed upon by the learned as a body assumes, however, a different legal aspect, but that is because of such agreement and not the strength of the reasons on which such collective decision may be founded.

Arguments against analogy

The Ẓáhirís, some Ḥanbalís and Ibn Ḥazm deny the authority of analogy as a valid source of laws, except in matters which are the rights of men (e.g. appraising the value of property destroyed by a trespasser), and are ascertainable by the exercise of our senses and reason. They contend[3] that any

[1] 'Áyátu'l-Baiyanát', vol. iv, p. 6.
[2] Ibid., vol. ii, p. 80.
[3] 'Áyátu'l-Baiyanát', p. 5.

other view of analogy would virtually amount to making laws which is the sole privilege of God. In support of their contention they rely upon the following texts :—

'We (that is, God speaking through the Prophet) have sent down the Book as authority for you.'

'There is nothing fresh nor dry, but is to be found (that is, the rule in every matter is laid down) in the revealed book.'

'Say, (God asks the Prophet to say to his audience), "God has not by his revelations made anything unlawful to man except a dead body or the flowing blood of an animal".'

'Say, "whatever is not found to be forbidden in the Book of God is lawful to men".'

'The affairs of the Isrá'ílites were in proper order, until those born of slave girls increased in numbers, and began to deduce from what had been laid down things which had never been laid down, and thus they themselves went astray and led others astray.'

Arguments in support of analogy

The arguments based on the above texts are thus met. It is admitted by the Sunní jurists with reference to the first two texts that the law for the guidance of Muslims in every matter is to be found in the Qur'án, but they point out that the law on some questions alone has been laid down in express terms, and, as regards the rest, the Qur'án merely affords indications from which inferences have to be drawn. As to the warning contained in the last mentioned text against the example of the Isrá'ílites, that was called for by the ignorance and prejudice of those addressed but no such charge can be made against Muḥammadan jurists as a body. The principle underlying the text which lays down that nothing that has not been declared unlawful by God can be made unlawful, is fully admitted; but it is not claimed that analogy can be used for such a purpose.

The Sunnís, on the other hand, rely upon the authority of the following texts in support of analogy: 'Did you think they would get away? They thought that their forts would protect them, but His punishment reached them from a quarter they had not anticipated. He

inspired fear in their hearts, and they pulled down their houses with their own hands, and so did the Muslims. So ye who have judgement take warning.' When the Prophet sent Mu'ádh to Yemen (as Governor), he said to him: 'how are you going to (decide cases)'; Mu'ádh answered: 'by (the light of) what is in the Book of God'. The Prophet next asked: 'And if you do not find anything in the Qur'án to guide you?' 'I will decide in the way the Prophet has been doing.' But inquired the Prophet: 'If you do not find any precedent from me, what then?' 'I will do my best by exercising my judgement.' The Prophet thereupon exclaimed 'Praise be to God who has so disposed the delegate of His Prophet as to be able to satisfy him.'[1]

The first text which is of the Qur'án is interpreted as showing that the Muslims are asked by God to infer analogically from the example of the Isrá'ílites that disobedience of God through insolent pride would not escape punishment. The second is a well-known tradition and furnishes a general authority for the use of human reason and experience in developing and applying the law of the Qur'án. It is especially relied on as a justification for analogical deduction as a source of laws. Furthermore, it is urged that the Prophet himself relied on analogy in determining questions of law. For instance, he was once asked by a man whose father, though possessed of means, had died without performing the pilgrimage, if it was necessary that it should be performed on behalf of the deceased for the benefit of his soul. The Prophet replied: 'What do you think you would do if your father died owing a debt?' Here, the argument is that the Prophet used the analogy of a debt to show that an undischarged religious obligation of the nature of pilgrimage should be discharged by the heirs of a deceased person. It is also urged that the Companions of the Prophet always employed analogy for purposes of legal deduction and no one doubted its legality.[2]

[1] 'Tauḍíḥ', p. 307.
[2] 'Áyátu'l-Baiyanát', vol. iv, p. 7.

The following are the conditions of a valid analogical deduction :—

Conditions of analogical deduction

(1) The law enunciated in the text to which analogy is sought to be applied must not have been intended to be confined to a particular state of facts.[1]

For example, the tradition, in which the Prophet says: 'If Khuzaima testifies for any one that is sufficient for him', does not lay down a rule of general applicability to the effect that testimony of a single witness is sufficient in law to support a claim. On the other hand, the injunction had reference to Khuzaima personally.[1] Those verses of the Qur'án which relate exclusively to the Prophet are other instances where analogy is inapplicable.

(2) The law of the text must not be such that its *raison d'être* cannot be understood by human intelligence nor must it be in the nature of an exception to some general rule.

Examples: The reason why a certain proportion of a man's property is fixed for the poor-rate (zakát) or why certain classes of heirs are allotted particular portions in the inheritance, such as one-fourth to the husband, one-eighth to the wife and the like, is incapable of ascertainment, and hence no argument can be built upon such cases for extension of the law in similar instances. According to Abú Ḥanífa, punishments of the nature of ḥadd for offences like drunkenness and defamation are also not extendible on the same principle, but Sháfi'í holds a different view. For instance, he would inflict the punishment of ḥadd provided for theft on a man who makes away with the shroud of a corpse, although such act does not amount to theft within the meaning of the text-law.[2]

In a contract of hire or lease the valuation of the future services or produce is allowed by law in order to fix the amount of the wages or rent payable. This is permitted by way of exception to the general rule that nothing which is not property of a tangible nature is capable of valuation. Hence, according to

[1] 'Tauḍíḥ', p. 308; 'Mukhtaṣar', vol. ii, p. 211.
[2] 'Áyátu'l-Baiyanát', vol. iv, p. 5.

the Ḥanafís, mesne profits are not recoverable from a wrongful possessor. Sháfi'í, however, holds that the value of property consists in the owner's proprietary rights (milk ملك), and, therefore, the person causing loss to him by wrongful appropriation of the usufruct (منفعة) of his property should be liable to make it good.[1]

(3) An analogical deduction may be founded according to the Ḥanafís and the Málikís on the law established either by a text of the Qur'án or Ḥadíth, which has not been repealed, or by a unanimous decision of the learned, and according to some Sháfi'ís and the Ḥanbalís it may also be based on another analogical deduction. The rule so deduced must not be opposed to a text law nor covered by the words of a text. In other words an analogical deduction is to be in the nature of a corollary of the text law. Analogy cannot be applied merely to the words of a text.[2]

The reason why the Ḥanafís and the Málikís do not allow an analogical deduction to be made from another such deduction is thus stated, either the effective cause on which the second deduction is sought to be based is the same as of the original text in which case it becomes superfluous to refer to the intermediate proposition, or it is not. If the latter, then the first deduction would itself be bad. The following is an illustration. The Sháfi'ís hold that the quality of edibility is sufficient to bring an article of which it is predicable within the doctrine of ribá, which forbids excess in favour of one of the parties to a sale of similars for similars. He argues that quinces being edible come within the principle like apples, which fall within the analogy of wheat which is expressly mentioned in the text.[3] Such reasoning, it is urged, is superfluous, for it would have been sufficient to say that a quince is an article of food in order to bring it within the principle without relying on the analogy of apples. It

[1] 'Tauḍíḥ', p. 309.

[2] Ibid., p. 309; 'Mukhtaṣar', vol. ii, p. 209; 'Áyátu'l-Baiyanát', vol. iv. pp. 12–26.

[3] 'Mukhtaṣar', vol. ii, p. 209; Ṣadru'sh-Shári'at, p. 13.

is contended, on the other hand, that it is possible that the second deduction may be based on an effective cause, not quite the same as that of the original text. For instance, the text regarding ribá mentions wheat which is staple food and measured by measurement of capacity as one of the articles, the sale of which in exchange for a similar article is not lawful unless both be equal in quantity. By analogy, the rule is extended to the sale of rice which like wheat is saleable by measurement of capacity and which is often used as staple food though not always like wheat. Proceeding next upon the analogy of rice the rule is applied to dried dates, as both are eatables and sold by measurement of capacity though dates are used as staple food less often than rice. In the next step the doctrine is analogically extended to raisins which are eatables and sold by measurement of capacity like dried dates though raisins are not used as food at all and lastly the doctrine is applied to apples because they are eatables like raisins.[1]

The reason for the condition that the deduction must not be opposed to text law nor covered by the words of a text is that analogy being a subordinate source the deduction made by such a process would be invalid if opposed to a text and would be superfluous if covered by a text. It follows, therefore, that the rule derived by the application of analogy should be in the nature of a corollary of the proposition established by a text. In illustrating this condition the Ḥanafís take exception to the deduction of Sháfi'í on the question of ribá, namely that the principle of ribá applies to the exchange of all eatables as being in violation of the rule. Ṣadru'sh-Shári'at argues that if Sháfi'í were right then an exchange of such eatables, as are articles of tale, would not be valid at all, for equality of number does not in such a case necessarily mean equality in actual fact, and if the condition of equality be disregarded, the doctrine of ribá would be inapplicable to wheat, and dried dates expressly mentioned in the text as being subject to

[1] 'Áyátu'l-Baiyanát', vol. iv, pp. 13–14.

ribá. The equality which is contemplated in such cases by the text is equality by measurement of capacity.[1] Another case is cited in which the application of analogy by the Sháfi'ís is alleged to be open to a similar objection. A Dhimmí[2] is admittedly empowered to divorce his wife in the form of ṭaláq. Proceeding analogically the Sháfi'ís hold that the law relating to zihár, which consists in a man comparing the person of his wife to that of a female perpetually prohibited to him, should be applied to them as well. But the Ḥanafís argue that zihár differs from ṭaláq, inasmuch as the husband can legally get over the effects of zihár by making an atonement, and the canonical doctrine of atonement does not apply to non-Muslims.[3]

As an example of violation of the rule that analogy must not be applied to the vocabulary of the text, but to the cause on which the law is based, the Ḥanafís cite the deduction made by the Sháfi'ís from the text which forbids drinking of khamr, an intoxicating drink prepared by fermenting the juice of grapes. The Sháfi'ís say that the root meaning of khamr is something which clouds the senses and hence the word applies to all intoxicants. The Ḥanafís object, saying that this is applying analogy merely to the language of the text.

(4) The deduction must not be such as to involve a change in the law embodied in the text. Example: A contract, in the nature of Salam by which a man buys an article to be delivered by the vendor subsequently and pays the price in advance, would not be a valid transaction according to the general rule of law by which a contract of sale is only valid if the thing sold be in existence at the time of the contract. The validity of a Salam contract has, however, been established by a tradition which says that the sale of an article to be delivered at a fixed date is lawful. When the Sháfi'ís hold that such a contract is

[1] 'Tauḍíḥ', p. 310.

[2] A non-Muslim living under the protection of a Muslim State.

[3] 'Tauḍíḥ', p. 310; 'Mukhtaṣar', vol. ii, p. 225.

lawful even if no date is fixed, they are charged with introducing a change in the law of the text. The law requires the presence of two witnesses as a necessary condition for the constitution of a marriage contract, and hence Málik in laying down that the presence of witnesses is necessary only for the sake of publicity is said to introduce a change in the law of the text. If the deduction serves to introduce a new basis or condition of validity of the law of the text, then also the deduction will be regarded as being in violation of this rule. A marriage according to the text law is prohibited within certain degrees of relationship of a man and a woman, who have had carnal connexion with each other. Málik would add as a condition of such prohibition that the connexion must have taken place under the tie of marriage. The Ḥanafís say that this is introducing a new condition.

'Illat or effective cause. Its general characteristics

Let us now try to understand what are the general characteristics of 'illat (علة) which I have translated 'effective cause'. 'Illat is defined as something which makes known (mu'arrif معرف), a sign ('alámat علامة), something which brings into existence (mu'aththir مؤثر). Ṣadru'sh-Sharí'at seems to prefer the first definition, as by 'illat the applicability of the law of a text to a case not covered by its language becomes known. The second meaning, he says, is included in the first, and as regards the last definition he objects to it on the ground that it is the Lawgiver who brings into existence the law and not the 'illat or reason. In plain words 'illat may be defined as the fact, circumstance, or consideration which the Lawgiver has had in regard in laying down the law embodied in a text. When the effective cause of a text has been determined the jurist is in a position by ta'líl (تعليل), or reasoning based on that cause, to apply the law of the text in a case in which the same cause is present.

The accepted Sunní doctrine is that the Lawgiver in enacting laws has in regard a certain policy (ḥikmat, maṣlaḥat مصلحة, حكمة). This policy is to promote

the welfare of men by securing to them positive advantages or averting from them injury, and, in so far as the cause or reason for a law advances that policy, it is said to be proper (مناسب). Abú Zaidini'd-Dabúsí says that a reason will be regarded as proper if it commends itself to a man's common sense.

The effective cause must be such as to promote men's welfare

The policy of the law has two aspects religious (دينية) and secular (دنيوية). The religious or spiritual policy of the law is, as already observed, the discipline of the soul and the improvement of morals (رياضة النفس و تهذيب الاخلاق).

Its secular or worldly purpose is the preservation of life, property, lineage, reputation, religion and understanding. These are regarded in law as matters of absolute necessity (ضرورة), and are the primary secular objects of the law. The law has also secondary or supplementary secular objects in view, namely, the removal of wants (حاجة), which is a matter of lesser degree of necessity than the first, and the determination of what is proper to the dignity of man (taḥsín تحسين).[1] There are again grades in the purposes both of primary and secondary necessity, some being more necessary than the others. The laws laying down retaliation as punishment for murder or voluntary hurt, obliging a wrongful possessor of another man's property to restore the same to the latter, inflicting punishment on persons guilty of whoredom, defamation and drunkenness, and the law sanctioning jihád are instances in which the objects of the Lawgiver are respectively to preserve life, property, lineage, reputation, understanding and religion.[2] In these cases the proper causes or reasons for the law are wilfully causing death or hurt, theft or trespass, whoredom, intoxication and the hostility of non-believers. The law authorizing guardianship for the purpose of giving a minor in marriage is an instance in which the end in view is regarded as of a supplementary nature.

[1] 'Taudíḥ', p. 318, et seq.; 'Áyátu'l-Baiyanát', p. 96; 'Mukhtaṣar', vol. ii, pp. 240–1.

[2] 'Taudíḥ', p. 318.

The laws authorizing sales, leases, and other contracts of a like character also belong to this category. Obviously it is not always easy to draw a line showing where the primary objects of law end and the supplementary or secondary objects commence. The difference must in many cases be a question of degree. It is pointed out, for instance, that the law authorizing sale of property is as much a matter of necessity for the support of human life as its protection from direct destruction. Similarly, the hiring of a nurse may be a matter of absolute necessity for the preservation of an infant's life.[1] Hence, it is a well-known maxim of Muslim jurisprudence, 'the wants of men are regarded in the same light as matters of absolute necessity.' That the law, in certain cases, is prompted by the consideration of what is fit and proper is exemplified by what may be called sumptuary ordinances, and by the rule that the testimony of a slave is not admissible.

A question of absolute necessity has precedence over other considerations, and a regard for the requirements of men is entitled to priority over a question of what is fit and proper.

Conflict between spiritual and secular purposes

It is difficult to lay down, as a matter of general proposition, whether spiritual consideration should always have precedence over non-spiritual consideration or the reverse. In many cases, no doubt spiritual considerations prevail. For instance, fasting during the month of Ramaḍán may be injurious to a man from the medical standpoint, but inasmuch as fasting tends to abate his animal propensities, the law regards it as beneficial to him. There are at the same time many cases in which secular or worldly considerations are given preference. For instance, a man while travelling is excused from observing the fast because of the physical suffering which it would entail on him. So also a Muḥammadan is excused from attending the mosque for saying the Friday prayers, if he is obliged to stay away in order to save his property.[2]

[1] 'Áyátu'l-Baiyanát', p. 97.

[2] 'Mukhtaṣar', vol. ii, p. 239, et seq. and 'Al-Majallih', p. 13.

In fact, there is a general maxim to the effect, 'hardships always call for relief'.

Deduction based merely on the general policy of the law not allowed

Generally speaking, it is not allowable to a jurist to make deductions merely from the broad policy of the law. The effective cause must have a particular reference to the subject to which the text relates. Otherwise, it is pointed out, one is likely to be involved in inconsistencies. For instance, the preservation of human life is one of the general objects in view of the law, and if it were open to a jurist to base deductions thereon without anything more, the waging of religious wars would be unlawful. He should, therefore, on such a question look to the policy of the law on the subject of religious warfare, which declares such wars to be lawful, inasmuch as they tend to the preservation of religion.

Effective cause must be something definite

The general rule is that the effective cause must be definite and perceptible; for instance, consent of parties to a contract is imperceptible in its nature and, therefore, the law proceeds upon the acts of proposal and acceptance. Similarly intention of a man cannot be definitely ascertained, and hence the law seizes upon its expression in some manifest fact which, in ordinary course of human affairs, necessarily implies its existence. Thus, when the question arises whether a man who killed another did so wilfully, the law fastens upon the nature of the weapon used as indicative of his intention.[1] According to the most correct opinion an abstract reason if sufficiently definite can form a good basis of analogical deduction.[2] As we shall see later on, the law in one matter is sometimes held to be the effective cause of law in a similar matter. So also in many cases of juristic equity the effective cause of a rule may be hidden and imperceptible. But these are really exceptions to the general rule that an effective cause should be some definite fact or event, embodying the reason of the law on the whole, so that whenever it is present the command should follow as a consequence.[3]

[1] 'Mukhtaṣar', vol. ii, pp. 239, 268.
[2] Ibid., vol. ii, pp. 213-4.
[3] 'Tauḍiḥ', p. 319; 'Mukhtaṣar', vol. ii, p. 239.

It is not necessary that the propriety of the cause should be apparent in every individual case

It is not necessary, however, that in every individual instance to which a law applies, the propriety of the fact or circumstance constituting the effective cause should be apparent. On the other hand, it is sufficient if it be found to promote good or to prevent evil in most cases.[1] Take, for instance, the law which relaxes the duty of fasting during the Ramaḍán in favour of a traveller. The reason for making the concession is the hardship and inconvenience which a man generally experiences while travelling, and though this is not predicable of every traveller, the rule still holds good in all cases.[2]

The first question to be considered is whether a text is based on an extendible cause or not

Some jurists are of opinion that, unless there is express authority to show otherwise, we must assume that the law enunciated in a text is not based on a cause or reason which is capable of extended application, for the law is established by the words of a text and not by its cause or reason. Others think that every circumstance or fact to which a text refers is to be taken as the cause or reason on which the law laid down by it is based, unless there is some reason to the contrary. The Sháfi'ís and the Ḥanafís repudiate both these views; the first, because while the law laid down by a text is to be ascertained from its words, the function of analogy, on the other hand, is to extend such law to other cases, and the second view cannot, it is urged, be sound because some facts and circumstances may be peculiar to the question dealt with in the original authority, while some particular consideration alone is capable of extended application. The Sháfi'ís hold that prima facie a text is capable of extension by analogy, or in other words, it is mu'allal (معلل), that is, based on an extensible cause; but it is necessary that there should be some reason for separating the particular facts to which the text may relate from the general considerations on which its law is based. So far the Ḥanafís agree with the Sháfi'ís, but the former would add a condition to the effect that, before a jurist proceeds to find the

[1] 'Tauḍíḥ', p. 319.

[2] 'Mukhtaṣar', vol. ii, pp. 213-4; 'Tauḍíḥ', p. 319.

cause of the law of the text, he must be satisfied by good authority or reason that the text, on the whole, is capable of extension by analogy. Ṣadru'sh-Sharí'at, however, argues that this additional condition would make ratiocination extremely difficult; in fact, if the principle be carried out to its logical extent, we should be involved in arguing in a circle.

There may be more than one effective cause of a particular sentence of law

An effective cause need not be such that whenever it is wanting, the law which it gives rise to should also be wanting, for sometimes the same law may be due to more than one distinct effective cause. For instance, apostasy is the effective cause of the sentence of death and so also is the offence of murder.

What may be effective cause

The effective cause of a law may be the quality of a thing inseparable or accidental, manifest or hidden, a combination of qualities, a generic name, or a rule of law. Let us take a few examples. A tradition lays down that the poor-rate is payable on gold and silver, among other articles. Here, according to Ḥanafí doctors, the effective cause of the assessment of gold and silver is fitness of these metals for being price or medium of exchange. This quality is, in their opinion, inseparable from these metals and the analogical conclusion which they come to is that gold and silver ornaments are likewise assessable to the poor-rate. In the text regarding ribá, the effective cause of the law prohibiting excess in favour of any one of the parties to a sale of one article for another article of the same species is the quality of such articles being ordinarily saleable by the measurement of weight or capacity. Such a quality is of an accidental nature, for instance, commodities like wheat and barley, which among other things are mentioned in the text, though generally sold by measurement of capacity, are sometimes sold by the measure of weight. In this case the quality forming the effective cause is of a manifest nature, while in the case of gold and silver the effective cause, namely, their fitness for being the medium of exchange may be said to be hidden. That sometimes a rule of law forms the effective cause of an analogical deduction is illustrated by the law forbidding sale of a mudabbar (a slave entitled under

contract with his master to be emancipated on the latter's death) on the analogy of an 'ummi walad (a female slave who has borne a child to her master), the common principle being that both are entitled to freedom on the death of the master.

Whether an effective cause may be limited to the text

There is a difference of opinion between the Ḥanafís on the one hand, and the Sháfi'ís and the Málikís on the other on the question whether a circumstance, which is limited to the original text, can rightly be described as its effective cause in cases other than those in which it is so designated by a text or consensus of opinion. Abú Ḥanífa says that it cannot be properly called effective cause, the very essence of which is that it should be applicable to fresh cases. The Málikís and the Sháfi'ís, on the other hand, point out that since such a limited fact is in certain cases designated as the effective cause by a text or consensus of opinion, there is no reason why it should not be so described in other cases. It may be true that it does not serve to extend the law, but it may have its use in making such law acceptable to one's judgement. A result of this difference of opinion, according to Ṣadru'sh-Sharí'at would be that a jurist, being precluded from accepting a cause of a limited nature, would among the Ḥanafís be at liberty to make deductions from another cause of a more general application. However that may be, it seems to be agreed upon by all the Schools that, if a cause be not extendible, the law of the text cannot be extended by reasoning based on that cause.

How an effective cause is known

The effective cause is sometimes expressly stated or suggested by indications in the text itself, and sometimes established by consensus of opinion.[1] When it is expressly declared, it is by such phrases as 'so that', 'by reason of', 'because of', 'if so and so then so and so', and the like. For instance, in the Qur'ánic text, 'as to thieves male and female *so* you cut off their hands', the word 'so' points to theft as the effective cause of the punishment.[2] In the precept which says,

[1] 'Mukhtaṣar', vol. ii, pp. 233–4.
[2] Ibid., p. 213.

'Mu'ádh committed whoredom, *and so* he was stoned to death'; the words 'and so' show that whoredom is effective cause of the sentence of death by stoning. In these two cases it should be noted the effective cause can hardly be said to be extendible.

When an effective cause is merely suggested, the indication may be furnished by the nature of the construction of a sentence or by the fact of the exposition of the law being made in answer to an inquiry or by the fact of the law in two cases being distinguished by reason of some particular fact or event. In the Qur'án after enumerating the heirs of a deceased person, it is laid down 'A murderer does not inherit'; here the construction of the passage or, in other words, the context indicates the fact of killing as the effective cause for excluding the person who has caused the death of a man from inheriting from him. The case in which the Prophet treated an obligation to perform pilgrimage as a debt is an example of an effective cause suggested by the fact of its being laid down in answer to a question. A Qur'ánic text says 'For a horseman two portions (i.e. of the property acquired during war) and for a foot soldier one portion'. Here the effective cause in each case is indicated by its distinguishing fact, that is, the fact of being a horseman is the effective cause of allotment of a double portion and the fact of being a foot soldier is the cause for allotment of a single portion. An effective cause may sometimes have been determined by consensus of opinion. For instance, that minority is the effective cause of an order placing the property of a minor in the custody of a guardian has been so determined.[1]

When the effective cause is not indicated by the text itself or determined by Ijmá', we have to find out what is the proper fact or reason on which the law of the text is based. A reason, as already stated, is said to be proper if it promotes the welfare of men. But it is a condition that the reason must not only be proper but must also be appropriate (mulá'im ملائم) for the purposes of deduction. A fact or reason is

When the effective cause is not indicated by a text or Ijma' one must find out the proper facts which are appropriate for the purpose of deduction

[1] 'Taudíḥ', p. 326.

said to be appropriate when the law considers facts and reasons of the same genus as efficient in giving rise to rules of the same genus as the rule of the text which is sought to be extended.[1] The closer the connexion of an effective cause with the text, the deduction based on it is proportionately stronger.

Effective causes of the same genus or species in their relation to laws of the same genus or species

The ideas forming the general policy of the sacred laws being the ultimate generalizations are regarded as the highest genus of effective cause or reason. These when analysed are found to comprise causes of a less general character and when the latter again are analysed they are found to include causes still more limited, and so on. A reason of a more particular nature is said to be a species or variety of the more comprehensive reason in which it is included as in its genus. For instance, helplessness of a child without understanding and of a lunatic are varieties or species of helplessness due to defective understanding. The latter again is in its turn covered by helplessness arising generally. from want of strength, mental or physical. Of a still wider character is helplessness induced without the volition of a person, as when he is confined against his will, or helplessness brought about by a man's own act such as by drinking alcohol. Still higher in order is helplessness generally whether brought about by a man's own act or by outside agency or arising from the nature of subject-matter of action. Helplessness generally gives rise to wants which ultimately bring about the intervention of law. Similarly rules of law form into a graduated scale of generalization, the one more general and comprehensive being regarded as the genus with reference to the more particular, which it includes as its species. For instance, guardianship generally is the genus of which guardianships of the person and the property are two varieties.[2]

Effective cause may be ascertained by elimination

One mode of ascertaining an effective cause is by elimination (sibr سبر), that is, by rejecting such facts

[1] 'Mukhtaṣar', vol. ii, p. 242.
[2] Ibid., vol. ii, p. 243.

and reasons as are not proper and appropriate and by gradually arriving at the true cause.[1] As to what facts and reasons are to be rejected as being unfit for purposes of analogical deduction depends upon the judgement and discretion of the jurist.

Binding nature of a deduction based on effective cause which is both proper and appropriate

According to all the Sunní Schools[2] a deduction based on a proper fact or reason, which is also considered appropriate for purposes of analogical deduction, is valid. In the opinion of Sháfi'ís and Málikís the Mujtahid is bound to make the necessary deduction if such a cause is available. On the other hand, according to the Ḥanafís, he is not so bound unless such cause be also authoritative (mu'aththir مؤثر). A cause or reason is said to be authoritative if a cause of the same variety or of a near genus has been held by a text or consensus of opinion to hold good in laws of the same variety or of a near genus as that of the text from which the deduction is sought to be made. Taftázání takes exception to the position of the Ḥanafí doctors and contends that there are many cases in which decisions by the Companions were not based on an effective cause determined by a text or consensus of opinion. For instance, when the question arose whether the brother or the grandfather is the preferential heir of a deceased person, 'Alí based his conclusion in favour of the brother on a simile indicative of closeness of relationship as the guiding principle. He likens the grandfather to the trunk of a tree putting forth a branch (meaning the father of the deceased) and that branch in its turn putting forth two twigs (namely, the deceased and his brother), and he then infers that the brother is nearer in relationship than the grandfather. Other jurists argue that a branch is part of the trunk. This case would show that the earlier jurists favoured a freer and more independent exercise of judgement in making deductions than Ṣadru'sh-Sharí'at would allow. According to some jurists, a jurist is bound to make deductions from a particular fact or circumstance as being the effective

[1] 'Mukhtaṣar', vol. ii, p. 232.
[2] Ibid., vol. ii, p. 242.

cause of the law of a text merely because it so appears to his mind. This is called argument based on general considerations of public good (مصالح المرسلة).

Imám Ghazzálí is of opinion that it is lawful to make a deduction from such reasons of a general character, if it be called for by absolute necessity affecting the Muḥammadans as a body. The following case is cited as an illustration of his opinion. If in a battle between the Muḥammadans and the non-Muslims the latter place in front of their lines a body of Muḥammadan prisoners as a shield, he holds that it would be lawful to shoot at them, if the situation could not be saved otherwise. The reason he gives is that, if by abstaining from attack the result would be a triumph of the non-Muslims, the Muḥammadan body politic would thereby be involved in danger. But suppose, a boat is caught in a storm and the passengers find that all of them would be drowned unless some be thrown overboard so as to lighten the load, the law would not justify the act since the safety of Muḥammadans in general is not imperilled.

The strength of an effective cause varies in different cases

There are certain effective causes which are fit for deduction in two or more of the four forms held by the Ḥanafís to be binding. An effective cause, which may be the basis of deduction in all the four forms, has the strongest claim to acceptance, next if in three and then if in two of the forms. It will be seen that there can be only one group of cases in which all the four forms of deduction are possible, four admitting of three forms and six admitting of two, altogether eleven. Minority, for instance, is an effective cause of a specific nature giving rise to a rule of law general in its application, namely, appointment of guardian of the property of a minor girl whether married or unmarried. Again helplessness of which minority is a variety, is the effective cause of appointment of guardian of the property not only of a minor, but also of a lunatic.

An analogical deduction based on an effective cause which is expressly established by the text is preferable to an effective cause indicated by a hint or suggestion,

and deductions of these two kinds have priority over one the effective cause of which is founded on appropriate reasons. A deduction based on an effective cause, the appropriateness of which, with reference to a rule of law of the same variety, is determined by consensus of opinion, is preferred to one based on an effective cause, the appropriateness of the genus of which, with reference to a similar command, has been determined by consensus of opinion. The latter in its turn has precedence over a deduction based on an effective cause, the appropriateness of the variety of which is by consensus of opinion regarded as of force in relation to laws of the same genus. Each of the above kinds is preferable to a deduction based on an effective cause, the genus of which is regarded as of force with respect to laws of the same genus. Then again a deduction based on an effective cause, the near genus of which is regarded as of force with respect to laws of a near genus, has priority over one based on an effective cause, the remote genus of which is regarded as of force with respect to laws of a remote genus.[1]

The following tests are, perhaps, more useful in determining as to which of several conflicting analogical deductions are to be accepted: (1) A deduction based on a cause having the stronger legal authority is to be preferred; (2) if one effective cause is more acted upon in law than another, a deduction founded on the former is to be preferred; (3) if one effective cause is found in a larger number of texts than another, the former is considered of greater legal force than the latter; (4) if an effective cause is of such a character that, when it is absent, the rule of law which it gave rise to is negatived, it is to be preferred to one with respect to which this test does not hold good.

A jurist is entitled to accept any one of the two conflicting deductions from a text

One analogical deduction cannot be said to abrogate another; and if two deductions be found to be in conflict, a jurist is at liberty to accept whichever of them commends itself to his judgement. The reason for this is, that the validity of an analogical deduction rests on the power of a Mujtahid, to draw correct

[1] 'Tauḍíḥ', p. 371.

conclusions and infallibility cannot be presumed in his favour.

Whether the applicability of an effective cause may be limited

Many Ḥanafís, some Sháfi'ís, the Málikís and Ḥanbalís hold that the operation of a particular effective cause may be limited, that is to say, a certain cause, though generally effective, may not be so in some cases, but eminent Ḥanafí jurists, like Fakhru'l-Islám and Ṣadru'sh-Sharí'at, say that nothing is a good effective cause, unless in every case in which it is found the command follows as the result.[1] This is also said to accord with one version of Sháfi'í's view and with that of most of his followers. The first view is undoubtedly borne out by the broad facts of the Muḥammadan system. Indeed, those who hold by the stricter theory have to make it good by an explanation that in some cases the legal effect does not follow upon its cause by reason of some obstacle. The truth is, as pointed out by Qáḍí 'Uḍad (عضد), that the controversy is more verbal than substantial.[2]

Let us understand the question with reference to some of the cases cited as illustrations. If a man in the extremities of hunger eats food belonging to another, he is liable to make compensation, the effective cause of the liability being a breach of the inviolability of a man's proprietary rights. On the other hand, if a Muslim forcibly takes or destroys a rebel's property, the law does not hold him liable. The Sháfi'ís would say that the last case is an exception to the rule that violation of a man's proprietary rights is the effective cause of compensation. The Ḥanafís, on the other hand, who do not admit the possibility of any exception to the operation of an effective cause, would say that, in the case of a rebel, hostility is the effective cause of negation of proprietary rights and not that the law in his case permits proprietary rights to be violated. In this connexion a metaphor, which is employed by those who hold the opposite view to indicate the different circumstances which prevent an

[1] 'Tauḍíḥ', p. 345.
[2] 'Mukhtaṣar', vol. ii, p. 219.

effective cause from being operative, may be found interesting.[1]

(1) Sometimes a certain circumstance may prevent an effective cause being constituted at all, as when a man trying to shoot an arrow, the string of the bow happens to snap. For instance, a contract to sell a free man is inoperative, as he cannot form the subject-matter of sale.

(2) In some cases the effective cause is not completed by reason of some obstacle, as if, to continue the metaphor, the arrow being shot, it should fail to hit the mark. If a person who is not the owner of a thing sells it, the contract which is the effective cause of transfer of the property cannot be completed, as the vendor is unable to give possession.

(3) In some instances, a certain obstacle stands in the way of the law coming into operation at all, just as when an arrow hits the enemy but his armour prevents the intended injury being caused. For example, a man contracts to sell an article with the option of revoking the contract on the happening of a certain event and the contingency happens preventing the sale from taking effect.

(4) Sometimes the obstacle stands in the way of the law having full operation, just as if the arrow should hit the enemy and inflict injury, but the wound is thereafter healed by the skill of a surgeon. For example, the law gives the person who buys an article without seeing it the option of cancelling the contract, which is the cause of transfer of the property on having inspection of the thing sold.

(5) Sometimes the law comes into operation by force of the cause but does not become binding, just as if the wound caused by the arrow should not heal but become chronic, so that the wounded person gets used to it. This happens,

[1] 'Tauḍiḥ', pp. 345-6.

for instance, when the buyer of an article rescinds the contract on discovering a defect.

Those who admit no exceptions to the legal effect of an effective cause say that in the above cases the fallacy lies in considering the contract, namely, the proposal and the acceptance to be the effective cause in all of them without taking into account the peculiar circumstances of each case. They say that the absence of all obstacles to the operativeness of an effective cause is a condition precedent of such cause. Against this theory of Ṣadru'sh-Sharí'at and Fakhru'l-Islám it is also urged that the effect of juristic preference is to limit the operation of the effective cause on which an analogical deduction is based. Ṣadru'sh-Sharí'at's answer is that in all cases in which juristic equity overrides analogy, the cause on which the analogical deduction is based should not be called effective cause.

Examples of analogical deduction

Here I may refer to some more cases with a view to show how differences of opinion have arisen in making analogical deductions and to illustrate the nature of the arguments by which each view is supported. In the books on Uṣúl, they are set out under the heading of certain rules, but those rules when closely examined do not involve any important principles of general application, but appear to be more in the nature of arguments in support of the view held by one school or the other in certain concrete cases and in refutation of the position of the adversary in such cases.

Pronouncement of Amen in a loud or low voice

1. Ḥanafís.—When a prayer is being said, the word Amen, at the end of the opening Súra of the Qur'án, should be pronounced in a low voice, because the utterance of Amen is an act of devotion, and therefore should be made in a low voice.

Sháfi'ís.—If the reason for pronouncing Amen softly be that it is an act of devotion, then how is it that calls to prayer or the invocation 'God is great', which are also devotional acts, are uttered in a loud voice, the first before the commencement of a prayer and the other at certain stages during a prayer?

The Ḥanafís answer: True, these cases resemble each other in so far as they are all devotional acts, but

in calls to prayer and in the repetition of the invocation 'God is great' during prayer, there is an additional circumstance which distinguishes them from the uttering of Amen, namely, the necessity for announcing to the congregation that the time for prayer has arrived or that a particular stage has been reached during prayer.[1]

Proof of marriage

2. Sháfi'ís.—A marriage does not stand on the same footing as property and, therefore, cannot be proved by the testimony of two women and one man.

Ḥanafís.—The deduction is bad, as it is based on a negation. The reason, why mixed evidence is allowed by the Ḥanafís in marriage, is that its validity cannot be affected by the existence of a doubt in the proof of it as appears from the fact that a valid marriage would be constituted even if it be contracted in jest. The analogy of theft which is relied upon by the Sháfi'ís is, therefore, inapplicable, as the sentence known as ḥadd cannot be imposed if there is the least doubt in the proof and a woman's testimony is ordinarily open to doubt because of her weakness.

A case relating to paternity of a child

3. Ḥanafís.—A woman is informed that her husband is dead, and she relying upon the information marries another husband and a child is born as the result of the second marriage. If the first husband thereafter returns and claims the child, he will be entitled to it, as he is the lawful master of the woman's bed.

Sháfi'ís.—The second husband is entitled to the child, as he is the actual master of the woman's bed, just as the paternity of a child born of a marriage contracted without two witnesses being present is imputed to the husband, though the marriage is vitiated in law.[2]

Guardianship for marriage

4. Ḥanafís.—The law places the property of a minor thayyiba[3] (ثيبة) in the custody of a guardian; similarly the guardian should also have custody of her person for the purpose of giving her in marriage, just as in the case of a minor maiden.

Sháfi'ís.—The reasoning is not sound, for, in the case of a minor maiden, the law gives the custody

[1] 'Kashfu'l-Isrár', pp. 1194-5.

[2] 'Taudíḥ', p. 351.

[3] i. e. a girl who has had sexual connexion.

of her property to a guardian, because her person is in such custody and not the reverse, and hence a guardian cannot lawfully give a thayyiba in marriage without her consent.

The Ḥanafís reply:—Guardianship has been instituted by the law for reasons of necessity and viewed in this light, no distinction can be drawn between the person and property of a minor and between a maiden and a thayyiba.[1]

A case relating to punishment for whoredom

5. Sháfi'ís.—A non-Muslim maiden girl is liable to the sentence of flogging for whoredom and, therefore, a non-Muslim married woman should be sentenced to death for a similar offence, just like a Muslim married woman under the same circumstances.

Ḥanafís.—The deduction is bad. A Muslim maiden is punished with flogging, because a married woman for a similar offence is sentenced to death, the guilt of the latter being more serious than that of the former, and there is no punishment of the nature of ḥadd below the sentence of death provided by law higher than a sentence of flogging.[2]

Trespasser's liability for mesne profits

6. Sháfi'ís.—A wrong-doer who has forcibly taken possession of the property of another is liable to restore it to him and is further liable to account for the mesne profits, just as a man who commits breach of a contract is liable for the consequent damages.

Ḥanafís.—The wrong-doer is bound to restore the property, but is not liable for the mesne profits because usufruct is an accident and does not stand on the same footing as property, which must be a thing or a physical object. Hence there is no basis for assessment of damages, the principle of which is that the parties should be placed on a footing of equality. No doubt this view of the law causes hardship to an innocent person, but this is better than that the law should award damages in excess of the loss caused, for that would be a hardship inflicted by the law itself, and as law emanates from God injustice would be imputed to Him. As for the analogy of the law relating to contracts, it is urged that the assessment

[1] 'Taudíḥ', p. 352.
[2] Ibid., p. 352.

of the future profits is allowed in such cases by way of exception and analogy cannot be applied to exceptions.

The Sháfi'ís reply:—The value of property consists in the rights connected with it and not in the physical object itself. Besides inability to ensure absolute equality is no reason why the injured owner should suffer the loss, rather than the wrong-doer.[1]

7. Sháfi'ís.—If either a non-Muslim wife or husband embraces Islám, then in case there has been no consummation, they will be separated at once and, if the marriage has been consummated on the expiry of three periods, an offer of opportunity by the judge to the non-Muslim husband or wife to embrace the faith is not necessary.

Effect of conversion to Islam of a non-Muslim wife or husband on marriage

Ḥanafís.—The Qáḍí must first inquire of the husband or wife who has remained non-Muslim if he or she will embrace Islám, and on his or her refusing will separate them, whether the conversion of the other happened before or after consummation. The reasoning of the Sháfi'ís is bad, because it really means that the fact of one of the spouses being a Muslim would be the effective cause for separation. This cannot be, as in that case Islám would be the cause of forfeiture of a blessing of life, namely, marriage, while, according to the Ḥanafí view, the refusal of the non-Muslim spouse to accept Islám is the effective cause of separation.

SECTION II—ISTIHSAN OR JURISTIC EQUITY

Istihsan or juristic equity

It sometimes happens that a rule of law deduced by the application of analogy to a text is in conflict with what has been expressly laid down by some other text, or by the unanimous opinion of the learned. All the four Sunní Schools of law agree that in such cases the former must give way to the latter. It may happen that the law analogically deduced fails to commend itself to the jurist, owing to its narrowness and in adaptability to the habits and usages of the people and being likely to cause hardships and inconveniences. In that event also according to the Ḥanafís, a jurist

[1] 'Tauḍíḥ', pp. 374–5.

is at liberty to refuse to adopt the law to which analogy points, and to accept instead a rule which in his opinion would better advance the welfare of men and the interests of justice. The doctrine by which a jurist is enabled to get over a deduction of analogy, either because it is opposed to a text or consensus of opinion, or is such that his better judgement does not approve of it, is technically called Istiḥsán (استحسان literally, preferring or considering a thing to be good) which I have translated juristic preference or equity.

The term Istiḥsán is used by the Ḥanafí lawyers alone, and so much of the doctrine itself which authorizes a jurist to rely on his private judgement, instead of following a rule resting on analogy, is also confined to the Ḥanafí system. In fact, it is with this special aspect of it that the principle of juristic preference is particularly identified. The Ḥanafí lawyers speak of this doctrine as if it was a species of analogical deduction. They say it is nothing but hidden analogy. However that may be, Istiḥsán not being hampered by rules is as a source of laws freer and wider in scope than analogy. In fact, as I have said elsewhere, if we call analogical deductions the common law of the Muḥammadans, then juristic preference may be relatively styled their equity. It has largely helped to develop the Ḥanafí system, the founder of which deserves the credit of having been the first to recognize that a strict adherence to analogy would deprive law of that elasticity and adaptability which alone make it the handmaid of justice. The principle of Istiḥsán evoked strong comments and opposition from jurists of the other Sunní Schools, and Sháfi'í is reported to have said: 'whoever resorts to Istiḥsán makes laws.' These strictures seem to have considerably affected the growth of the doctrine in the hands of Abú Ḥanífa's followers, and would also serve to explain why the Ḥanafí jurists are so anxious to assimilate it to analogy, though it can hardly be said that the attempt which they have made in this connexion is of any practical guidance to a student of Muḥammadan law.

Laws based on juristic equity are divided by some lawyers into two classes: (*a*) those that carry conviction to the mind of a jurist as being sound, and (*b*) those that appear at the first glance to be sound, but do not produce such conviction in the mind of the jurist. In juxtaposition to this classification of juristic equity law, analogical deductions are similarly classified into (1) those that are weak and (2) those which at the first glance appear to be unsound, but are found on further examination to be correct. When opposed to each other (*a*) is to be preferred to (1) and (2) to (*b*).

Different kinds of juristic equity as opposed to different kinds of analogical deduction

Some jurists make a more elaborate comparative classification of these two forms of deduction. A juristic preference according to them may (*a*1) appear at the first glance to be sound and be found to be so on closer examination, (*b*1) not only appear at the first glance to be unsound, but be found to be so on further consideration, (*c*1) appear at the first glance to be sound and be found to be unsound on further consideration and (*d*1) appear at the first glance to be unsound, but on further consideration be found to be sound. They also divide analogical deductions into corresponding classes, which may be numbered respectively as (1*a*), (1*b*), (1*c*) and (1*d*). When opposed to each other (1*a*) is to be preferred to juristic preference of any class; and (1*b*) and (*b*1) are never to be accepted; (*a*1) is to be preferred to (1*c*) and (1*d*), (*d*1) to (1*c*), (1*d*) to (*c*1), (1*c*) to (*c*1) and (1*d*) to (*d*1). It is urged, however, by the author of 'Taudīḥ' that a rule of sound juristic equity cannot be opposed to a sound analogical deduction relating to the same matter, because whenever the effective cause of a text is correctly found the command must follow, and juristic preference is but a variety of analogical deduction. Such a conflict is only possible, when there is an error in ascertaining the cause.

Instances of the application of this doctrine are to be frequently met with in the books and, in fact, some important branches of Muḥammadan law owe their origin to it, such as contracts of the nature of

Application of juristic equity

salám and istiṣná'. The doctrine is chiefly resorted to, in cases arising out of the complex conditions of a growing society where a strict adherence to analogy would fail to meet the wants of the people. It will also be remembered that it is on the strength of this principle that the Ḥanafí doctors abandon a rule of analogy in favour of a different rule sanctioned by custom as being more acceptable to the people.

SECTION III—PUBLIC GOOD

Maliki doctrine of public good

Imám Málik sanctioned a doctrine somewhat similar to juristic equity or preference. He would allow a deduction of law to be based on general considerations of the public good (maṣáliḥu'l-mursala wa'l-istiṣláḥ مصالح المرسلة والاستصلاح) and Imámu'l-Ḥaramain also held a similar view.[1] But it does not appear that the Málikí jurists took full advantage of this principle, and it would seem that many followers of that School like the Ḥanafí doctors consider the doctrine to be too vague and general to be useful in making legal deductions.[2] Further a case which is cited as an illustration of the application of the doctrine cannot be said to be a happy one. For instance, some Málikí jurists have invoked this doctrine to justify the use of force to a person accused of theft to make him confess. It is, however, pointed out with reference to this case that it is better that a guilty person should escape than that an innocent man should be subjected to ill-treatment.[3]

SECTION IV—ISTIDLAL

The word Istidlál (استدلال) in ordinary use means the inferring from a thing another thing; and we have noticed that the Ḥanafí jurists use the word more or less in this sense in connexion with the rules of interpretation. But with the Málikís and the Sháfi'ís Istidlál is the name for a distinct method of juristic ratiocination, not falling within the scope of interpretation or analogy. Istidlál is of three kinds:—

[1] See 'Jam'u'l-Jawámí' ', vol. iv, pp. 101-2.
[2] See 'Mukhtaṣar', vol. i, pp. 281-9.
[3] 'Jam'u'l-Jawámí' ', vol. iv, p. 102.

(1) The expression of the connexion existing between one proposition and another without any specific effective cause (التلازم بين الحكمين من غير تعيّن علة).

(2) Istiṣḥábu'l-ḥál (استصحاب الحال) or presumption that a state of things, which is not proved to have ceased, still continues.

(3) The authority of revealed laws previous to Islám (شرائع من قبلنا).

Istidlál of the class (1) is of four varieties: (i) when the connexion is between two affirmative propositions, for example, the proposition that every one who is competent to give a valid ṭaláq can also make a valid ẓihár; (ii) when the connexion is between two negative propositions, for example, the statement that if a regular ablution (waḍú' وضوء) were valid without specific intention, then a substitutory ablution (tayammum تيمم) would also be valid, that is to say, as a substitutory ablution is admittedly not valid without specific intention, a regular ablution also cannot be valid without such intention. This is in refutation of the Ḥanafí position to the contrary. (iii) When the connexion is between an affirmative and a negative proposition, for example, the proposition that what is permissible cannot be ḥarám or forbidden; (iv) when the connexion is between a negative proposition and an affirmative proposition, for example, the statement that what is not valid is forbidden.

(2) As an example of Istiṣḥáb may be mentioned the case of a man who has disappeared, and whose whereabouts are not known. The Sháfi'ís would treat such a man as living for all purposes of the law until his death is proved, so that his estate will not be distributed among his heirs, and he will be allotted his share in the estate of a person from whom he is entitled to inherit, and who happens to die during his disappearance. The Ḥanafís say that the presumption that a particular state of things continues until the contrary is proved is valid only to the extent it serves to protect existing rights (للدفع), and not for establishing or creating a new right (لا للاثبات). Therefore in the

above case they would agree with the Sháfi'ís so far that they would not allow the property of the man who has disappeared to be distributed among the heirs, but they would not recognize his right to inherit from the person who has died since the man's disappearance.

(3) As for the binding character of the laws which were revealed previous to Islám, I have elsewhere stated the Ḥanafí view, and there does not seem to be any marked difference on the point between it and the views of the other Sunní Schools.[1]

It would seem that Istiḍlál as a method of juristic deduction includes all forms of ratiocination which do not fall within the scope of analogical deduction. Qáḍí Uḍud himself says that the Ḥanafí doctrine of Istiḥsán, or juristic equity, as well as the Málikí doctrine of public good are covered by Istidlál.[2]

SECTION V—IJTIHAD AND TAQLID

Is further juristic exposition and development of the Muhammadan law precluded

With reference to the sources of law, it is a matter of considerable importance that we should consider the question whether further juristic exposition and development of the Muḥammadan law is inconsistent with the principles of the system. For this purpose, we must endeavour to understand the precise scope of the rules relating to the qualifications of a Mujtahid or jurist, and endeavour to ascertain the true position of the Sunní Schools in connexion with the doctrine of taqlíd, that is, the duty of adopting the exposition of law as made by the ancient jurists. The word Mujtahid which is a *nomen agentis* means a person who can make ijtihád. Ijtihád literally means striving, exerting and as a term of jurisprudence it means the application by a lawyer (faqíh فقيه) of all his faculties to the consideration of the authorities of the law (that is, the Qur'án, the Traditions and the Ijmá') with a view to find out what in all probability is the law (that is, in a matter which is not covered by the express words of such texts and has not been

Ijtihad or juristic exposition

[1] See *ante*, chapter iii, part i, section i, 'Tauḍíḥ', p. 250; 'Jam'u'l-Jawámi'', vol. iv, pp. 191–2; 'Mukhtaṣar', vol. ii, p. 286.

[2] 'Mukhtaṣar', vol. ii, p. 281.

determined by Ijmá').[1] In other words Ijtihad is the capacity for making deductions in matters of law in cases to which no express text or a rule already determined by Ijmá' is applicable. Here it must be observed that though questions, which have been determined by Ijmá', are not open for the exercise of Ijtihad, yet as none but Mujtahids can take part in collective deliberations the question relating to the qualifications of a Mujtahid necessarily affects this source of laws as well. It will be seen that a Mujtahid or jurist is something more than a faqíh or lawyer. He must not only be learned in the law but must be able to make legal deductions. The legal effect of Ijtahad is the probability of the conclusion so arrived at being correct, but the possibility of such conclusion being erroneous is not excluded. That is why juristic deductions are classed as discretionary or presumptive laws. If a jurist makes a wrong deduction, he incurs no spiritual responsibility for he has done his best to reach the right conclusion and infallibility is attributable only to the words of the Divine Lawgiver and of the Prophet, whose utterances in all matters of law and religion are inspired. All the Sunní Schools agree that a juristic deduction is not certain and that a jurist is liable to err. Only the Mu'tazilís hold that a juristic deduction must be correct.[2]

Who may be Mujtahids or jurists

I have elsewhere[3] described in a general way the qualifications which are required of a Mujtahid. But as the question is one of importance, it is necessary that I should enumerate these qualifications in the language of the writers on Uṣúl. Ṣadru'sh-Sharí'at following Fakhru'l-Islám says that a jurist should have knowledge of the Qur'án together with its meaning, dictionary and legal, and its various divisions, of the traditions including the texts and the authorities thereof, and of the rules relating to analogical deduction.[4] The author of 'Jam'u'l-Jawámi'' enumerates the qualifications of a jurist with power of independent exposition

[1] 'Jam'u'l-Jawámi'', vol. iv, p. 262; 'Mukhtaṣar', vol. ii, p. 289.
[2] 'Tauḍíḥ', p. 382.
[3] See *Ante*, Ijmá'.
[4] 'Bazdawí', vol. iv, p. 1135; 'Tauḍíḥ', p. 382.

(al-mujtahidu'l-mustaqil المجتهد المستقل) as follows: he must be major, passed of understanding and of sufficient intellectual acuteness to be able to grasp the drift of a speech; he must have average knowledge, of the Arabic language, grammar and rhetorics, of the principles of jurisprudence and of the sources of law, that is, the Qur'án and the traditions; he must be well versed in the main principles of the Sharâ or the legal code so as to be able to ascertain the intention of the lawgiver; he must know the repealing and the repealed texts, the circumstances in which the texts of the Qur'án were revealed, and the rules relating to the continuous and the isolated traditions, and be able to discriminate between authentic traditions and traditions of weak authority, and he must know the history of the narrators of traditions, but in this connexion it would be sufficient for a jurist in our days to refer to the authority of one of the Imáms of tradition such as Aḥmad, Bukhári and Muslim. It is not necessary that a jurist should know the science of divinity, or all the rules of law in the different branches of the code. A woman may be a jurist, and so also a slave. Nor is it necessary that a jurist should be a man of piety. It will be observed that this statement of what are the necessary, and what are not necessary qualifications for a jurist is more detailed than what is given by Fakhru'l-Islám and Ṣadru'sh-Sharí'at but the rules on the point are in substance the same in all the four Sunní Schools. Tájud-d'ín Subkí then goes on to say that there may be a jurist of a lower rank, namely, Mujtahidu'l-Madhhab (مجتهد المذهب) that is, a jurist following a particular School of law. Such a jurist must be able to apply the principles laid down by the founder of his School to particular cases. He then goes on to point out that there are jurists with a still narrower sphere of exposition. He describes them as Mujtahidunu'l-Futiyá' (مجتهدون الفتيا), that is, those who are competent to give fatwás or, in other words, to decide as to which of the conflicting views reported from the jurists of a higher rank is correct.

The Sháfi'ís and the Málikís also hold that there may be men whose qualifications as a Mujtahid are confined to certain special branches of the law such as the law of succession and inheritance. Ṣadru'sh-Sharí'at and Fakhru'l-Islám do not expressly mention jurists of the two lower ranks, but we may take it that, in all the four Sunní Schools, the jurists who lived after the age of the four Imáms mostly, if not all, have mainly occupied themselves in developing the work of the founders of the four Schools, especially the Ḥanafí, the Sháfi'í and the Máliki Schools. It would seem so far as I am aware that 'Jam'u'l-Jawámi'' is the earliest writing in which attempt is made to classify the jurists according to the kind of work to which they devoted themselves. But we shall presently see that writers of later times have made an even more elaborate classification of the jurists. Such gradation in juristic work so far as it is a fact of history cannot be gainsaid. What then is its legal significance?

In this connexion it is necessary that we should ascertain the exact scope of the doctrine regarding Taqlíd.

Taqlíd means following the opinion of another person without knowledge of the authority for such opinion.[1] As a term of jurisprudence it means following the opinion of a jurist in matters which have not been dealt with by an express Qur'ánic or traditionary text or by Ijmá', for in matters which have been so dealt with there is no room for juristic opinion and all persons whether jurists or not would be equally bound to accept such laws. It will be apparent from the definition of Taqlíd that the doctrine applies only in the case of those who do not possess the qualifications of a jurist. In fact, if a jurist has formed an opinion of his own on a particular question it is forbidden (ḥarám) to him to follow in preference the opinion of another jurist to the contrary. And even if a man who does not possess the qualifications of a jurist but is learned

Taqlid or duty to follow

[1] 'Jam'u'l-Jawámi'', vol. iv, p. 276; 'Mukhtaṣar', vol. ii, p. 307; 'Taqrír wa't-Taḥbír', vol. iii, p. 340.

in the law ('Álim عالم) holds a certain view on a particular question he ought to act upon it though the contrary view may have been sanctioned by a jurist.[1] Indeed, it could hardly be otherwise considering that the basis of the Muḥammadan law is laid in men's conscience.

Questions connected with Taqlid

The questions which are raised by the doctrine of Taqlíd as some would interpret it may be thus specified. (1) Must a Muḥammadan of the present day adopt one of the current Schools of legal thought, or is he entitled to say 'my law is the Qur'án and what the Prophet has laid down by his precepts, but in matters not expressly dealt with therein, I hold myself free to make deductions therefrom according to the best of my lights, independently of what the others have said'; or can he say: (2) 'I adhere to the tenets which are common to all the four Sunní Schools, and that on any question on which they differ, I am free to adopt the view of such one of them as may commend itself to my judgement'; or (3) if he is a follower generally of one of the four Schools, is he at liberty on a given question to adopt the view of any other Sunní School; and (4) is it open to a Qáḍí, or a judge, to base his judgement in a question of juristic law on a view, which is opposed to that held by the jurists of the School to which he belongs, or of the School to which the litigants belong, if such view has the support of one or more of the other Sunní Schools and is, in his opinion, more in consonance with the requirements of justice than the other view. The first three questions affect the conscience of individual Muslims as to the right law by which to govern their conduct, and the fourth question concerns the practical administration of justice.

The duty of laymen

So far as a layman ('Ámí عامي), that is, one who has not made a study of law and religion is concerned, his duty is to follow the guidance of the learned, and it will be sufficient to absolve his conscience, if he consults and acts upon the opinion of the man most noted for his religious learning that

[1] 'Jam'u'l-Jawámi'', vol. iv, p. 264.

may be available to him and, according to the Málikís and the Sháfi'ís and the earlier Ḥanafí jurists, even if the person whom he consults happens to belong to a School of theology other than his own.[1] The proposition in its general aspect would seem to be self-evident, once it is granted that a juristic deduction has the force of law.

Does the law refuse to accord the status of a jurist to modern lawyers

The really important question is, is there anything in the law or in the Sunní doctrines which precludes the recognition of any jurists, other than the ancient doctors. The answer to that must be decidedly in the negative. The Ḥanbalís go further and hold that there can be no age in which there should not be a Mujtahid, though the other Sunní Schools do not deny such possibility.[2] Imám Rázi[3] raises the question whether it is permissible to follow the opinion of a jurist who is dead, but no one who can claim any authority as a jurist has said that the law denies to a modern lawyer, although possessing the necessary qualifications, the authority of a jurist. There are no doubt some men who think that the age of independent juristic thought has come to an end,[4] and some seem to have gone so far as to hold that there can be no further exposition and development of the doctrines even of a particular School. If the age of Ijtihád had come to an end with the four Imáms, their disciples, and those that immediately followed them, one would have expected to find some mention of such an important doctrine in the books on Uṣúl, which is the science that deals, as we know, with the sources of law. On the other hand, Fakhru'l-Islám and Ṣadru'sh-Sharí'at only discuss the question how far it is incumbent on the Muḥammadans to follow the individual opinions of the Companions of the Prophet, and they decide that even their opinions stand on no better footing than those of other jurists. In this the Sunní jurists generally agree. It cannot then be suggested for a moment that the opinions of the

[1] 'Mukhtaṣar', vol. ii, p. 309.
[2] Ibid., vol. ii, p. 307.
[3] 'Jam'u'l-Jawámi'', vol. iv, p. 269.
[4] 'Durru'l-Mukhtár', vol. i, p. 57.

founders of the different Schools should have a higher authority than those of the Companions and, if it were so, the writers on Uṣúl would have been expected to mention such opinions as a distinct source of laws. Baḥru'l-'Ulúm very justly observes: 'there are men who say that after Nasafi there can be no jurist of the third class (namely, one fit to interpret the law of a particular School), and that as to jurists of the first class they came to an end with the four Imáms, and consequently it lies with every one to follow one of them. But all this is mere fancy, and they cannot support it by argument and no reliance can be placed on their words. To them applies the saying of the Prophet: 'they pass opinions without knowledge and not only they themselves go wrong but lead others astray'. Their dictum (namely, that there can be no longer a Mujtahid of the first or even of the third degree amounts to an assertion with reference to one of the five things hidden in the womb of futurity, of which no one can have knowledge, except God.'[1] Those who do not go so far, hold that, though it is not impossible that there should be Mujtahids in these days, it is highly improbable that there should be one. But the qualifications required of a Mujtahid would seem to be extremely moderate, and there can be no warrant for supposing that men of the present day are unfitted to acquire such qualifications. It has been seen that the law regarding Ijmá' contemplates the possibility of there being jurists in every age, and similarly the elaborate discussion of the rules relating to analogy, which is to be found in the books on Uṣúl, proceeds on the assumption that it is a living source of law. It is not pretended that there is anything in the Qur'ánic or traditionary texts which countenances the above notion; on the other hand, the very Qur'ánic text, which is the principal authority for juristic deductions, namely, 'then ask those who have knowledge, if you yourselves do not know', contemplates the existence of learned men at all times. Nor can

[1] Commentary on Musulmanu'th-thabúṭ by Baḥru'l-'Ulúm (Lucknow edition of 1878), p. 624.

it be said that there is anything in support of the notion in the writings of men who according to those that believe in Taqlíd in its extreme form belonged to one of the recognized ranks of jurists.

It is, therefore, difficult to understand how men who do not claim to be jurists themselves could lay down a doctrine the effect of which if rigidly interpreted would be to seal up, as it were, the two most important sources of the law, namely, Ijmá' and juristic deduction. And as the possibility of further revelation is denied, the result of this would be to reduce things to an impasse. Further, such a doctrine would seem to be in conflict with the fundamental principle of Sunní jurisprudence, that all juristic deductions are uncertain and discretionary, for it would practically involve the position that the individual opinions of ancient jurists, supposing we are able to ascertain what they are, cannot be dissented from and must be followed like absolute and certain laws. The fact is that the theory of Taqlíd has a historical rather than any legal significance.

As I had occasion to mention elsewhere, since the age of the four Imáms, the Muḥammadan world generally, with the exception of the Shí'ah sect, has adhered to the doctrines to which those jurists gave vogue. It may also be observed that, considering the number of sects holding all shades of possible and impossible opinions, which arose during that period and subsequently disappeared, it is not to be wondered at that the Muḥammadans, having deliberately made their choice out of such a variety of doctrines and their teachers feel at the present day that the last word has been said on the main principles of interpretation of their religion. It may further be justly said that within the limits of the four Schools there is ample scope for expansion and development of the law. It, therefore, seems to be more or less natural that, though the Sunní theory does not preclude recognition of a new teacher yet the Sunnís should have been slow to accept any new doctrines radically different from those of their Schools.

As regards the second question, it would appear that the more bigoted spirits among the Sunnís,

Muqallids and Ghairu Muqallids

especially among the Ḥanafís, require that a Musalmán, if he is not to be regarded as outside the pale of Sunní orthodoxy, should attach himself to one or other of the four Schools. Such men have placed themselves in violent opposition to a number of men amongst the Sunnís, who would not call themselves followers of any of the four teachers in particular, and whom they therefore, describe by the name of Ghairu Muqallids (غير مقلد), or 'men who do not follow' distinguishing themselves as Muqallids, or 'those who follow.' They are also known by the name of Wahhábís or followers of one 'Abdu'l-Wahháb of Arabia, who lived in the thirteenth century A.H. and by his hostile political attitude towards the Turkish Government, brought considerable odium on the Ghairu Muqallids generally.

The Ghairu Muqallids prefer to call themselves Ahlu-l-Ḥadíth or the followers of traditions. These men, it may be observed, accept not only the Qur'án and the Ḥadíth, but also, at least in theory, Ijmá'[1] and analogy[2] as the legitimate sources of law. But they give analogy a very narrow scope and make an extensive use of traditions. In this respect they proximate towards the teachings of Imám Ḥanbal, but they would not presume in favour of the dicta of any of the four teachers or of any other jurists, however distinguished, that such dicta must be in accordance with a proper interpretation of the Qur'ánic or authentic traditionary texts; nor would they reject a tradition as of doubtful authority because one of the four Imáms did not chose to rely upon it. They do not deny that the opinions of the Imáms and the jurists of the orthodox Schools are entitled to respect, and often speak of Ijmá' as an authority, but on particular questions they consider themselves entitled to hold a view in opposition to one on which all the four Sunní Schools have agreed. For instance, on the question of validity of a waqf for the benefit principally of the donor's family

[1] 'Rauḍatu'n-Nadia' (Bulaq edition), p. 284, a commentary by Nawáb Ṣiddíq Ḥusain on 'Durru'l-Bahiya' by Shaukání of Yemen, who died in A.H. 1255.

[2] Ibid., pp. 251-2.

and posterity, they hold such a waqf to be invalid contrary to the unanimous opinion of the jurists of the four Sunní Schools. It is interesting to note here that the arguments advanced by an Ahlul Ḥadíth[1] about thirty-three years ago against the validity of such waqfs are in substance the same as those subsequently relied on by the Privy Council in *Abú Fate'ḥ Muhammad Isháq's* case[2] and in *Ahsanullal Chowdhry's* case.[3] It does not appear that the Courts, on questions of Muḥammadan law arising in cases in which members of Ahlul Ḥadíth were parties, adopted any rules as being peculiarly applicable to them and different from the rules of the Ḥanafí or other Sunní Schools. I am not sure whether any such claim has yet been put forward on their behalf. On the other hand, the Courts have decided against the claim made by some Ḥanafís to exclude members of Ahlul Ḥadíth from mosques founded by Ḥanafís on the ground that they pronounce Amen in a loud tone (آمین بالجهر) and practise rafu'u'l-yadain (رفع الیدین), that is, raise the hands to their ears at certain stages of prayer which the Ḥanafís condemn.[4]

As regards the third and the fourth questions which concern those who profess to follow one of the four Sunní Schools, the law as expounded by the jurists of recognized authority is, as I shall presently show, that it is open to a follower of one School to adopt, on a particular point of juristic law, the interpretation by the jurists of one of the other Schools in preference to that which has found favour with the jurists of his own School. The author of 'Jam'u'l-Jawámi' ' was the first, as mentioned above, to attempt any kind of classification of the jurists working in a particular School of law; and he mentions it merely as a historical fact. There is no mention of such classification of juristic work in the writings of Fakhru'l-

[1] 'Rauḍatu'n-Nadiya', pp. 283–4.
[2] 22 Cal., p. 619.
[3] 17 Cal., p. 498.
[4] See 18 Cal., p. 448; 12 All., p. 494; 13 All., p. 419; 35 Cal., p. 294.

Islám, Ṣadru'sh-Sharí'at and Ibn Ha'jib which one would have expected to find if there was any idea prevalent among the writers on jurisprudence of that age that the law required that the scope of juristic interpretation should be gradually narrowed. On the other hand, it has been seen that, for the constitution of Ijmá', agreement among the jurists of all the four Schools is required and in fact unity is the essential principle on which these Schools take their stand as Ahlu's-Sunnat wa'l-Jamá'at, that is, followers of the traditionary law and the main body of the people. No doubt the four teachers had each his own followers and these men, as time progressed, devoted themselves more and more to the task of developing the particular doctrines of their respective masters until we arrive at the age of the writers on Uṣúl, when the labours of these jurists who devoted themselves to the separate systematization of the principles laid down by the early teachers must have accelerated the tendency to form into distinct Schools. But even in their time the question of difference of opinion among the masters was regarded as a matter for discussion and controversy, and it was not supposed that, because a certain view had found vogue among the principal exponents of a particular School, it was on that account binding on the conscience of a Sunní Muḥammadan, or on the Courts of justice in preference to any other view which had the support of some other Sunní School. It was not until very modern times that attempt was made by means of the doctrine of Taqlíd to confine the Court and the jurists to one of the four Schools of law as distinguished from the others. This doctrine has been understood by many people to have the effect of assigning even to jurists and doctors of the respective Schools other than the founders a certain sphere, as it were, of authority, so that the opinion of a jurist of a particular grade is allowed no force if it be opposed to that of a higher grade. A classification has also been made of the writings of the jurists of different ranks in a particular School of law showing what weight is to be attached to the statements of law in the various legal treatises.

But before dealing with this classification let us trace the growth of the doctrine of Taqlíd in its present shape, especially in connexion with the administration of justice. It should be borne in mind that the opinion expressed by the Qáḍí, that is, the Judge, on a question of law, although it is made the basis of decision of a case, does not determine the law on the point. The legal effect of a decree is to settle the dispute between the parties, so that it is binding on them, although the view of law on which it is founded may be wrong and the Qáḍí, who passed the decree, happens to be an ignorant man. It is the opinion of a jurist that carries with it a presumption that it represents the correct law. If a Qáḍí happens to be a jurist, his opinion on a point of law like that of any other jurist would carry weight but not otherwise. There have been Qáḍís who were noted as great jurists, such as Qáḍí Shuraiḥ, Abú Yúsuf, and Qáḍí Khán. If the Qáḍí is not himself a jurist, he must on all questions of law in which he entertains any doubt consult a jurist if one is available or refer to the writings of deceased jurists. In fact for some time past it has been the practice of the Muḥammadan Governments to appoint law officers called Muftís to advise the Qáḍís on questions of law. This was partly perhaps for reasons of administrative convenience, and partly because the best lawyers would not accept the office of Qáḍí, and the men who were appointed as Qáḍís did not enjoy a high reputation for integrity, and it was, therefore, thought necessary to curtail their powers.

The following are the rules which are to guide a judge in ascertaining and applying the Muḥammadan law.

Duty of the Judge in matters not covered by a text or consensus of opinion

A Qáḍí in deciding a case must follow and cannot act contrary to the law laid down by a clear text of the Qur'án or of an universally accepted or well-known tradition, or by consensus of opinion (Ijmá'), and any decision of his opposed to such certain and absolute law, must be set aside by himself or by the succeeding Qáḍí when the error is discovered. But otherwise his decision cannot be set aside by another

judge or by himself, although the view of law on which it is based may be erroneous. The principle is that in all matters of juristic opinion (مجتهد فيه mujtaḥadun-fíh), no one can be certain, as already stated, that a particular view is wrong, and hence the view which has the additional advantage of being embodied in a decree has a greater claim to being upheld than the opposite view.[1] Abú Ḥanífa goes even further and holds that, if in such a matter, the Qáḍí based his decision on a view of the law which is not in consonance even with his own opinion but which he adopted by mistake, it will be operative and binding. But on this point his disciples do not agree with him[2] and fatwá is given according to either view.[3] Not only is a decree based on a wrong view of juristic law binding and operative, but it also salves the conscience of a person availing himself of it.[4] That such a latitude is allowed to the Court in matters of juristic law is supported on the authority, among others, of 'Umar, the second Caliph to whom the Ḥanafís assign a high rank as a jurist. The defendant in a suit against whom Qáḍí Abú'd-Darḍa who had been appointed by the second Caliph himself had passed a decree went to the Caliph and stated his case to him complaining of the decision. The Caliph replied that he himself would have decided otherwise, but that he could not revise the order of the judge as the question of law involved in the case was not covered by a text but depended upon juristic opinion.[5]

When a question depends upon juristic deduction a Qáḍí belonging to one School of Sunní law such as the Ḥanafí may decide it according to the Sháfi'í law, if he prefers that view, or he may make over the case, to a Sháfi'í Qáḍí for decision, if there is one available. In support of this a number of cases are mentioned. For instance, a Ḥanafí Qáḍí follow-

[1] 'Hedáya', vol. vi, p. 396; 'Fatwá 'Álamgír', vol. iii, pp. 431–2, 434.

[2] 'Hedáya', vol. vi, pp. 396–7.

[3] 'Fatḥu'l-Qadír', vol. vi, p. 397.

[4] 'Hedáya', vol. vi, pp. 398–9.

[5] 'Fatḥu'l-Qadír', vol. vi, p. 396.

ing the views of other Sunní Schools, in preference to those of his own School to the contrary, may declare that divorce by a drunken person is not valid, uphold a marriage contracted without two witnesses being present as valid, set aside the marriage of a minor contracted by his father in the presence of profligate witnesses, uphold the sale of a mudabbar and perhaps of an ummí walad and so on. That this is the correct view of the law on the subject cannot be doubted not only upon principle but having in regard the array of authorities cited in its support, such as As-Siyáru'-l-Kabír, Jámi'u'l Futáwá, Khazánutu'l-Muftiín, Majma'u'n-Nawázil, Al-Zakhíra, Futáwá Rashídu'd-dín, Shaikhu'l-Islám 'Abdu'l-Wahhábu'sh-Shaibáni, Shaikhu'l-Islám 'Aṭá ibn Ḥamza, and others.[1] But it appears that by the time of Ibn Hammám, the well-known commentator of 'Hedáya', the Qáḍí who had been losing confidence of the public since the days of Qáḍí Khán and the author of 'Hedáya' had so far gone down in the estimation of the learned that they were inclined to curtail his discretion as much as possible. Hence Ibn Hammám lays down that a Qáḍí of the present day should not be allowed to decide cases contrary to the law of the School to which he belongs, as he might do so from improper motives. He justifies this restriction on the ground that when the Sulṭán appoints a judge to administer a particular School of law he would be acting contrary to the order appointing him if he administers any other law.[2] A further reason put forward with a view to reconcile this limitation with the opinion of the ancient jurists is that the Qáḍí in whose favour Abú Ḥanífa and his disciples conceded so much latitude was meant to be a Mujtahíd in the sense of an independent expounder of law.

[1] 'Fatáwá Qáḍí Khán', vol. ii, pp. 451-9; 'Fatáwá 'Álamgírí', vol. iii, pp. 439-41. As for the sale of an ummí walad Ṣadru'sh-Sharí'at seems to think that it would be void as being opposed to consensus of opinion. See 'Tauḍíḥ', p. 445.

[2] 'Fatḥu'l-Qadír', vol. vi, p. 397.

If the Qáḍí happened to be an ignorant man he was not, according to the ancient jurists, confined in his choice of lawyers whom he was to consult on doubtful questions of law to lawyers of his own School. But here again his discretion has been limited by modern writers.

Since about the time of Ibn Hammám down to the time of the author of 'Baḥru'r-Rá'iq' and the compilers of 'Fatáwá 'Álamgírí', the Qáḍí was only restricted to the law as expounded by the Companions of the Prophet and by the founders of his own School. If he was a Ḥanafí he was not to adopt a view opposed to that of Abú Ḥanífa and his disciples, and in case of difference of opinion among them he was expected either to follow the law as laid down by Abú Ḥanífa or, in the absence of any recorded opinion of his, that of his disciples. A tendency was also apparent in those days to restrict the freedom of the Qáḍí in dealing with questions on which no dictum of these jurists was available by requiring him to follow the later doctors. But it was not until about the time of the author of 'Durru'l-Mukhtár' when apparently an order was promulgated by the then Sulṭán of Turkey, enjoining upon Qáḍís not to follow 'weak opinions' that the doctrine of Taqlíd received its present elaborate and apparently rigid form. And it seems that one Allamah Qásim was chiefly instrumental in giving it vogue.[1]

Classification of jurists

The jurists are thus classified by these modern lawyers of the Ḥanafí School:

(1) Mujtahidun fi'sh-Shari' (مجتهدون في الشرع) jurists who founded Schools of law, such as Abú Ḥanífa, Málik, Sháfi'í and Ibn Ḥanbal, the founders of the four Sunni Schools. To them is conceded an absolute and independent power of expounding the law. That is to say, they were not hampered by any rules or limitations in the interpretation of a text of the Qur'án, or Tradition, or in deciding upon the authenticity of the latter, and they formulated theories and principles of general applicability relating to interpretation and deductions. It is by the authority of these jurists that

[1] 'Raddu'l-Mukhtár', vol. i, pp. 55-7.

consensus of opinion, analogy, juristic preference, public good, custom and istidlál have been established as sources of law.

(2) Mujtahidun fi'l-Madhhab (مجتهدون في المذهب) jurists having authority to expound the law according to a particular School. They were the disciples of jurisconsults of the first rank; of these Abú Yúsuf, Muḥammad, Zufar, Ḥasan ibn Ziyád are among the most prominent in the Ḥanafí School; Nawawí, ibnu'ṣ-Ṣalaḥ and Suyúṭi in the Sháfi'í; Ibn 'Abdu'l-Barr and Abú Bakr ibnu'l-'Arábi in the Málikí School. These Mujtahids followed the fundamental principles laid down by their respective masters, for instance, that a rule of law sanctioned by consensus of opinion is of absolutely binding authority or that a deduction of analogy cannot be opposed to a text of the Qur'án or Ḥadíth. They did not, however, consider themselves bound to follow the masters in the application of general principles or in the arguments in particular cases, and they often profounded views opposed to those of their masters.

(3) Mujtahidun fi'l-Masá'l (مجتهدون في المسائل) jurists, who were competent to expound the law on particular questions, which had not been settled by jurists of the first and the second ranks, and a fortiori were not competent to oppose them on any matter of principle. But on fresh points and in cases which had not been clearly dealt with by a higher authority, a jurist of this rank was at liberty to lay down the law in conformity to the principles of his school. Among the Ḥanafís, Khaṣṣáf, Ṭaḥáwí, Sarakhsí, Karkhí, Bazdawí, Ḥalwáni and Qáḍí Khán attained this position, and according to many lawyers also Nasafí.

These were the three classes of lawyers to whom the doctrine of Taqlíd concedes the rank of Mujtahids properly so called. As regards the lawyers that followed, the theory is that they did not expound the law at all, their function being to explain and to draw inferences, or to classify the dicta of the above-mentioned jurists and to decide between them. Strictly speaking they are Muqallids (مقلدون) or followers, but they

are also sometimes called Mujtahidunu'l-Muqayyid (مجتهدون المقيّد) or Mujtahids with a limited sphere of exposition like those of the last two grades though of inferior authority as distinguished from Mujtahidunu'l-Mutlaq (مجتهدون المطلق) or Mujtahids with absolute powers, namely, the jurists of the first rank.[1]

These doctors of inferior rank are divided into four grades.

(1) Aṣḥábu't-takhríj (اصحاب التخريج) or those that occupied themselves in drawing inferences and conclusions from the law laid down by higher authorities and in explaining and illustrating what had been left doubtful or general. Abú Bakru'r-Rázi was a jurist of this class.

(2) Aṣḥábu't-tarjíḥ (اصحاب الترجيح) or those who were competent to discriminate between two conflicting opinions held by jurists of a higher rank and to pronounce that, 'this is better', 'this is most correct', 'this is agreeable to people', and so on. Qadúrí and the author of 'Hedáya' have been assigned a place in this rank.

(3) Aṣḥábu't-taṣḥíḥ (اصحاب التصحيح) or those who have authority to say whether a particular version of the law is strong or weak, namely, whether it is a manifest or rare version of the views of the Mujtahids of his School. There is a presumption in their favour that they do not embody in their books rejected or weak reports of the law. The great jurist Ṣadru'sh-Sharí'at who was rightly called Abú Ḥanífa the second and the author of 'Al-Mukhtár' (not Durru'l-Mukhtár) and according to some the author of 'Kanz' are given a place in this rank.

(4) Those that have not the capacity of doctors of the last rank; these lawyers cannot even decide for themselves whether a particular rule of law is strong or weak in authority. They have to accept what the doctors of the above-mentioned classes have laid down. On any question not dealt with by them,

[1] 'Durru'l-Mukhtár', vol. i, p. 57.

they have to proceed upon the analogy of what has been laid down in similar matters, taking into account, the change in the customs and affairs of men and must adopt a rule which would be most suitable to them in the circumstances of the case and in accordance with their usage.[1] The author of 'Durru'l-Mukhtár' says: 'we' belong to this rank, meaning himself and other modern lawyers.

Reports of juristic dicta

The doctrines and rules of Ḥanafí juristic law as expounded by the juris-consults or Mujtahids of the first three grades are then classified having regard to the means for their ascertainment. This became necessary as with the progress of time many dicta of doubtful authority came to be attributed to these jurists especially the founders of the different Schools and their immediate disciples.

(1) Dicta reported to have been laid down by Abú Ḥanífa, Abú Yúsuf and Muḥammad, and also by Zufar, Ḥusain ibn Zyád and other disciples of Abú Ḥanífa, but chiefly by the first three. Of these some are known as ẓáhiru'r-riwáyat or másá'ílu'l-uṣúl (literally, manifest reports or doctrines of the founders), that is, opinions which are proved beyond a doubt to have been held by them. They are embodied in certain books attributed to Muḥammad by continuous or notorious testimony. These books are 'Al-Mabsúṭ', 'Az-Ziyádát', 'Al-Jámi'u'ṣ-Ṣaghír', 'As-Siyáru's-Ṣaghír', and 'Al-Jámi'u'l-Kabír' and are known as books of ẓahiru'r-Riwáyát. Of these 'Jámi'u's-Ṣaqhír', which is a very elementary treatise is ordinarily available, and perhaps also 'Jámi'u'l-Kabír', but not the others. The other dicta reported to have been enunciated by these juris-consults are known as maṣá'ílu'n-nawádir, or shortly speaking an-nawádir or rare dicta, as they are not to be found in the books just mentioned and their authenticity or accuracy is not proved to be beyond all doubt. They are contained in books some of which are attributed to Muḥammad such as 'Kisániyát', 'Hárúniyát', 'Jurjaniyát' and 'Ruqíyát', and some to others such as 'Al-Muhurar' said to

[1] 'Durru'l-Mukhtár', vol. i, p. 57.

have been written by Ḥasan ibn Ẓiyád and some which are called books of Amálí, that is, books which are said to have been written by scribes at the dictation of Abú Yúsuf. The reputed authorship of these books is not universally or generally accepted as proved beyond a doubt and none of them so far as I am aware are ordinarily available.

(2) Wáqi'át or cases: these are dicta of later doctors, that is, of the disciples of Abú Yúsuf, Muḥammad and their disciples, and other jurists of the third grade enunciated by them in answer to questions put to them. Among the disciples of Abú Yúsuf and Muḥammad are mentioned the names of 'Isám ibn Yúsuf, ibn Rustúm, Muḥammad ibn Samá, Abú Sulaimana'l-Jurjani, Abú Ḥafsíni'l-Bukhárí and among those who succeeded them were Muḥammad ibn Salma, Muḥammad ibn Muqátil, Naṣír ibn Yáḥyá and Abú Naṣrini'l-Qásim ibn Salam. The opinions of these jurists have been collected among others by Abú'l-Laith of Samarkhand and after him other doctors have also collected them in their books known as 'Majma'u'n-Nawáyil', 'Al-Wáqi'át' by Nátifí and 'Al-Wáqi'át' by Ṣadru'sh-Shahíd. None of these writings are available at the present day.

In some collections like the 'Fatáwá' of Qáḍí Khán and 'Al-Khulása' the rules of law laid down by, or attributed to Abú Ḥanífa and his disciples, are mixed up with the cases last mentioned. But some jurists in their books have discriminated between them such as Raziu'd-Dínu's-Sarakhsí in his 'Al-Muḥit', setting out first the manifest reports, then the rare reports and then the cases. This 'Al-Muḥit' is of great authority and constantly referred to, but it has not been printed and I am not aware whether any copy of it is to be found in India.

'Al-Káfí' by Ḥákimu'sh-Shahíd is another reliable book in which the opinions of Abú Ḥanífa and his disciples are collected. It has been commented on by many doctors, but the commentary by Shamsu'l-'Aimmá Sarakhsí called 'Al-Mabsúṭ' is the best known of all and may be said to have even eclipsed the text itself. 'Alláma Tarsúsí says in appreciation of

'Al-Mabsúṭ' that no one should accept anything contrary to what is laid down in it and every one should rely on it and give fatwá according to what is stated therein.

This 'Al-Mabsúṭ' by Shamsu'l-'Aimmá Sarakhsí must be distinguished from the 'Al-Mabsúṭ' of Muḥammad previously mentioned, and which is frequently referred to as 'Al-Aṣl' or the original source. There are several copies of the latter mentioned, the most reliable being that by Abú Sulaymánu'l-Juwazjání. Many commentaries have also been written on Muḥammad's 'Mabsúṭ', the best known of which are by Shaikhu'l-Islám Abú Bakr known as Kháhir Záda and called 'Mabsúṭu'l-Kabír' and by Shamsu'l-'Aimmá Halwáni whose commentary is called 'Mabsúṭ'. None of the Mabsúṭs have been printed, but there are some imperfect copies of one Mabsúṭ to be seen in India. The original authorities not being available, the result is that we have to rely upon the writings of comparatively modern writers like Qáḍí Khán, the authors of 'Ḥedáya' and 'Viqáyah' for the opinions of ancient jurists.

Rules for guidance in cases of difference of opinion

Now supposing we are in a position to ascertain with any degree of certainty the opinions of the jurists of the first three ranks—and the difficulty of this is obvious—then the next question is, when there is difference of opinion among them, especially among the founders of the Schools and their disciples, who in fact, frequently disagreed, how is the law to be determined? According to some fatwá, that is, opinion or ruling of a lawyer ought to be given absolutely according to the opinion of Abú Ḥanífa, even if all his disciples differ from him, and in absence of any dictum of his in accordance with the opinion of Abú Yúsuf, then Muḥammad, then Zufar, and then Ḥasan ibn Ziyád.[1] This, however, cannot be said to be the accepted rule. It is also stated that the learned have given fatwá according to the view of Abú Ḥanífa on all question of 'Ibádat, or devotional matters and that, in all judicial matters and in questions relating to the duties of the magistrate and the law of evidence,

[1] 'Durru'l-Mukhtár', vol. i, p 52.

fatwá is based on the opinion of Abú Yúsuf because of his experience as the chief Qáḍí of Baghḍáḍ, and in questions relating to the succession of distant kindred on the opinion of Muḥammad. The opinion of Zufar has been accepted only in seventeen cases.[1] But though this may be correct as a general statement, it would be misleading to regard it as a rule of invariable application. Al-Ḥáwi lays down as the correct rule that in such cases of difference of opinion regard should be had to the authority and reasons in support of each view and the one which has the strongest support should be followed: and this is undoubtedly in strict accord with the principles of Muḥammadan jurisprudence apart from the great weight which attaches to that eminent authority.[2] But according to the modern interpretation of Taqlíd as above stated a lawyer of the present day should, in such cases, accept the view which according to the jurists of the fourth, fifth and sixth degrees is correct and has been acted upon. But if in any case the later doctors have not adopted in clear language any one of the conflicting opinions, the law is to be ascertained by proceeding on the view which is most in accord with the habits and affairs of men.

When jurists of the first and the second degree have not expressed any view on a particular question but the jurists of the third degree have expressed an opinion, such opinion should be accepted. And if they differ in opinion, the majority should be followed. In cases in which the jurists even of the third degree have expressed no opinion, the Muftí is to form his opinion according to the best of his judgement.

Certain phrases by which doctors of the fourth, fifth and the sixth grade express their opinions

The doctors of the fourth, fifth and sixth grade indicate their preference or the adoption by the lawyers of a particular view of the law by certain phrases of which the following are the most common: 'On this is the fatwá', 'On this fatwá is given', 'We hold by this', 'On this is reliance', 'On this is based the practice', 'According to this is the practice of the

[1] 'Raddu'l-Muḥtár', vol. i, p. 53. I have not been able to ascertain what these seventeen cases are.

[2] 'Durru'l-Mukhtár', vol. i, p. 52.

people', 'This is correct', 'This is most correct', 'This is most apparent', 'This is most likely', 'This is stronger in reason' and 'This is accepted'. It is also stated by Ramli that some of the above expressions are stronger and more emphatic than the others. 'Fatwá' is stronger than 'Correct', 'Most correct', 'most likely'; and 'On this is fatwá' are more emphatic than 'On this fatwá is given'; and 'this is most correct' is stronger than 'this is correct'. The author of 'Raddu'l-Muḥtár' points out that sometimes a particular view is stated to be correct or most correct, but fatwá is based on an opposite view, because it is found to be more agreeable to the people and more in accordance with their habits of life. Hence he says the expressions 'We hold by this', 'On this is the practice', and 'On this is the practice of the Muslims', are as emphatic, as if the jurist had said 'On this is the fatwá'. The expression 'on this is the practice of Muslims' indicates Ijmá' or consensus of opinion.[1] But if there are two different versions of the law and some authoritative jurists have pronounced one of them to be 'correct' and the others, the other version, fatwá may be based on either view.[2] If a certain view of the law is expressed to be in accordance with analogy and the opposite view is in accordance with istiḥḥán or juristic equity, the latter is to be accepted, because it is of the very essence of a valid juridical preference that it overrides a rule of analogy. If a rule of law is stated to be in accordance with ẓáhiru'r-riwáyát, or manifest report, it should be accepted because it means that this is what the founder of the School and his disciples have laid down.

Some books of doubtful authority

In this connexion one has to be careful as to the books that he consults. Writings of obscure authors, such as Mullá Miskin's commentary on 'Kanz' or Qahastáni's commentary on 'Niqáya', and unreliable books, that is, those in which weak versions of the law are reported such as 'Qinyah' by Záhidi should be avoided and the propositions laid down in them

[1] 'Raddu'l-Muḥtár', vol. i, p. 54.
[2] Ibid. vol. i, p. 53.

can only be accepted if their authority be known. Fatwá ought not to be given on the statements contained in elementary treatises such as 'An-Nahar', Aíní's commentary on 'Kanz', 'Durru'l-Mukhtár' and perhaps 'Ashbáh wa'n-Naẓá'ir' as they generally stand in need of explanation. But these remarks must not be understood to apply to the accepted writings of jurists belonging to a recognized rank.

Of the law books some are muṭún or textbooks in which the law is concisely but authoritatively laid down, such as 'Qudúri', 'Hedaya', 'Kanz' and 'Viqáya'; some are commentaries (Shuruḥ), such as 'Faṭhu'l-Qadír', 'Baḥru'r-Rá'iq' and the like; some are glosses or annotations on the commentaries such as 'Raddu'l-Muḥtár' and some are fatáwás or collections of juristic opinions such as 'Fatáwá Qáḍí Khán' and 'Fatáwá 'Álamgírí'. Textbooks supplemented by the commentaries and glosses are more to be relied upon than fatáwás, because the law is systematically discussed and explained in the former, while the latter generally speaking are merely a collection of opinions.

Observations

It is to be observed that so far as the administration of justice is concerned it was mainly the appointment of corrupt and incompetent Qáḍís that led to the formulation of the doctrine of Taqlíd in its present form. That the simpler remedy of appointing competent men as judges and in other ways securing a proper administration of justice should not have been sought, is apparently due to the fact that the Sharí'at or the Islámic Code except during the age of the first four Caliphs and for some brief periods of time afterwards never had the full support of the heads of the State, who more often than not assumed powers which the law did not concede to them, and in their conduct isolated its vital principles. It is contended that Taqlíd introduces the principles of certainty and uniformity in the administration of laws; but it may be doubted whether this advantage is not greatly outweighed by the danger that the rule, if narrowly interpreted, might put obstacles in the way of progress and development of law. Besides it must not be over-

looked that Islámic jurisprudence which accords an absolute authority to Ijmá' or consensus of opinion furnishes by that doctrine a guarantee against such uncertainty in the administration of laws as is capable of being avoided.

In support of Taqlíd it is further contended that at least since the fifteenth century, it had the implied support of the Sunní lawyers and would thus be covered by the principle of Ijmá'. But the fact supposing it to be so would not, as I have pointed out, bring the rule within the purview of Ijmá'. The only intelligible principle on which the doctrine can be based in my opinion is that if the people be found to have acted upon a certain interpretation of the law that ruling ought not to be disturbed. If this be the true meaning of the doctrine it would be covered by the principle of ta'ámul or practice of the people which is recognized as a legitimate source of laws. Further, though the theory of Taqlíd may at first sight appear to be narrow and rigid, the rules which have been formulated in this connexion if properly understood would seem to contemplate the result which I have just suggested. The lawyers who gave currency to the doctrine, in fact, emphatically lay down that on questions which have not been clearly pronounced upon by Mujtahids of the first three degrees especially the first and the second the Muftí and the Qádí in applying the law must have regard to the change in the circumstances of society, which indeed is in accordance with the vital principles of the system. If this be borne in mind along with the fact that the questions on which Abú Ḥanífa and his disciples agree are but few, and that they or the later jurists of recognized authority the last of whom lived in the fourteenth century, could not have anticipated most of the questions which now a days arise under different combinations of circumstances, and that the doctors who devoted themselves to the task of collecting and sifting the dicta of the ancient jurists disagree among themselves as to which of the various conflicting versions of their views is correct, the doctrine of Taqlíd should not stand in the way of substantial justice or of the

progress of laws in accordance with the requirements of an advanced society. Nor as I had occasion to mention elsewhere, can it be truly said that the Muḥammadan legal system has been stationary since the days of Abú Ḥanífa and his disciples or even of Qáḍí Khán, the author of 'Hedaya' and 'Ṣadru'sh-Sharí'at.' For instance, the modern Ḥanafí lawyers have recognized the validity of rules for the limitation of suits though, according to the strict theory of Ḥanafí law, the court cannot refuse to entertain a suit for the enforcement of rights merely on the ground of lapse of time. Similarly the modern Sunní lawyers have sanctioned forms of punishment in accordance with the ideas of the present day by application of the doctrine of ta'zír (تعزير). It must, however, be admitted that the progress of the Muḥammadan laws has been slow compared to that of the European laws, but it seems to me that this is to be attributed to unfavourable political conditions and the social and intellectual stagnation which has been for a long time an unmistakable feature of Muḥammadan history rather than to any doctrine of the Muḥammadan legal system.

If this view of Taqlíd is correct it would seem to be substantially in agreement with the principle on which the Muḥammadan law has generally been interpreted and applied by the British Indian Courts.[1]

[1] See chapter i.

CHAPTER IV

ACTS, RIGHTS AND OBLIGATIONS

Acts, rights and obligations

FOLLOWING the method adopted by Ṣadr'u'sh-Sharí'at, we have to study the remaining topics of the science of Uṣúl with reference to the two main classes of law, namely, defining and declaratory laws. Defining law is that which does not derive its character as such from the fact of one thing being connected with another. It may define either (1) the quality of an act of the obligee, that is, the person to whom the law is addressed, for example, the law which tells us that a certain act is obligatory or forbidden, or (2) indicate its legal effect such as ownership, and that which is connected therewith, for example, right to conjugal society, right to the usufruct, whether produce of property or services of man and the establishing of obligation to discharge a debt.

Classification of acts

Let us now see how the objectives of law (Maḥkum bihi محكوم به), namely, acts, rights and obligations are classified.

Natural, juristic, physical and mental

Acts are, first of all, classified into natural acts (hissi حسي) and juristic acts (shara'í شرعي). Natural acts include acts of the body or physical acts (af'álu'l jawáriḥ افعال الجوارح) as well as acts of the mind (af'álu'l-qalb افعال القلب).[1] An act of the body consists of the motion of some limb of the human body, such as utterance of words, eating, drinking, striking, and so on. One of the obvious properties of such an act is that it is perceptible to persons other than the doer. In this respect it differs from an act of the mind such as believing, acknowledging,

[1] 'Tauḍíḥ', p. 410; 'Talwíḥ', p. 704.

intending, wishing and the like. Human tribunals cannot deal with an act of the mind by itself, for the simple reason that they cannot seize upon it. Suppose a man acknowledges in his mind a multiplicity of gods instead of one God, the magistrate is powerless to deal with the matter and the offender can only be held responsible by God himself. On the other hand, if he expresses such acknowledgement in words or conduct, the law would treat him as a non-Muslim. Similarly one may intend to take another's watch, but so long as he does nothing to accomplish his purpose, the law will leave him alone.

A juristic act may be described as an aggregate of more than one natural act of one or more persons which the law treats as one act, such as imán or act of faith or belief, ṣalát or prayer, a contract of sale or hire, an offence of sedition and the like. Juristic acts or rather their component elements must have existence in the outside world, and also separately in the contemplation of law while a natural act has no separate existence in law though the latter deals with it.

Physical acts are broadly divisible into acts of utterance (Qaul قول) and acts of conduct ('amal عمل or fi'l فعل).[1] Utterances consist of spoken words, or of such other expressions of the will as are intended to be substitutes for spoken words, such as writings, gestures, etc., and acts of conduct include all other motions of the body or a limb such as walking, hunting, striking, threatening as well as acts of omission to discharge obligations (tark ترك), such as default in fulfilling one's contracts.

Voluntary and involuntary

The legal character of an act is often affected by the state of mind of its doer preceding or accompanying the act, and hence one important classification of acts is into voluntary and involuntary. But the nature of the relation between the mind and the legal character of an act is a question of considerable refinement and difficulty in the Muḥammadan system, which I shall have to discuss at some length in dealing with the

[1] 'Tauḍíḥ', pp. 463-5; 'Talwíḥ', p. 791.

circumstances affecting legal capacity. All voluntary acts are called taṣarrufát (تصرفات), which means expenditure of one's energy or will, and taṣarrufát'ush-shari' (تصرفات الشرع), are acts according to the shara' or lawful acts.

Originating acts, informations and acts of faith

Juristic acts generally are divisible into inshá'át (انشأت) or originating acts, akhbárát (اخبارات) or informations and i'tiqádát (اعتقادات) or acts of faith.[1] As I have already pointed out, the difference between an originating speech and an information is this: with reference to the latter it is possible to affirm whether it is true or not, but not so with respect to the former. Originating acts and informations are physical acts, while acts of faith are mental acts. The object of an originating act is the production of a legal result, such as sale, marriage, divorce manumission, etc., and the object of an information is to describe an event, such as testimony (shahádut) of a witness in Court, admission (iqrár) which is testimony against one's self, narration of a tradition and the like.

Acts creating rights and acts extinguishing rights

Lawful acts generally are again divided into ithbátát (اثباتات) or creative acts, that is, acts creating rights, for example a sale, a lease, a gift, etc., and (isqátát اسقاطات) or acts extinguishing rights, such as release, divorce, manumission, etc.[2]

Acts which can be undone and acts which cannot be undone

Originating acts are of two kinds, those whose legal effect can be undone, that is, revocable acts (ما ينفسخ), such as sale, lease, etc., and those whose legal effect cannot be undone (مالا ينفسخ), that is, irrevocable acts such as divorce, manumission and vow.[3] Such originating acts as create legal relations are called 'uqúdát (عقودات) or contracts and acts cancelling or annulling contracts are called fusúkhát (فسوخات) such as avoidance of a sale in the exercise of an 'option'.

Contracts and acts annulling contracts

[1] 'Tauḍíḥ', p. 450; 'Talwíḥ', p. 773.
[2] Ibid, p. 74.
[3] Ibid, pp. 450–3.

Acts which are causes of legal injunctions and acts which are not such causes

Physical acts are divided into:—

(1) acts in respect of which there is a pronouncement of the law and which are also the cause of another command of the law. Example: Whoredom is a physical act and is pronounced by the Muḥammadan law to be forbidden (ḥarám), and it further gives rise to the sentence of ḥadd;

(2) acts in respect of which there is a pronouncement of the law, but which do not form the cause of another command of the law. Example: Eating, which is regarded in some cases by the law as being obligatory (wájib) as when eating is necessary for the preservation of life and in some cases as being forbidden, for instance, eating during a fast. But eating itself is not the cause of a legal injunction.

Similar distinction holds good with reference to juristic acts. With reference to some juristic acts there is a pronouncement of the law, and they are also the cause of a further command of the law. For instance, selling is a juristic act and the law designates it as permissible and spiritually indifferent (mubáḥ), and it further leads to a legal result, namely, transfer of ownership. There are other juristic acts which, though subject to a pronouncement of law, are not the cause of any further command or consequence. Ṣalát or prayer, for example, is a juristic act and according to Muḥammadan law it is sometimes obligatory and sometimes supererogatory (nafl); but it is not the cause of any other command.[1]

Acts classified with reference to their religious purpose

In so far as the defining law indicates the quality of an act, its object may be mainly secular or spiritual. The secular object of a law of this class when it imposes an obligation to perform certain devotional acts is to secure the release of a person from such obligation by performance of the acts enjoined, and its spiritual object in such matters is to secure spiritual reward. All acts viewed with reference to their spiritual purpose may be thus classified.

[1] 'Tauḍíḥ', p. 410.

If an act be such that the doing of it is regarded as better than the omitting of it and the omitting of it is prohibited, it is either obligatory in the first degree (farḍ فرض), or obligatory in the second degree (wájib واجب). An act is said to belong to the former class if the prohibition of its omission is established by a clear and conclusive text of the Qur'án or tradition, but if such prohibition is established by an authority of a presumptive nature, the act would belong to the other category. A Muslim is bound to do acts which are obligatory either in the first or the second degree. If he does them, he secures spiritual merit (thawáb ثواب), and if he wilfully abstains from them, he makes himself liable to spiritual punishment ('adháb عذاب). The difference between the two classes consists in this, the man who refuses to believe in the binding nature of a command imposing an obligatory act of the first degree becomes an infidel, but not if he disputes the authority of an obligatory command of the second degree, although he becomes a transgressor, if he makes light of the authority on which such a command rests. The saying of the five daily prayers, fasting, pilgrimage, payment of the poor-rate are, as I have already mentioned, obligatory acts or duties of the first degree. The maintenance of one's wife, children and poor parents are examples of obligatory acts or duties of the second degree. Imám Shafi'í, however, does not draw any distinction between farḍ and wájib. Again there are certain acts which are obligatory on the Muslim community as a whole; if these are performed by a sufficient number of Muslims, the law is satisfied. Such acts are called furḍun kifayatun (فرض كفاية) and may be described as duties of the community. Jehad or religious war is an act of this character. If an act be such that the doing of it is better than abstention from it, but at the same time such abstention is not forbidden, it is called sunnat (سنة), if it be in accordance with the practice of the Prophet or his Companions or of the Muḥammadans as a body, otherwise it is called supere-

rogatory, but commended (mandúb, mustaḥab, nafl مندوب مستحب نفل). To create a charitable or religious endowment, to make gifts either *inter vivos* or by will, to give alms to the poor, the saying of certain prayers besides those prescribed as obligatory, fasting on days other than those of the Ramaḍán, attending the sick and the like are duties of this category. There are, however, some supererogatory duties of this class, abstention from which subjects a man to blame, as absence from congregational prayers and omission to call out to prayers. If an act be such that abstention from it is better than the doing of it, it is called forbidden, if the doing of it is prohibited; otherwise, it is regarded as abominable or condemned (makrúh مكروه). Of the class of condemned acts there are some which approximate towards unlawfulness (makrúhun kirahata taḥrímin مكروه كراهة تحريم) and some towards lawfulness (makrúhun kirahata tanzíhín مكروه كراهة تنزيه). Further an act may be forbidden with reference to certain physical objects, such as the drinking of wine, eating pig's flesh, and carcases, or with reference to the rights of other persons, such as killing or injuring a person, appropriating to one's self another's property, defamation of a man or a woman's character. If an act be such that the commission or omission of it is regarded with indifference by the lawgiver, it is, as I have already mentioned, called mubáḥ (مباح) or permissible. Transactions of sale, pledge, lease and the like are acts of this class.

With reference to the secular purpose of the law acts are classified as follows:—

Classification of acts with reference to their secular purpose.

A juristic act is said to exist if it possesses its essential elements. (arkán ارکان) and conforms to the necessary conditions (شرائط sharia'at) insisted on by the law. If it also possesses such qualities of an extrinsic character as the law takes notice of it is said to be legally correct (saḥíḥ صحيح) otherwise it is regarded as faulty or vitiated in law (fásid فاسد). But if a juristic act be wanting in any of its essential elements or conditions it is called báṭil (باطل) or null

Correct, valid, vitiated and void.

and void. A vitiated or faulty act is correct in its essence and defective only so far as qualities, that is extraneous considerations are concerned, while a void act is bad essentially. A correct juristic act leads to the desired object and a void act altogether fails to attain such object. A vitiated act leads to the object in view so far as its constituting elements and necessary conditions are concerned, but not its extraneous conditions. The difference between the three kinds of juristic acts stated briefly amounts to this: both correct and vitiated acts are legally valid and operative,[1] but in the case of vitiated acts the law allows the parties a certain locus penitentia to withdraw from them so that they may not incur spiritual demerit for violating such injunctions in connexion therewith as are of a directory rather than imperative character. The Shafi'ís do not recognize vitiated acts as forming a separate class and hold that juristic acts are either valid or void, and they use the word fásid which I have translated as vitiated or faulty as synonymous with háṭil or void, both being wanting in correctness. Even some Ḥanafí jurists, including such a careful writer as the author of 'Hedayah', sometimes use the term fásid in place of báṭil and sometimes in its proper sense of vitiated or faulty in law.[1] Used in its proper sense the word fásid or vitiated denotes an act which under certain conditions is voidable at the instance of the parties. In English textbooks on Muḥammadan law, and in the reports of cases the word is sometimes translated as voidable, sometimes as invalid and at other times as vitiated or faulty.

Constituted, operative and binding

A juristic act of the nature of a secular transaction (mu'ámilát معاملات) is said to be constituted (muna'qad منعقد), if it possesses the necessary elements of such transaction. An act of this class is said to be operative (náfiḍ نافذ), if it has the desired legal effect, otherwise, it is called inoperative. A contract of sale of an article by its owner, if duly formed, is operative, but if such a contract is entered into by a person

[1] Talwíḥ', p. 651.

who is not its owner, nor an authorized agent of the owner, it is inoperative even though duly made or constituted. A vitiated sale would be duly constituted though not legally correct. There seems to be no difference between a legally correct or valid act and an operative act.[1] A void transaction of the nature of contract or disposition of property is always inoperative, and a valid transaction of this class is always operative. A transaction is said to be binding (lázim لازم), if the person entering into it cannot get rid of its legal effect, such as a valid waqf contrary to a bequest which the testator is always at liberty to revoke.

Essential elements of a secular transaction

Three things, generally speaking, are the essential elements of a secular transaction: (1) legal fitness or capacity of the person entering into it; for instance, he must be a person of understanding; (2) fitness of the subject-matter, that is, whether it can be dealt with by such a transaction and (3) consent of the parties. A gift by an infant is void in law as he lacks legal fitness to make a disposition of property without consideration. A sale of a carcase is void as it is not a proper subject-matter, not being property according to the Muḥammadan law, so also a marriage within the prohibited degrees of relationship. As regards consent the general rule is, if a transaction is a contract consent of both the parties is necessary; if it is an act extinguishing a right consent of the owner of the right is necessary. What is the exact nature and degree of consent required in particular cases will be discussed hereafter.

Conditions

As regards necessary conditions, I mean those exclusive of the three essential elements just mentioned, they vary according to the nature of a transaction. Such conditions may relate to either of the three elements. For instance, the condition that the testimony of a witness who is not a man of rectitude is not to be accepted is one relating to the capacity of a person for that particular juristic act. As an example of

[1] 'Talwiḥ', p. 651.

a condition relating to the subject-matter, it may be mentioned that sale of gold for gold is not allowed, unless both the articles of exchange be equal in quantity. The conditions that, in a contract with the object of alienation, the intention to part with the entire proprietary rights must be expressed, and that when a gratuitous gift is made the expression of intention must be made manifest and complete by the donor actually delivering possession of the property to the donee, are instances of conditions relating to the act itself. The question relating to conditions of legal transactions will, however, be more particularly considered with reference to the juristic ideas appertaining to the different departments of law.

As regards the standpoint from which Muḥammadan jurists regard the legal relation of the state of mind of a person to his acts generally, we shall presently consider the subject, but it may be pointed out here that the normal act of a person is the expression of the free-will of a man, acting with full knowledge of the effect of his act. In its spiritual aspect the value of an act is measured by the state of mind of its doer, for God knows everything. But in apportioning the secular effect of an act, with reference to the mental condition of its doer, a human tribunal is under considerable difficulties. This difficulty is the main reason for the elaborate and at times too subtle, distinctions with which the matter is discussed by Muḥammadan jurists.

Classification of rights. Public rights and private rights.

Rights having regard to the person of inherance are principally classified by the Muḥammadan jurists into rights of God (حقوق الله) and rights of men (حقوق العباد). Rights of the former class are such as involve benefit to the community at large and not merely to a particular individual. They are referred to God because of the magnitude of the risks involved in their violation and of the comprehensive benefits which would result from their fulfilment. It is not to be understood that those rights are called rights of God, because they are of any benefit to God for He is above all wants, nor because they are the creation of God for all rights are equally the creation of God who is the Creator of everything.

The rights of God correspond to public rights and since the Muḥammadan law regards the observance of obligatory devotional acts as being beneficial to the community there is no difficulty in describing all rights of God as public rights.[1] What chiefly distinguishes such a right from a right of man or a private right is this, the enforcement of the former is a duty of the state, while it is at the option of the person whose private right is infringed whether to ask for its enforcement or not. It may be that certain acts which give rise to a public right affect some particular individuals more than the others but that fact will not entitle those individuals to condone the acts of the offender. It is, however, entirely at the discretion of the individual injuriously affected by the infringement of a private right, whether to pardon the wrong-doer or to insist upon redress.

From the above point of view the Muḥammadan jurists make the following classification of rights:—

(1) Matters which are purely the right of God, that is, public rights involving benefit to men generally. For instance, the infliction of the punishment of ḥadd for theft is such a right and the person whose property is stolen is not, therefore, entitled to condone the offence.

(2) Matters which are entirely the right of individual men, that is, private rights, such as a right to the enforcement of contracts, protection of property and the like. Enforcement of such rights is entirely at the option of the individual whose right is infringed.

(3) Matters in which rights of the community and of individuals are combined but those of the former preponderate. The right to punish a slanderer who imputes unchastity to another person belongs according to the Ḥanafīs to this class. By such imputation the right of the community is infringed by reason of depreciation of the honour of one of its members, and the right of the individual slandered is violated inasmuch as slander tends to destroy one's prestige in society. According to the Ḥanafīs the right of God preponderates in this matter because the person

[1] 'Talwīḥ', p. 705.

defamed is not entitled to compound the offence nor in the case of his death, can his heirs demand punishment of the offender. The Sháfi'ís, however, hold a contrary view. According to them the person defamed is entitled to exonerate the defamer and the right to prosecute passes on the death of the former to his heirs.

(4) Matters in which public rights and private rights are combined but the latter preponderate. Qiṣáṣ or retaliation which is the punishment for murder or voluntary hurt is a right of this kind. Here the right of the community consists in putting a stop to disturbances and breaches of the peace on this earth. The private right in a case of murder arises from the fact of the offence having caused loss and sorrow to the heirs of the person murdered and in the case of voluntary hurt by reason of the pain and loss caused to the injured man. The private right preponderates in these cases because the person injured or the heirs of a murdered man may pardon the offender or accept money in satisfaction of the injury, and it is, therefore, their right to enforce punishment.

Public rights further classified.

Classes (1) and (3) are again divided under eight heads:—

(i) Acts of devotion, pure and simple (ibádát, عبادات), namely, faith or Imám and the consequential duties that is the saying of prayers (ṣalát صلوٰة) payment of the poor rate (zakát زكاة), fasting (ṣaum صوم) and pilgrimage (ḥajj حج) and jihád (جهاد).

(ii) Punishments ('uqúbát عقوبات) of a perfect nature (kámilatun كاملة) attached as a consequence to the commission of certain offences, for example, punishments known as ḥadd, for theft, adultery, drunkenness and slander.

(iii) Punishments of an imperfect nature (qáṣiratun قاصرة), such as depriving a man who has killed another, of his right of inheritance, if he be an heir of the person he has killed. Such a penalty is regarded as imperfect as it inflicts no physical suffering nor deprives the guilty person of anything of which he is already the owner.

(iv) Matters which partake of the nature both of devotion and punishment, such as atonements (kaffárat كفارة) for the non-discharge of certain obligations. These bear affinity to acts of devotion as they mostly consist of fasting or emancipating a slave or feeding and clothing the poor.

(v) Acts of devotion involving an impost (مؤنة), consisting in an obligation to make payments out of one's possessions such as the giving of certain appointed alms at Eed-ul-fitr.

(vi) Imposts having the sense of worship, for example ('ushr عشر) or tithe payable by a Muslim owner of lands of certain description.

(vii) Imposts which have the sense of punishment, for example, khiráj (خراج) or land tax originally leviable from non-Muslims.

(viii) Certain rights which exist by themselves (ḥaqqun qá'imun bi nafsihi حق قائم بنفسه), that is, rights in respect of which there are no active duties imposed on any particular individual. Examples: the right to one-fifth of the booty acquired in religious wars which is reserved by the law for distribution among the poor while the remaining four-fifths are to be divided among those taking part in such wars. Jihád or the waging of a religious war against hostile non-Muslims, is a public right, and, therefore, its proceeds should prima facie belong entirely to the community. But the Lawgiver out of grace has allowed four-fifths to go to the soldiers engaged in the fight and reserved only one-fifth for the community, empowering the head of the State as agent of the community to take it on its behalf and distribute the same among the poor. Another instance, is the right to one-fifth of the contents of a mine such as gold and silver. As God has created all that is inside the earth, whatever is in a mine belongs to Him entirely, but He has out of grace permitted the owner of a mine or the finder of precious metals to take four-fifths, reserving the remaining one-fifth for the community.

Independent and dependent rights

As we have just seen, the Muḥammadan jurists divide rights generally into those that exist by themselves, that is to say, rights which are independent as distinguished from dependent rights. It is the characteristic of a right of the former class that it imposes no corresponding obligation on any particular individual, though it is a duty of all alike not to infringe it, while the essence of a dependent right is that it exists against a particular person, who is under an obligation to discharge certain duties towards the possessor of the right.[1] In short an independent right is the 'right in rem' and a dependent right is the 'right in personam' of European jurisprudence.

Original and substitutory rights

The Muḥammadan jurists make a further general classification of rights into aṣl (اصل) or original, and khalf (خلف) or substitutory. For instance, the right of God to require the performance of ablutions with water before A says his prayers is an original right, but in case of sickness, ablution by rubbing one's hands and face with earth (tayammum) is allowed as a substitute. Similarly, A buys certain goods from B. A's right to have the goods delivered to him is a right of the first class, and in case of default by B, A's right to recover damages belongs to the other class. Original and substitutory rights correspond to what are called antecedent and remedial, to use the language of Professor Holland.

Classification of private rights

The division of rights generally into independent and dependent, and original and substitutory runs through the entire group not only of public rights but also of private rights. The jurists do not, however, make an exhaustive classification of private rights as they do of public rights, and even Ṣadru'sh-Sharí'at is content to leave the subject with the observation that private rights are too numerous to mention. The reason for this seems to be that the science of Uṣúl is mainly concerned with the sources of law, and the rest of the topics are dealt with as supplementary to the main subject. But the basis for the classification of

[1] 'Tauḍiḥ', p. 414.

private rights has already been sufficiently indicated in connexion with the purposes of law and the objectives of law.

If we group private rights with reference to the purpose of law then some of them would relate to matters of primary necessity, such as the right to the protection of person and property and the others would relate to matters of secondary necessity, such as rights arising out of contracts. But, as we have seen, it would be difficult to draw the line between the two classes. A more useful method would be to classify private rights according to their subject-matter, following the line adopted by the Muḥammadan jurists with respect to public rights. The direct subject-matter of a private independent right as we have seen in the case of a public independent right is some physical object, or something which the law considers as such, and that of a private dependent right is the act of another person. Viewed with reference to their subject-matter private rights may be classified as:

Original private rights.

(1) right to safety of person (nafs نفس);

(2) right to reputation (ḥurmat حرمة), according to the Sháfi'ís;

(3) rights of ownership (ملك);

(4) family rights, including:

(i) marital rights (zanjía زوجية),

(ii) rights of guardianship (wiláyat ولاية),

(iii) rights of children and poor relatives,

(iv) right to succession (khiláfat خلافة) and inheritance (wiráthat وراثة),

(5) right to do lawful acts (taṣarrufát تصرفات)

(6) rights ex-contractu.

Substitutory rights.

The above are the most important original private rights. The substitutory private rights are treated by the Muḥammadan jurists from the point of view of the person of incidence, that is, as part of the subject of obligations (wajúb وجوب) imposed by an imperative command of the law and the performance of what has been so ordered (الايتان بالمامور به).

Obligations having regard to their origination may be generally classified as those arising—

(1) by the implication of law (i) towards God or the State, for example, obligations to worship, to pay taxes, etc.; (ii) towards individuals, such as those arising out of family relations, namely, connubial, parental, filial, and kinship and out of constructive trusts.

(2) Out of a man's own acts of utterance that is, rights ex-contractu or by the admission of another's claim;

(3) by reason of conduct infringing another's rights relating to (i) personal safety, (ii) the doing of lawful acts (iii) reputation, (iv) family rights, (v) ownership and possession.

Obligations of the classes (1) and (2) relate to acts which are designated as obligatory (farḍ) and those of the class (3) arise by the commission of acts which are forbidden (ḥarám).

Obligation per se as distinguished from obligation to perform certain acts

Most Ḥanafí jurists including Ṣadru'sh-Sharí'at and Fakhru'l-Islám would distinguish obligation *per se* (nafsu'l-wajúb نفس الوجوب) from obligation to do or perform certain acts (wajúbu'l-adá' وجوب الاداء). The first consists in the liberty of the obliged being restricted with reference to certain matters, and the second in his obligation to release himself from such restrictions.[1] That is to say, one is the incidence of an obligation and the other is the discharge of such obligation. Obligation of the last kind arises when the law demands it and not until then On the other hand, the mere incidence of certain obligations may have existed antecedently. The obligation, for instance, to perform certain appointed acts of devotion, is said to have existed from eternity, but that it becomes ripe for fulfilment only after a man has attained the age of discretion, and is required to be fulfilled only when the hour fixed for the performance of such devotional exercises has arrived. Here the attainment of majority and the arrival of the particular time of the day are regarded as the causes for the discharge of this obligation, the former being

[1] 'Tauḍíḥ', pp. 199–212.

preparatory and remote and the latter the proximate and effective cause.

Similary if a man sells to another certain goods without fixing the price, and the buyer takes possession of the goods, the vendor becomes entitled to the proper price, with respect to which an obligation is imposed on the buyer. But the buyer is called upon to discharge the obligation only when a demand to that effect is made on him. Some jurists, however, fail to see any substantial distinction between obligation *per se* and the obligation to discharge such obligation. They say that obligation must have reference to the performance of some act and cannot be disconnected from it.

Discharge of obligations, specific or non-specific

The discharge of an obligation may be either specific (adá اداء) or substitutory or non-specific (qaḍá' قضاء). It is specific when the very thing which is required has to be carried out, and non-specific when what has to be carried out is something similar to what is required. This classification holds good both as to obligations which are the right of God as well as of men.

Further the specific discharge of an obligation may be perfect (كامل) or defective (قاصر) or it may be such as to resemble non-specific performance. For instance, when the very thing sold by a man is delivered to the purchaser or the thing which a person has wrongfully taken possession of is restored to its rightful owner the obligation is performed by the obliged in each case specifically. But suppose a slave, who has been wrongfully taken possession of, is restored by the wrong-doer to the lawful master, but after such slave has incurred criminal or civil liability, the obligation of the wrong-doer is said to be imperfectly discharged. If in the last case, the slave be sentenced to death or a limb of his cut off on account of his offence, or if he is sold in satisfaction of the debt, the owner will then be entitled according to Abú Ḥanífa to the full price, and according to Abú Yúsuf and Muḥammad, he will be entitled to the difference in price between such a slave and a similar

slave free from such liabilities. In some cases, specific performance of an obligation resembles non-specific performance, for instance, A takes wrongful possession of B's slave and the former thereafter produces the slave before the latter and asks him to emancipate him, which he does in ignorance of the fact that it is his slave. According to the Ḥanafís not only will such emancipation be effective, but the wrong-doer will be absolved from liability. The Ḥanafís argue that the wrong-doer in making over the slave to his master has discharged his obligation, and any subsequent act of the master emancipating him cannot make any difference. But according to Sháfi'ís the action of the wrong-doer would not be regarded as a valid performance of his obligation because of the fraud accompanying it.[1]

Non-specific discharge of an obligation may be by means of something, which is intelligibly similar (mithlun máa'qúlun) to the subject-matter of the right both in appearance (ẓáhirun) and in essence (bátinun). When that is not possible the law will be satisfied with something which is similar in essence though not in appearance, such as payment of the price of an article which has been misappropriated.

If there be no intelligible similar at all, non-specific discharge of an obligation will be ordered according to the Ḥanafís, only in cases for which there is the authority of some express text. Thus, as we have seen, they do not allow recovery of mesne profits from a wrongful possessor of another's property, for according to them usufruct is in the nature of a mere accident and is not capable of being valued like property. When the object of a right is of an unascertained description and, therefore, its restitution in specie cannot be ordered the law is satisfied with payment of its price.

If the thing which is the subject-matter of a right has no intelligible similar, the obligation with respect to it is sometimes discharged, that is, according to Ḥanafís

[1] 'Talwíḥ', p. 322.

when there is authority for it by means of property, such as in the case of non-wilful homicide. But if it has a probable similar satisfaction by means of property will not be given preference, for instance, in a case of murder the aggrieved persons, that is, the heirs of the deceased cannot be compelled to accept blood-money in lieu of retaliation. Compensating by payment of the blood-money is allowed for this offence out of mercy to the murderer and in order that loss of a life may not be altogether uncompensated for.[1]

Origination, transfer and extinction of rights and obligations

The declaratory laws as already mentioned deal with the origination, transfer and extinction of rights and obligations. A declaratory law derives its character as such by reason of the connexion existing between one fact and another. If the connexion between the two be such that one is included in the other, the former is called ruku (رکن) or constituent of the latter. If one fact directly brings about another fact as its legal result the former, as we have seen, is regarded as the 'illáṭ (علة) or effective cause of the latter. If one fact leads to another fact on the whole that is to say, not directly and immediately but remotely the one is called the sabab (سبب) or preparatory case of the other. If the existence of one fact be dependent on the existence of another fact, the latter would be called the sharṭ (شرط) or condition of the former. Until the fact which is the condition of a law happens, the effective cause will not come into operation. When the existence of a fact is indicated by, but does not depend on, another fact the latter is called the ('alámut علامة), or sign of the former.

Constituents, causes, conditions and signs of the law

Taṣdíq (تصديق) or acknowledgement of God's unity and authority, for instance, is a constituent of Imán or faith; so that if such acknowledgement be wanting faith would be negatived. It may be mentioned here that the Ḥanafís draw a distinction between necessary constituents and supererogatory (زائد) constituents. For instance, they regard declaration of

[1] 'Tauḍíḥ', p. 165.

faith in so many words (iqrár إقرار) as a supererogatory constituent, so that its omission would not negative, the existence of faith.

The different kinds of effective cause

An effective cause has three aspects: (1) in so far as a legal injunction is referred to it, it is effective cause by name (اسماً); (2) in so far as it tends to bring about the legal injunction, it is effective cause in essence (معنى) and (3) in so far as it is immediately followed by the legal injunction, it is effective cause in its effect (حكماً). An absolute sale is the effective cause of transfer of proprietary rights; marriage is the effective cause of lawfulness of connubial intercourse; and murder is the effective cause of retaliation. These are instances of effective cause in all the three senses. A sale with an option and a lease are examples of effective cause in the first two senses, because completion of the legal result, namely, the acquisition of property in the first case and of usufruct in the second case are postponed until the expiry of the option and the coming into existence of the usufruct. A divorce which is referred to a future date, such as the husband saying to the wife, 'Thou art divorced to-morrow'; death-illness, the legal effect of which in giving rise to the rights of heirs cannot be ascertained until death actually occurs, and a wound, the effect of which on the wounded person can only be ascertained at a future date for the purpose of computing compensation are other examples of effective cause in the first two senses. An effective cause of an effective cause also falls within the category according to Fakhru'l-Islám, for example, purchase of a slave by his brother is the effective cause of the former's emancipation for purchase is the cause of ownership, and ownership of a slave by his brother is the cause of emancipation. But Ṣadru'sh-Sharí'at says this is not correct and would treat it as an illustration of effective cause in the last two senses, as the purchase in this case is only the preparatory cause while proprietorship is the effective cause of emancipation and further the legal result, that is, emancipation follows immediately and is not postponed.

As instances of effective cause in the first and the third senses are the cases in which the legal result is imputed to what is really the preparatory cause, because it embodies the effective cause. Examples: The right of the father to a child is imputed to the marriage between its parents as presumptive of cohabitation between them, which is the effective cause of birth of the child while marriage is only its preparatory cause. Another illustration is furnished by the rule fixing an interval of time between each pronouncement of divorce in the approved form. Divorce according to Muḥammadan religion is an act to be avoided as it involves dissolution of marriage but is allowed because of necessity as sometimes the parties to it are unable to discharge their marital duties towards one another. The existence of such a necessity is not a perceptible fact, and the law, therefore, requires that a certain interval of time should elapse before each declaration is made, so that if the husband remained of the same mind at its end the necessity for separation would be established.[1] Similarly travelling is allowed to be a good ground for non-observance of fasting, because of the hardships and inconveniences incidental to travelling, but the law has put down travelling as the effective cause of the concession inasmuch as travelling in most cases entails hardships and inconveniences.

Preparatory cause

When two causes in the chain of events contribute to a certain result, the one which is proximate to the result is regarded as the effective cause and the more remote, the preparatory cause so that the result would be attributed to the former. But if the effective cause itself be attributable to the preparatory cause the result will be ascribed to the latter. For instance, if an animal driven by a man treads upon something and destroys it the loss will be attributed to the act of driving for that led to the treading which was the immediate or effective cause of the loss. But if it be otherwise as when the immediate or effective cause is the act of a free agent, the result will be attributed to

[1] 'Tadwīḥ', p. 677.

such act. For instance, if a man gives a knife to a boy to hold it for him and the latter voluntarily cuts himself with it, the man who gave the knife would not be held liable, because the cutting which was the immediate cause of the hurt was ascribable to an act done in the exercise of volition. But if the boy accidentally cut himself, the person who gave the knife to him would be responsible. On the same principle, a person who points out to warriors certain property of the enemy will not be entitled to a share in that property when captured, nor will a person who points out property to a thief who steals it will be liable for damages.

Some causes are preparatory in a secondary sense, for example, pronouncement of a contingent divorce or manumission, as when a husband says to his wife: 'if thou enterest the house thou art divorced', or a master of a slave says: 'if I enter the house my slave is free.' In these cases the cause is the declaration; it is called preparatory, because the event contemplated may never happen. If it does happen the cause will be regarded as effective.

It is to be borne in mind that for each injunction of the law there must be a perceptible cause on which the injunction is based. For instance, the cause for faith or belief in God is the creation by Him of the universe, but since this cause has always been manifest in the physical and animal world, the acknowledgement of God by an infant is regarded as valid, although the law imposing obligation to believe in God is not addressed to infants. Similarly certain particular hours of the day are preparatory causes of certain prayers; the possession of property is the cause for payment of the poor-rate, the month of Ramaḍán is the cause for fasting; the existence of the house of Ka'ba is the cause for pilgrimage; produce of the soil is the cause for payment of 'ushr and khiráj; theft and murder are the causes for punishments, the necessities of life are the causes for legality of dealings among men, and the different transactions authorized by the law are the causes of the particular results which are in the contemplation of law in each case, for example,

sale is the cause of ownership, marriage is the cause of legality of sexual intercourse and the like.

When an injunction of law has been based by the lawgiver on a fact or event which is not within the control of men and the reason why the law is based on that fact or event is not intelligible to human understanding, such fact or event is called preparatory cause. An illustration of this is furnished by the ordnance imposing the duty of saying certain prayers at particular hours of the day. Here the arrival of the appointed time is not within the control of men and the reason why that particular hour should be the cause of the obligation to say particular prayers cannot be ascertained by human understanding. The death of a person is also similarly called the sabab or preparatory cause having the sense of an effective cause, of the creation of a right in particular persons to certain appointed shares, in the inheritance.

If the cause be within the power of man, and it was brought into operation with the intention of producing the desired legal result, it is properly speaking the effective cause of that result but is also in a secondary sense called its preparatory cause. For instance, an act of sale giving rise to the transfer of proprietary rights is often called the preparatory cause of such transfer though it is really an effective cause. But if the result produced by such cause is not what was designed but incidental to the main object then the act in question would be rightly called the preparatory cause of such indirect result. If the cause be such that human reason is able to understand why it produces a particular legal result, as already mentioned in the chapter on Analogy, it is properly called the effective cause of the law in question. For instance, minority is called the effective cause of guardianship because the reason for this is intelligible.

Conditions

A condition of law may be (1) a condition pure and simple or (2) it may have the force of an effective cause or preparatory cause or (3) it may be a condition in name but not its legal effect. In the first sense a condition may be proper that is one on which something is dependent in fact or in law, for

instance, understanding on the part of a person making a disposition of property is by law a condition of its validity and the presence of two witnesses according to the Ḥanafís is by law a condition of the validity of a marriage. A condition may be the creation of a person (جعلي) as when a man makes the operation of an act of his dependent on the happening of a certain event, for instance, a man declaring 'the woman I shall marry is divorced' separation will take place according to the Ḥanafís from the woman with whom he may thereafter contract marriage on the instant of such marriage taking place.

A proper condition may sometimes come into existence, before the effective cause itself and sometimes after the effective cause, while a condition which is the creation of a person always comes into existence subsequently to the effective cause.

A condition has the force of an effective cause, when there is no effective cause to which the injunction of the law may be properly referred. For instance, A digs a well in B's land without the latter's knowledge and B while walking on his grounds falls into it and is killed. Here according to Muḥammadan jurists the effective cause of the fall was the weight of the man's body but no liability could be imputed to it as it is a fact of nature nor to walking which is a lawful act. But the condition on which the fall depended was the destruction of a certain portion of the surface of the earth, and therefore liability is imputed to the person who brought about that condition by his wrongful act. Hence in this case the condition has the same juridical effect as an effective cause. As an example of a condition which has the legal effect of a preparatory cause: a man unfetters another man's slave in consequence of which the latter runs away, the unlocking of the fetter is the condition on which the escape of the slave depended but as between the two acts the volition of a free agent, namely, that of the slave intervened, no responsibility is attached to the action of the man who by undoing the fetters brought about the escape and his act is regarded in the light of a preparatory cause.

As an example of a condition, which is so nominally but not in legal effect, is mentioned the case in which a man suspends a divorce on two conditions. Here the first contingency would be a condition only in name and not in legal effect.

Signs

A'lamat, or sign, is really a condition which is prior in existence to an effective cause. It has not the force of an effective cause, because the legal result is not imputed to it. For instance, the fact that a man or a woman who is guilty of whoredom is legally married (iḥṣán احصان) is called a sign of the particular punishment laid down for such offence. But iḥṣán is also often called a condition of such punishment.

CHAPTER V

LEGAL CAPACITY

HAVING dealt with the general features of the defining and declaratory laws and the objectives of law (محكوم به), the Muḥammadan jurists next deal with persons, that is, those to whom law is addressed (maḥkúm 'alaihi محكوم عليه). The fitness (ahliat اهليت) of a person for the application of law to his actions is called (dhimma ذمه) or legal capacity. Dhimma is defined as the quality by which man becomes fit for what he is entitled to (má lahu ماله) and what he is subject to (ما عليه).[1] Legal capacity defined

Legal capacity is divided into two parts, capacity for the inherence of rights and obligations (ahliatu'l-wajúb اهليت الوجوب) and capacity for the exercise of rights and the discharge of obligations (ahliatu'l-adú' اهليت الاداء). The former may be described as the receptive and the latter as the active legal capacity. Every man according to the Muḥammadan theory is inherently clothed with legal capacity, which is at once a privilege and responsibility inseparable from the dignity of human nature. As already observed such capacity had its origin when the human species was first created, but in the individual it only becomes manifest along with the events connected with his earthly existence. The active part of such capacity is necessarily conditioned on maturity of the human faculties, mental and physical, and, therefore, comes into play gradually and by degrees. For instance, when the child is still in the womb as an embryo its life is joined to that of its mother and hence even its inherent capacity is defective while it has Receptive and active capacity

[1] 'Tauḍíḥ', p. 419.

no active capacity at all. On birth the receptive capacity in the child becomes complete and his active capacity gradually develops itself, until it is perfected with the maturity of his mental and physical faculties. Infancy, therefore, is one of the circumstances (*'awárid* عوارض), which affect legal capacity, although it is a circumstance which is inevitable in man's natural being. There are also other circumstances which impair legal capacity in a general way by their effect on a man's faculties, such as idiocy, lunacy, weakness of intellect not amounting to idiocy, and death, or entail its forfeiture either wholly or partially by reason of hostility to the law, such as apostacy, unbelief and slavery, or cause its suspension in order to safeguard the rights of others, such as death-illness and insolvency. A person with full legal capacity is, therefore, a living human being of mature age and understanding, free, of Muslim faith, not seized with death-illness and solvent.

Circumstances affecting legal capacity generally

Person of full legal capacity

Artificial person

It may be doubted whether the earlier jurists would recognize an artificial or juristic person. The State or community is regarded by them as holding and exercising the rights of God on His behalf through the Imám. Similarly the deceased is spoken of as having rights and obligations and not his estate, for the law deals both with a man's spiritual and worldly rights and obligations and even the worldly rights and obligations of a person cannot be said to be altogether lost on his death, inasmuch as he is entitled to have his funeral expenses and his debts and other obligations discharged out of the estate. But later jurists seem inclined to recognize an artificial person, for instance, they would allow a gift to be made directly to a mosque, while the ancient doctors would require the intervention of a trustee.

Circumstances affecting legal capacity in particular cases

There are again circumstances which affect the application of law to the acts of a person whose general capacity is not affected. These circumstances have relation to the state of volition and knowledge of the doer of an act preceding or accompanying such act, for example, coercion, ignorance of law, or of facts, etc.

The Muḥammadan jurists group the circumstances which generally affect the legal capacity of a person, or interfere with the proper legal effect of a man's actions in particular cases into two classes; samáwí (سماوي) or circumstances which are the work of Providence, that is, those which are beyond the control of man and maksúba, (مكسوبة) that is, those which are created by man. Infancy, idiocy, lunacy, forgetfulness, sleep, a fainting fit, illness and death are circumstances of the former class while ignorance of the truth of the Islámic religion as in the case of non-Muslims and heretics, or ignorance of fact or law with respect to a particular matter and slavery, drunkenness, jest, folly, mistake and duress are circumstances belonging to the latter class. Of the last, some circumstances are attributable to the person whose acts are in question, such as ignorance, speaking in jest, drunkenness, folly and mistake, while duress is a circumstance created by men other than the person acting under its influence. But it seems to me that it will be a more convenient plan, though involving a slight departure from the arrangement of the writers on Uṣúl to consider separately the circumstances which bear on the question of juridical relation between the act of a person and the actual state of his mind and will, preceding or accompanying such act, and the circumstances which in a general way affect a person's legal capacity.

It may also be observed here that circumstances like apostacy and death are also divestitive and translative facts, extinguishing certain rights and obligations and giving rise to certain rights and obligations in others. But since neither death nor apostacy in the Muḥammadan law divests a person of his rights and obligations altogether, these circumstances are regarded by the Muḥammadan jurists as circumstances affecting the general legal capacity of the apostate and the deceased and not as purely divestitive or translative facts.

Relation of acts to mind and will

In connexion with the question how the legal result of an act is affected in Muḥammadan jurisprudence by the condition of mind of its doer, some writers on Uṣúl enter upon a lengthy disquisition on the

Predestination and free-will

question of predestination and free-will. All that is necessary for my purpose, however, is to state the net result of such discussion so far as it has a juristic significance.

According to the accepted Ḥanafí view, which is substantially the same as that of the other Sunní Schools on this point, a man's action is partly within his power and partly the result of God's interference. It is so far within his power that he is left free to choose between the doing and not doing an act. This power to choose is called (ikhtíár اختيار), that is, will or volition. Having chosen one of the two alternatives, namely, doing the act, he is said to intend it (qaṣd, irádat قصد, إرادة). If this intention is followed by the act intended, ordinarily it is only so when the act is such, as we are led by our experience to expect from the surrounding conditions; but sometimes it happens that the act intended happens though we should not have expected it in the ordinary course of events as is evidenced by miracles. As the truth of miracles cannot be gainsaid by the Muslims, it is argued that, when our intention is followed by the act intended, the result is not produced by the man intending but by God. It is, however, pointed out by Taftázání [1] that the fact that miracles sometimes happen is not, it may be urged, a strong argument for the proposition that an act which ordinarily follows upon intending is not within the man's power. All that can be said is that if God wishes to produce a result contrary to the ordinary course of nature God's will will prevail.

Difference between intending and consenting

Then a man may intend to do an act, but he may not consent (riḍá رضا) to do it. For instance, a man who, under threat of bodily harm, does a thing, chooses between two alternatives, doing the act or suffering the threatened pain, but adopting the former intends it. He is not, however, satisfied or, in other words, does not consent that he should do it. Intention with reference to an act is, therefore, according to Muḥammadan jurists, that condition of

[1] 'Talwíḥ', p. 355.

the mind which directly and immediately sets the nerves in motion resulting in the act. An act done under duress (ikráh اكراه) is intentional but not consented to. But duress though it does not negative the intention, vitiates it, that is, makes it fásid or vitiated. An act which is not voluntary, that is, the result of choice, for instance, when a man talks or moves his hands in sleep or in a fainting fit or in a state of forgetfulness or drunkenness is not an act of the will or volition at all, but is involuntary.

Vitiated intention

A man having chosen between the doing and not doing an act may not yet intend doing the act, by placing his will in such an attitude with respect to it as to shut out the other alternative. This distinction, however, is not of any juristic importance, for choosing as an act of will and intending are practically one and the same mental phenomenon regarded from different standpoints. In fact, the words ikhtiár, irádat and qaṣd are mostly used as convertible terms.

An act is generally directed towards an object (maḥal محل). In that case intention in order to be complete must be considered with reference to the act itself as consisting of motion of the body as well as the object.[1] Sometimes the act itself may happen, but directly affect an object other than the one intended. This may be attributable to the means actually employed in doing the act, or to ignorance of the outward circumstances affecting the accomplishment of the object in view. If the employment of such means or such ignorance is due to not using that amount of judgement attention or effort as men ordinarily use, the act is said to be negligent, heedless or careless (turku't-tarwá; ترك التروي) otherwise it is called a mistake or accident (khaṭá خطا).

Intention considered with reference to the object of the act

Mistake, negligence

Our volition or will is often moved by a feeling towards or desire for (shauq شوق) the object directly aimed at by the act or by its immediate or remote

Wish, motive and expectation:

[1] 'Talwíḥ', p. 787.

intention and motive distinguished

results or effects, or for some other object. When the object of our intention is also the object of our wish, the law treats the latter as merged in the former. But when they are different the object of our wish is called the motive (niyat نیت) of the act. For instance, if I intend to sell my house for a certain sum of money, it means that I intend entering into the necessary contract with reference to the house as its object, and the motive for my doing so may be to pay off my creditors with, or to deprive them of, the sum of money which I expect to acquire as the immediate result of my act. Or if I make a gift of my property to a certain friend, what I intend is the juristic act by which gift is constituted and my motive for it may be the enrichment of such friend, or spiritual reward in the next world. Motive may be spiritual or secular, laudable or fraudulent, and as a general rule, it has a religious rather than a legal significance, unless it has caused loss to another's right. Indeed, the corresponding Arabic word niyat is mostly used in the religious sense. For instance, a man saying prayers, say between noon and 2 p.m. his niyat or motive may be to discharge the duty of saying certain obligatory prayers fixed for that time of the day, or to discharge certain arrears with respect to similar obligatory prayers of a previous day. It should be noted that sometimes the word niyat is used to denote the assignation of meaning by a person to certain expressions in the nature of kināya, or allusive expressions used by him; for instance, if a man says to his wife 'I shall have nothing to do with you', the law would inquire what was his niyat in using the words, that is, whether he meant by it divorce or not. This, however, is to be distinguished from the question of intention properly so called. Here whatever the man might have meant, he intended uttering the words, unless he uttered them involuntarily as in sleep.

Different meanings of niyat

As intention in connexion with an act has reference to its object, so it has reference to its legal effect (hukm). Similarly consent has reference to the act itself or its legal effect or both. Sometimes a man may intend and consent to do an act but may

neither intend nor consent that it should have its legal effect. I have already said that a man acting under duress intends the act itself, though his intention is of a vitiated character; but he does not consent to the doing of it. And it follows that such a man neither intends nor consents to the act having its legal effect. But suppose a man utters a legal formula in jest (hazl هزل), that is to say, without wishing that it should have any effect either in its primary or secondary sense; here also the question of intention and consent would be considered with reference to the utterance of the words and their legal effect. Such a man is said to intend and to consent to the formation of the juristic act in question, but not to intend or to consent that such act should have legal effect.

Intention and consent when said to be complete

In Muḥammadan law we are thus required to distinguish not only between intention and consent, but between intention and consent on the one hand and motive on the other. Again we have to consider intention with reference to the actual act, as well as the object and the legal effect of such act. Intention is not regarded as complete unless it holds good with respect to all the three elements. The same is the case with consent. With reference, for instance, to acts done in sleep or a fainting fit, or in a state of forgetfulness or drunkenness intention is altogether wanting and, a fortiori, consent. In respect of an act done under duress or mistake, the intention is vitiated or incomplete and there is also want of consent. In an act done in jest the intention is incomplete and so also consent.

Judgement and knowledge

Sometimes a man's act may be induced by something said or done by another with a view to produce a certain effect. If what is so represented by words or conduct be untrue, that is, be not in accordance with facts and the person making such representation knows of it, he is said to be guilty of fraud (ghurúr غرور). Fraud according to Muḥammadan jurisprudence directly affects the judgement of its victim and his intention only indirectly and remotely. Therefore such a man will be said to intend and consent

to the doing of the act itself and also to its having legal effect. As regards the person who has practised deception fraud would be referred to his motive in doing the act and not to his intention, as already indicated. Sometimes the person doing an act may not be aware of its legal character or consequences, or he may do an act or abstain from doing an act in misapprehension or ignorance of certain facts. The question which the law has to deal with in such cases is generally put in this form: how far such ignorance (jahl جهل) of law or fact is an excuse.

Instances of circumstances affecting legal capacity in particular cases

Bearing in mind these general considerations let us now follow the cases in which they are illustrated. Forgetfulness according to Muḥammadan jurists is brought about by God; in other words, it is not a condition attributable to any act of men. Such a state implies absence of volition, but it does not negative legal capacity. Since, however, the condition is due to providential interference, it forms a good excuse in matters which are purely the right of God, provided they are such that, in connexion with them, a man is likely to be forgetful by reason of his ordinary habits, for instance, when a man during a fast eats or drinks something. Forgetfulness, however, forms no excuse if the act which is the result of it, affects private rights. The reason is that the inviolibility of a man's rights is absolute and is not measured by the culpability of the person violating them. Therefore if a man in a state of forgetfulness destroys or damages another's property he will be held liable.

Forgetfulness

Sleep

Sleep is a condition which incapacitates a man during the time it lasts from perceiving by means of his senses and from all voluntary movements. As sleep negatives volition any speech or utterances whether in the nature of a creative act or information made in such a state would be void and of no effect in law, such as confession of faith, apostacy, divorce, admissions, manumission, sale, gift and the like. But a sleeping person happening to cause damage to another's property will be held responsible in the same way as a person acting in a state of forgetfulness and for the same reason.

If a person is seized with a fainting fit which is brought about by disease, he loses his power of perception and voluntary motion. As long as it lasts all his acts will be treated on the same footing as those done in sleep. Fainting fit

If an act which under ordinary circumstances would amount to an offence be done under a mistake, the person doing it will be given the benefit of doubt, so that sentences of the nature of ḥadd and retaliation will not be inflicted on him. But as to his liability for any injury or loss caused to another's rights, that is, for the violation of individual rights, mistake will not be regarded as a good excuse in law. But it is a good ground for modifying such obligations as have a semblance of benevolence, for instance, the payment of compensation (diyat). Mistake

According to Ḥanafís the words of ṭaláq uttered by mistake operate as a divorce. For instance, if a man intending to say to his wife 'thou art sitting' makes a slip and says 'thou art divorced', a valid divorce will be effected. The Sháfi'ís, however, do not agree with the Ḥanafís on this point. The Ḥanafís base their view on the general principle that the law accords full effect to a man's words and deeds, and does not undertake to ascertain hidden facts which, according to them, cannot be done with any certainty. As it is difficult to say when a man's act is attributable to his intention and when to a mistake, the law presumes that the words uttered by a grown-up person are intentional and not the result of a slip. The Sháfi'ís argue that a divorce pronounced under a mistake is inoperative because of want of intention, and that such a case stands on the same basis as words uttered by a sleeping man which admittedly have no effect. The Ḥanafís attempt to get over this analogy by arguing that the state of sleep is a reliable and unmistakable proof of the absence of volition, which is not the case with an alleged mistake. A sale effected under a mistake is, however, inoperative even according to the Ḥanafís, for it is a transaction for the validity of which both intention and consent on the part of the vendor

must be present. Intention is said to exist in both the above cases, because the husband in the one case, and the vendor in the other, set their nerves in motion, resulting in the utterance of the words of divorce and offer. In the case of divorce the law is satisfied with such intention and does not insist on consent. It has been objected to the above argumentation of the Ḥanafís, that consent is also an imperceptible fact, and how is it then that the law takes notice of it? They answer that when a person consents to do an act his countenance shows satisfaction or pleasure when it is done, unlike that of a person acting under a mistake or coercion. This expression of the face, they say, is a perceptible fact which can be fastened upon, just as the waking state of a man is ascertainable by the senses and is therefore held by the law to be indicative of intention.[1] One cannot help observing that the Shafi'í view of the law appeals to one's common sense more than the subtle distinctions of the Ḥanafí School.

Intoxication

Intoxication is predicable in law of a condition in which the person under its influence falters in his spirit; but Abú Ḥanifa adds that he must also be incapable of discriminating the earth from the heavens. As regards its effect on a man's legal capacity, the law looks to its cause, that is, how it is brought about. Regarded in this light it is of two kinds, either it is such as is forbidden (ḥaram) by the religion or is permitted as being spiritually indifferent. Intoxication, which is brought about by a man being forced to drink intoxicating liquor as, for instance, when he is about to die of thirst and no other drink is available, or by drugs taken medicinally such as opium, or by the use of preparations having the properties of food made from wheat, barley or honey, is permitted by the law as spiritually indifferent.[2] The legal capacity of a man is affected by intoxication when not caused by forbidden means in the same way as by a fit of unconsciousness; that is, to say

[1] 'Talwiḥ', pp. 878-9.
[2] Ibid., p. 770.

all his dispositions, contracts, and legal declarations such as waqf, hiba, sale, divorce and manumission would be void in law. But he is liable for any loss caused by him to another's property.

If intoxication is caused by a man drinking voluntarily, or under coercion, forbidden liquor, that is, khamr or the fermented juice of grapes, his legal capacity remains unaffected. The general rule is that legal effect will be given to whatever declarations and dispositions he might make in such a state, such as sale, divorce, marriage, manumission, admissions, borrowing, lending, etc.,[1] although they may be injurious to his interests. He is also liable for any crimes and wrongs he might commit such as murder, defamation, theft, whoredom, destruction of or loss to other's property and the like. The reason is that a man's legal capacity is regarded as complete on his attaining majority and if a temporary suspension of his judgement and understanding due to an over-powering accession of pleasurable excitement is brought about by a wilful transgression, the law will not take notice of it, as otherwise it would be encouraging disobedience of the injunctions of religion. Furthermore, the commands of law are addressed to drunken persons since God has said: 'Oh ye Muslims do not approach your prayers while ye are drunk.' If a Muslim in a state of intoxication says things which would ordinarily amount to unbelief, for instance, if instead of saying: 'Oh God thou art my master and I am thy slave' makes a slip and says just the reverse he will not be held answerable for apostacy. On the other hand, if an infidel while drunk adopts Islám, he will be regarded in law as a Muslim because the law gives preference to Islám.

As regards an admission made by a drunken person, if it be in respect of a matter in which retraction of admission is allowed, such as of an offence of whoredom, he will not be bound thereby unless he ratifies it subsequently on regaining consciousness. The reason is that as a drunken man is not steady or uniform in his

[1] 'Talwíḥ', p. 771.

speech his condition is in itself regarded as indicative of retraction. But if he makes admission of a mater which does not admit of retraction such as defamation or retaliation, he will be held bound by such admission although the sentence will not be passed until he recovers.[1]

Jest

If a person utters words and expressions without intending to convey either their primary or secondary meaning, he is said to speak in hazl or jest. If such intention is only a matter of inference the law pays no heed to it and effect is given to what has been expressed. What, therefore, calls for inquiry is not the hidden intention of a man that his words should not have their proper legal effect, but only those cases where such intention has been declared in so many words previous to the transaction in question, such as, by two persons having arranged among themselves before entering into a contract, that they were going to use words appropriate for such a contract, but that such words were not to be given effect to. Such secret arrangement need not be part of the transaction in question; indeed all the cases assume the undisclosed arrangement between the parties to be that the transaction to be disclosed to the world should be different from the one previously agreed upon. The juristic principle underlying these cases of secret arrangement is, as already mentioned, that the parties to it while intending and consenting to the constitution of the transaction in question, so far as its legal formulae are concerned, do not intend or consent that they should have their ordinary result.

Bearing this in mind the subject under consideration may be regarded with reference to (1) originating acts (inshâat), such as sale, lease, gift, waqf, marriage, divorce, manumission, etc., (2) proofs and admissions (akhbârât) and (3) matters of faith (i'tiqâdât). As regards originating acts some are capable of being avoided, such as a sale, lease and gift and some are not, such as marriage, divorce and manumission. We shall first consider the effect of a secret arrangement in transactions of the

[1] 'Taudîḥ,' p. 449.

former description. Let us take the case of a sale as an illustration. If the parties who entered into a transaction of sale, having arranged beforehand that their contract should not have that effect should after the contract is made agree that they have resiled from the secret arrangement and adopted the transaction as disclosed, the sale will be held to be valid. On the other hand, if they agree that the secret arrangement was to be the basis of the transaction to be given effect to, the contract as disclosed would be voidable at the option of either of the parties, as if it was made expressly subject to such option. If both the parties after having entered into a contract subject to a secret arrangement, afterwards agree that, at the time of making it, it was not present before their minds, either that they were contracting on the basis of the previous secret arrangement, or that they intended to resile from such arrangement, or if they differ from each other one saying that the contract was made on the basis of, and the other saying that it was made in supersession and substitution of that arrangement, then according to Abú Ḥanífa the contract will be upheld as valid and the secret arrangement will be regarded as cancelled. In the opinion of his two disciples, however, the contract will not be given effect to for, according to them, the previous arrangement shows the real intention of the parties. If one of the parties says either that the contract was made on the basis of the secret arrangement, or that it was made in supersession of it, and the other says that neither of the two things was present to his mind at the time of the contract the answer would be the same as in the previous case. If the secret arrangement was not that there should be no sale but that the consideration was to be more or less than what was to be mentioned in the disclosed contract, Abú Ḥanífa would uphold the transaction in terms of the contract, while his two disciples would give effect to the previous arrangement, unless both the parties at the time of entering into the contract resiled from it. But if the consideration, as previously arranged, differs from that mentioned in the contract itself not

in quantity but in kind, the one being, for instance, one thousand dirhams and the other one hundred dinars then, in the opinion of all the three, the consideration mentioned in the contract, namely, one hundred dinars, will be payable.[1]

As regards transactions which are not capable of avoidance, if they do not involve any property such as divorce, manumission, waiver of the right of retaliation, vows and the like, the previous arrangement will be disregarded altogether and effect given to the disclosed act of the parties. The reason is that the utterance of the appropriate formulae in connexion with the above matters is regarded as the cause irrevocably inducing the legal effect, and hence the man uttering such formula consents to the cause, and the fact that he had made a different arrangement previously would only show that he did not consent to the legal effect. The very characteristic of these juristic acts is that no sooner are their formulae uttered than effect is given to them at once, and such effect is not capable of being avoided. Hence, in these matters, an option to revoke is held to be void. The authority for this is a precept of the Prophet, in which he lays down: 'there are three things in which it makes no difference whether a man is in earnest or in jest, marriage, divorce and vows.'

When property is involved as subsidiary to any of these transactions, as the payment of dower in marriage and the undisclosed arrangement was that the transaction itself was to be a nullity, such arrangement must be disregarded altogether. If the secret arrangement was with respect only to the amount of dower, for instance, that the dower should be one thousand dirhams and the dower ostensibly fixed at the time of marriage is two thousand dirhams then, if both the husband and the wife agree that at the time of marriage, they intended to resile from the previous arrangement, the dower payable will be two thousand and, if they agree to the contrary, the amount payable will be

[1] In the Buláq edition of 'Talwíḥ' 'one thousand dirhams will be payable' is clearly a misprint for one hundred dinars. See Lucknow edition, p. 501.

one thousand. If they both say, on the other hand, that at the time of marriage it did not occur to them either to treat the previous arrangement as a nullity or to make it the basis of the contract, or if they disagree as to what they meant at the time of the marriage, then, according to what Muḥammad relates as the opinion of Abú Ḥanífa, the dower payable will be one thousand dirhams, and according to Abú Yúsuf's version, it will be two thousand. If the discrepancy between the secret arrangement and the dower fixed at the time of marriage be one of kind and not merely in amount, and both agree that at the time of marriage the earlier arrangement was discarded, then the dower ostensibly fixed will become payable. If, however, the husband and the wife agree that the previous arrangement was intended to be adhered to at the time of marriage, then, according to all, proper dower will be payable as if no dower was fixed, the reason being that rights and obligations with respect to property cannot be established by means of a contract made in jest, or without intending its proper effect. The same will be the case according to the two disciples and one version of Abú Ḥanífa's opinion, when the parties agree that, at the time of marriage, it did not occur to them either to discard or to act upon the previous arrangement, or if they disagree as to what they meant at the time of marriage. According, however, to another version of Abú Ḥanífa's opinion the dower named in the contract will be enforced.

Where in transactions of the nature under consideration, the object in view is the acquisition of property, such as when a husband for consideration confers on the wife the power to dissolve the marriage, or a master manumits his slave in lieu of money, or the heirs of a murdered person release their right of retaliation for consideration, the transactions themselves will be binding, and the ostensible consideration become payable whether the undisclosed arrangement referred to one or the other, and whether both the parties agreed that, at the time of the transactions, they intended to withdraw from the previous arrangement, or that it did not occur to either of them either to

discard the previous arrangement or to abide by it, or if they disagree as to what they intended. The result, according to the two disciples, would be the same even if the parties agree that they intended to abide by the previous arrangement, but as regards khul it will depend, according to Abú Ḥanífa, on the option of the wife.

If a pre-emptor makes a demand of his right in jest, such demand will have no effect; similarly release of a debt by the creditor, subject to a secret arrangement that it was to have no effect, is inoperative.

As regards informations, a secret arrangement of the kind under consideration makes them void of effect, because the object of the law is to discover the truth by their means and its attainment is negatived by such arrangement. Hence an admission made in jest by a person to the effect that he has divorced his wife, or manumitted his slave, is inoperative, just as if it was obtained by coercion.

With regard to matters of faith, the utterance of words denoting un-belief without intending to mean anything makes the speaker guilty of unbelief. This is because jesting in such matters tends to lower the prestige of Islám, which is in itself an act of unbelief, and not because the words themselves are given any effect. If an infidel utters the formula constituting the Islámic faith, though without intending that it should have any effect, he will nevertheless be held to have embraced Islám because as soon as such a formula is uttered the legal effect follows: the reason being that the law always favours the Islámic religion.[1]

Coercion

The effect of duress or coercion on the legal effect of a man's act done under such influence has three aspects: (1) how far the act is valid or effective; (2) how far the doer is responsible to a third person who may be injuriously affected by the act; (3) what is the responsibility of the coercer towards the doer of the act and towards any third person who may be affected thereby. The last aspect of the question appertains

[1] 'Tauḍíḥ', pp. 454-5.

mainly, if not solely, to the law of torts or wrongs, while the second aspect of the question is capable of being regarded from two-fold standpoints, as a tort from the point of view of the third person affected by the act, and from the point of view of the doer as to how far the effect of coercion on his will affects the normal consequences of his act. The first aspect of the question relates solely to the effect of coercion, on the legal capacity of the coerced so far as the operation of the act done under coercion is concerned.

Coercion or duress having regard to the intensity of its effect on the freedom of action of the person subjected to it is of two kinds. If it consists of a threat to destroy a man's life or limb it is, to translate the language of Arab writers, called constraining (maljíun ملجئ), and if it is exercised by imprisoning, confining or beating a man, it is regarded as non-constraining (ghairu maljíin غير ملجئ). Both forms of coercion deprive a man's act of the element of consent while only the extreme form of it also vitiates his intention or freedom of choice. If a man is not in danger of losing his life or limb, he should not choose to break the law but rather put up with the consequences of conforming to it. At the same time a person acting under such compulsion cannot be said to consent to or be satisfied that he should do the act to which he is compelled.

Coercion does not destroy the legal fitness of the person who is subjected to it, and the commands of the law are held to be addressed to such a person inasmuch as some acts done under such influence are spiritually regarded as obligatory, some as forbidden and others as indifferent. For instance, it becomes obligatory on a man to drink intoxicating liquor, if he is otherwise threatened with death and it is forbidden to a Muslim to kill another Muslim under the same circumstances, and a person breaking the fast under coercion does not incur any spiritual liability.

According to the Ḥanafís, as already mentioned, coercion does not negative choice or intention of the

person subjected to it, because in fact he chooses between the two alternatives, not doing the act he is asked to do, and suffering the threatened pain or doing what he is asked to do and thus escaping the threatened suffering. Coercion, nevertheless, vitiates such intention and negatives consent.

The result is that all acts of the nature of utterance (qaul), which require consent for their validity, for instance, a sale, gift and lease, admission, release and the like, would, if entered into under coercion of the extreme or mild form, be vitiated but would become valid if ratified afterwards.[1] But acts of utterance which are irrevocable, such as divorce and manumission, even if effected under coercion of the extreme form are valid and operative. It is argued in support of this position that a similar act done in jest, which negatives both intention and consent with reference to the legal result of the act is valid, while coercion though it negatives consent, both with reference to the cause, namely, the uttering of the formula and the legal result, does not negative intention or choice with reference to the cause. An act of divorce or manumission, even if an option to revoke be attached to it, becomes immediately operative and binding, the option having no effect, although in such a case intention to produce the legal result is altogether wanting.

But, observes the author of 'Tauḍíḥ', when a man pronounces divorce or manumission in jest, he chooses or intends, and also consents to the cause, namely, the utterance of the formula, while a man acting under coercion does not at all consent to such cause, and though he may be said to choose or intend it, his choice or intention not being the result of free volition is of a *vitiated* character.[2] This would show that Ṣadru'sh-Sharí'at does not favour the extension of the tradition already cited to cases of coercion, but would confine them to hazl or jest.

If coercion is exercised in the matter of divorce with the object of acquiring property, the divorce will take

[1] 'Talwíḥ', p. 795.
[2] 'Tauḍíḥ', p. 474.

place but the person so coerced will not be liable for the property. For instance, a man coerces his adult wife to accept the power of divorcing herself, on condition that she would pay him one thousand rupees as consideration for conferring on her such authority; in such a case the divorce will take place at once, for the acceptance of such power *ipso facto* dissolves the marriage without the necessity of a further act in the exercise of the power. But his wife will not be bound to pay the thousand rupees, because a disposition of property has no effect unless the owner consents to it. This case stands on the same footing as when a power to dissolve marriage is conferred on a minor wife in lieu of consideration; here also a valid divorce will be effected but the consideration cannot be enforced against her.

As regards acts of conduct done under coercion, the question that is to be considered is, whether the act is such that the doing of it may be imputed to the coercer. If so, the volition of the doer disappears and the act is imputed to the coercer. For instance if a man acting under coercion destroys the life or property of another the legal consequence will not be fastened to his act. But the Ḥanafís add one qualification: suppose in imputing the act to the coercer there would be a change in the character of the subject-matter then the result will be confined to the doer; for instance, A is compelled by B to sell and deliver the property sold to C, the delivery of the property will not be imputed to B for the effect of his act is not the delivery of the property sold but of property wrongfully acquired, because the sale being effected under coercion is bad, as already mentioned. The result would be that the sale, would be set aside, and B would not be liable for damages for no loss has actually been caused to the owner of the property. If the act be such that it cannot be imputed to the coercer, then the legal result will be imputed to the doer of it, for example, an act of fornication.

The principal question to be considered, according to the Sháfi'ís as regards the effect of duress on the legal operation of a man's act, is whether coercion

was exercised for a just cause or not. For instance, if a non-Muslim subject of a hostile State adopts the Islámic faith under coercion, such conversion will be regarded as valid. But conversion of a non-Muslim subject of a Muslim State brought about by duress will not be valid as the application of force for such a purpose is not justifiable for the Prophet of God has said 'leave them and their religion alone'. The order of a judge compelling an insolvent debtor to sell his property in order to pay his creditors is an instance of coercion for a just cause.

If coercion be not for a just cause then its effect varies according as the act to which it relates is of a character that the law would exonerate a person doing it under coercion or it would not. If the former, the action of the coerced will have no legal effect, because he did not intend it, and it follows from his right to the safety of his person that he cannot be made to suffer by reason of an act to which he did not consent. In such a case the law according to the Sháfi'ís makes no difference whether the act belongs to the class of utterances or conduct.[1] And if the act be such that it can be imputed to the coercer, such as when a man compels another to destroy the property of a third person the legal consequences will not be fastened on the doer. On the other hand, if the act done under duress cannot be imputed to the coercer, such as admissions, dispositions and contracts, the act will have no legal effect whatever. On this ground, according to the Sháfi'ís, if a husband under coercion divorces his wife or a master manumits his slave, or a person admits that he has committed theft, then no effect will be given to such divorce manumission or admission. Such acts cannot be attributed in law to a person other than the agent, because, divorce can only be effectively pronounced by the husband, and the master of a slave alone can declare him free, and a person makes himself liable for an offence by admitting that he committed it, if he makes the admission in his own words.

[1] 'Talwíḥ', p. 791.

If the act to which a man is coerced be such that the law will not exonerate the person doing it, he will be held liable even if he acted under coercion. For instance, a man killing another or committing whoredom under compulsion subjects himself to the penalties of law.

If coercion be for a just cause the act done under such coercion will be valid in law. For instance, a compulsory sale of a debtor's property for discharging his debts will be valid. And according to Sháfi'ís no distinction is to be drawn between coercion by threat to kill and coercion by imprisonment.

The writers on Uṣúl do not discuss fraud under the heading of circumstances affecting legal capacity; but apparently their list of such circumstances is more or less illustrative and does not purport to be complete. Fraud, as I have pointed out, affects a man's judgement but not his intention or consent. It follows, therefore, that acts which are not capable of being undone, such as divorce and manumission would be valid and operative, even if effected under fraud. But transactions of the nature of Mu'ámilát such as a sale, a lease and the like would, if vitiated by fraud, be always voidable at the instance of the party defrauded, if he has suffered thereby loss of property.[1] Fraud

In Muḥammadan jurisprudence the effect of ignorance of law on a person's act is thus dealt with. The exposition of law is regarded, as a juristic act entitling the expounder, if he has done his best, to spiritual reward and the decree of a judge is a juristic act in a secular sense. The ignorance of a judge or a jurist who expounds the law contrary to a text of the Qur'án, or a well-known tradition or contrary to consensus of opinion will not be excused. In other words rules of law if opposed to such authorities have no force, so that a decree of a judge based thereon, will not be operative.[2] The following cases are cited in 'Taudíḥ' as illustrating the above principle though, as regards each of them as pointed out by Taftázání, it is more Ignorance of law

[1] 'Al-Majalláh', p. 52.
[2] 'Taudíḥ', p. 445.

than doubtful if the disapproved opinion is opposed to a clear text. A decree in favour of the plaintiff, based on the testimony of one witness and the oath of the plaintiff himself, would be bad as being opposed to a text of the Qur'án which requires the testimony of two witnesses to support a claim. A man is found dead with marks of violence on his person and his heirs charge a certain man with his murder. If following the opinion of Sháfi'í, the Qáḍí orders the accused to pay blood-money merely on the deceased's heirs taking the oath fifty times that the accused had killed the deceased, such a decree would be inoperative as being contrary to the well-known tradition in which the Prophet lays down that the burden of proof is on the claimant, and that the person denying the claim should be given the oath.

Ignorance of law in a question which is not covered by an express text or consensus of opinion will be excused; in other words, the Qáḍí is entitled to follow his own opinion in such matters, so that his decree will be binding, even if opposed to the current juristic opinion. The reason as already indicated is that the law on a point not expressly dealt with by a text or concurrent decision of the learned is regarded as uncertain, so that it cannot be said with respect to any particular view of it that it must be correct and that any other view must be wrong. This is the case with all laws based on analogy.

The effect of uncertainty or doubt as to the correct law is also apparent in questions relating to the infliction of certain sentences. For instance, if one of the two heirs of a murdered person pardons the offender but the other does not and claims retaliation thinking, as is the opinion of some jurists, that he is entitled to it in spite of pardon by the other heir, the Court will not order retaliation because difference of opinion among jurists entails doubt as to the correct law on the point, and in cases of doubt the sentence of retaliation is not passed. Even when the law is not really open to doubt but there are sufficient grounds in a particular case for an individual to hold an erroneous view with respect to it, such law is not applicable to him, as it

will not be considered to be free from doubt, and he will not, therefore, incur the full penalty for its violation. For instance, if an infidel belonging to a non-Muslim State after embracing Islám happens to come to a Muslim country and there drinks intoxicating liquor not knowing that it is forbidden by the religion of his adoption, he will not incur the punishment assigned to it. But, on the other hand, if such a person committed whoredom under similar circumstances, he will not be exempted from punishment, for whoredom is prohibited by all religions, and hence it is not a matter in which any doubt can be reasonably entertained.

Except as stated above ignorance of the law is not held to be an excuse, for it is the duty of every Muslim to make himself acquainted with it. It is otherwise in the case of ignorance of facts. For instance, a Muslim girl, who is given in marriage by her guardian other than her father or grandfather, has a right on attaining majority to repudiate such marriage. She has also a similar option according to some jurists, if she has been married by her father or grandfather to a person not her equal or for grossly inadequate dower. If in such cases the minor wife, not being aware of the fact of her marriage, did not repudiate it on attaining puberty, she may do so when she comes to know of it. But if she knew of the fact of such marriage when she reached majority but says that she was not aware of her right under the law, the Court will not listen to her plea. But if a slave wife, who on being manumitted has the option to repudiate her marriage with her slave husband, was not aware at the time of her manumission that the law gave her such option her case would be treated as an exception and a further opportunity would be given to her when she becomes aware of her rights, because her duty being to serve others she has not had the opportunity of making herself acquainted with the law. The following cases afford further illustration of the rule that ignorance of a fact is a good excuse in law. A pre-emptor's right, for instance, will not be lost, if he failed to make a demand through ignorance of the fact that his

Ignorance of facts

co-owner or neighbour had sold the property subject to pre-emption. Similarly if an agent's authority is withdrawn, but the agent not being aware of the fact continues to act on behalf of his principal, the latter will be bound by such acts.

Immaturity of or defect in understanding affects legal capacity

As law is addressed to human intelligence the absence of or the immature or defective condition of the power of understanding in a person affects his general legal capacity. Human beings do not mature their understanding until a certain point in their lives, which varies in individual cases. Even in the same individual, the power of the mind varies under different conditions. But as law requires something certain and uniform to proceed upon, it fixes upon a particular period in human life as the dividing line between immaturity and maturity of understanding. A person until he has reached that age is said to be a minor (ṣaghír صغير), and after he has attained it is regarded as major. But a minor may yet, in fact, be possessed of understanding and the Muḥammadan law does not altogether ignore that fact. An infant is not only of immature understanding but also of imperfect physical development and of defective volition. It also happens that a person though past the years of discretion may yet be of markedly defective understanding. A person of this kind is called an idiot (mátú ماتوه). A foolish and reckless person (safíh سفيه) is also regarded as of defective legal capacity though in a lessor degree. Sometimes a grown-up person may entirely lose his power of understanding and volition by reason of disease; such a person is called insane or a lunatic (majnún مجنون). A person who is seized with death-illness is also regarded as of defective legal capacity, because in the majority of cases his mental and physical faculties are seriously affected. Death causes a total extinction of a man's faculties.

Infants

A living child in the womb of its mother is a person in the contemplation of law and is, therefore, possessed of inherent legal capacity, which, however, is regarded as defective inasmuch as an embryo's life is not independent of its mother's. Because of such

inherent capacity the law recognizes its lineage, and it is held to be capable of acquiring rights, such as to inheritance, a legacy and the like.[1] A child in the womb cannot, however, be fastened with liabilities.[2] For instance, if its guardian on its behalf buys something, it cannot be held liable for the price, that is, it cannot be realized from the property belonging to the embryo.

On being born a child acquires capacity to discharge obligations though of a defective character, the law requiring him to discharge only such obligations as are possible for him to discharge. And, generally speaking, only such acts and transactions of a minor will be upheld as are of benefit to him and whatever is injurious to his interests will be disallowed. As regards his liability for his acts of conduct an infant is subject to such liabilities for infringing private rights as can be satisfied by substitution of property, that is, by compensation. The reason is that an obligation of this kind may be discharged out of the infant's property by the guardian acting as his agent. He is, therefore, liable to make good out of his property whatever loss he causes to others by his tortious acts, the principle of such liability being the loss to the owner of the property and not the moral culpability of the person causing the loss. He is also subject to such obligations of a benevolent nature (ṣilát صلة) towards his kindred and wife as are imposed by the law by way of tax or in exchange for benefits received. For instance, an infant is liable for the maintenance of his kindred within certain degrees of relationship, such as his poor parents and of his wife. An infant even if possessed of understanding is, however, under no obligation with respect to what is regarded in law as a benevolent act having a semblance of penalty, such as the payment of blood-money (diyat), which is realizable from the members of the tribe of the person who has killed a member of another tribe. He is also not liable to penalties which

[1] 'Talwíḥ', p. 730.
[2] 'Tauḍíḥ', p. 421.

are in the nature of private rights like retaliation, nor can he be deprived of his right of inheritance from a person whose death he has caused.

An infant's obligation with respect to public rights

As regards the rights of God, he is not bound to perform acts of worship, whether they be such as are to be performed personally, for instance, the saying of prayers, fasting and pilgrimage, or such as can be discharged by means of property, such as the payment of poor-rates. He is exempted from devotional acts of the former class, because of his physical inability and from those of the latter category, because being an act of worship the obligation in respect of them is personal. An infant is also exempted from all punishments which are public rights such as ḥadd. As regards acts of worship which have the semblance of a tax, such as payment of the appointed alms at the conclusion of Ramaḍán there is a difference of opinion, Muḥammad holds that he is not liable while Abú Ḥanífa and Abú Yúsuf think otherwise. Such payments, however, which are imposed purely as a tax, though incidentally they may bear resemblance to an act of worship, or to penalty such as tithe and land tax, are payable by an infant.

His competence to perform juristic acts and to enter into transactions

The competence of an infant possessed of understanding to perform juristic acts and to enter into legal transactions is defective because his understanding is immature. He is entitled to do any acts which are entirely beneficial to him, such as acceptance of a gift and the like, even though his guardian does not accord permission. Similarly, if his services are hired by another, he has a right to recover his wages, though the employer will not be held responsible, if in the course of such employment, he meets with an accident. He may also appoint an agent for his business without the permission of his guardian but without binding himself. This is allowed because it is necessary for him to acquire experience in trade. But an infant with or without permission of his guardian cannot do any act which is absolutely injurious to his interests, such as divorcing his wife, or making a gift or wáqf of his property, or lending

his money.[1] Similarly a bequest of an infant is void, because it is laid down that it is better for a man that he should leave his heirs rich rather than they should beg of people.

As regards transactions which may be profitable or may result in loss, such as sale, purchase and the like, the law draws a distinction between an infant possessed of discrimination and one that is not. If the former he may enter into them with the consent of his guardian and they will be valid, as if they were acts of the guardian, done on his behalf.

Even if such a transaction involves gross and evident loss, it will be held valid in the opinion of Abú Ḥanífa but not according to his disciples Abú Yúsuf and Muḥammad. A sale by a minor possessed of understanding to his own guardian, if it involves gross or evident loss is void according to one version and valid according to another version. The former seems to be the more correct view.[2]

A disposition or a contract by an infant not possessed of discrimination is altogether void. The test as to whether an infant possesses discrimination is whether he understands the meaning of sale and purchase and of profit and loss.[3] A minor cannot marry without the intervention of a guardian. But according to the Sháfi'ís a minor thayyiba can marry without such intervention.

Status of an infant follows that of his parents

The status of an infant so far as his religion is concerned follows that of his parents. He, therefore, loses the protection of the Muslim State if his parents apostatize and leave its jurisdiction. If one of the parents be or remains a Muslim the infant will have the status of a Muslim.

Effect of conversion of an infant to Islam on his marriage

According to the accepted Ḥanafí view, however, the law recognizes the acts of an infant of discretion relating to faith. Thus if a non-Muslim infant embraces the Islámic faith his marriage with the non-Muslim wife will be dissolved, and he also loses his

1 This is because the taking of interest is prohibited by the Muḥammadan law.

2 'Tauḍíḥ', p. 425.

3 'Al-Majalláh', p. 152.

right to inherit from his non-Muslim relatives. The reason is that the good which the sacred laws have in view with respect to an act of faith is spiritual benefit, and the losses in question are of a collateral and indirect nature. Furthermore, they should not be regarded as consequences of the man's faith, but of the unbelief of his wife in one case, and of his relatives in the other.

Apostacy of a Muslim minor

In the same way if a minor apostatizes the law will take cognizance of his apostacy, which is an act of choice indicating exercise of judgement. Spiritual consequences of such an act must necessarily follow, and in their wake its legal results as well, even though they may be of the nature of penalties and disabilities. But an infant apostate is not liable to the sentence of death, because such a sentence is inflicted not because of mere apostacy, but because of the possibility of an apostate waging war against the Muslim State as is shown by the fact that a female apostate is not sentenced to death. A Muslim infant who has apostatized will not be sentenced to death, even if he persists in his apostacy after attaining majority, because there is a difference of opinion among the learned on the question whether an infant's faith in Islám is recognized by the law, and whether he can at all be guilty of apostacy, the rule being that whenever a doubt intervenes capital punishment is not enforced.

If a non-Muslim infant's wife embraces Islám, the Qáḍí, on his attaining majority, will offer him the option of adopting the faith and if he refuses, his wife will be separated from him, because it would be a hardship to a muslim woman to live as the wife of an infidel.

The test of majority is the attainment of puberty, the minimum age for which in a male is twelve years and in a female nine years and the maximum in the case of both is fifteen years.[1]

Lunatics

The legal capacity of an insane person except as to acts done in lucid intervals is affected in the same way as that of an infant without discrimination. But in case a non-Muslim lunatic's wife embraces Islám,

[1] 'Al-Majalláh', p. 157.

his guardian or committee will be offered the option of adopting that faith and if he does not, the lunatic's wife will be separated from him. This is according to juristic preference, but according to analogy the Qáḍí should wait until her husband recovers and then ask him to embrace Islám; and then if he refuses a decree will be passed dissolving the marriage. The rule of analogy is rejected, because there is no knowing when, if ever, the lunatic will recover, while in the case of an infant, he is sure to attain majority and his Muslim wife will not have to live with him indefinitely. If a lunatic's parents leave him within the jurisdiction of a Muslim State, he will be treated as a Muslim.

Idiots

The legal capacity of an idiot stands on the same basis as that of an infant possessed of discrimination. An idiot is a person who is confused in his speech and speaks sometimes like a sensible man and sometimes like a lunatic. But if a non-Muslim idiot's wife embraces Islám her case will be treated on the same principle as that of a lunatic and not of an infant.

Persons of weak mind

A person though not an idiot may be so foolish by reason of weakness of intellect that his actions generally are not in accord with what reason or common sense would dictate, so that he wastes his property by extravagance, and from incapacity to take care of it. But as understanding is not absent in his case, as in the case of a lunatic, the law does not deny him legal capacity, and he is subject to all the injunctions of the law. The jurists are, however, all agreed on the authority of a text of the Qur'án that, if a person on reaching the age of majority is found to be of weak intellect, his property should not be made over to him until he has developed sufficient judgement and discretion and this will be presumed at the age of twenty-five. Further a person of weak intellect even after that age is to be placed under inhibition by order of the Court, as far as the making of contracts and dispositions is concerned, in order as much to protect his own interests as those of the public. Abú Ḥanífa, however, says that such interdiction is lawful but not obligatory.

According to the accepted opinion an order of the Qáḍí is necessary, restraining alienations and dispositions by such a person, though Muḥammad thinks otherwise holding that his acts are inoperative by reason of the mere fact that his intellect is weak.

Insolvents

If a person be insolvent (muflis مفلس), that is, if his debts be equal to his assets or more, or if he attempts to place his property beyond the reach of his creditors by transactions apparently of the nature of a sale or the like, but subject to some secret arrangement for his own benefit, the Qáḍí will pass an interdiction or prohibitory order restraining all alienations by him, and direct the sale of his property for the benefit of his creditors. The order will only be made at the request of a creditor.[1]

Unqualified professional men

The law also recognizes inhibition of a limited character by which unskilled persons may be prohibited from pursuing certain occupations because of the danger to the public. Thus an unqualified doctor may be prevented from practising medicine.[2]

Slaves

Slavery is a defect in legal capacity created by the law. In its inception it was a penalty for unbelief or non-acknowledgement of the authority of the Law-giver, and, therefore, the creation of the condition of slavery is said to be a public right. Further, when a man denies the authority of the One perfect Creator by refusing to take notice of the proofs that exist in that connexion, he reduces himself to the level of a lower animal, and the law therefore, allows him to be in a limited sense, the property of his fellow creatures as a mark of degradation. That is the reason why a Muslim free-man cannot be turned into a slave. Though the creation of the status of slavery is a public right, once it has been brought about, it becomes transmuted into a private right in the nature of property. Hence though a Muslim cannot be made a slave, yet if an infidel slave becomes Muslim, he still remains a slave, for otherwise the proprietary rights of the master would be affected.

[1] 'Tauḍíḥ', pp. 457–8; 'Al-Majalláh', pp. 158–9.
[2] 'Al-Majalláh', p. 154.

Slavery being in the nature of punishment, it cannot be partial, that is to say, a person cannot be partly a slave and partly freeman. Hence if a person whose parentage is unknown makes an admission that, one-half of him is the property of another person, he will be regarded as a slave in all matters of law, such as competency to be a witness. Similarly if a man emancipates a slave in part, the latter will become absolutely free. This is according to the opinion of Abú Yúsuf and Muḥammad while Abú Ḥanífa holds that a slave may be emancipated only in part. But, according to all, a slave can be the property of more than one man.

Manumission

Though the creation of the status of slavery is a public right, yet a slave being substantially in the nature of property, the master is allowed to abandon his right by manumitting him, though the right of the community is thereby indirectly affected. This is in accordance with a well-established principle that the law allows many things incidentally which it would not sanction directly. The law always encourages emancipation as thereby a man is restored to his original condition.

A slave cannot own property

As slavery connotes disability and degradation making a slave the property of his master the former is not competent to own property. Hence a Muslim slave is not bound to perform pilgrimage, because it is obligatory only on those who own property of a certain value. But a slave is competent to acquire property, if he has his master's permission to carry on trade or other business, but any property so acquired will belong to the master.

He may marry and divorce

Slavery, however, does not negative capacity for any other primary rights except right to property and therefore a slave has a right to marry and to divorce. If, however, a slave marries without the consent of his master, the wife will not be entitled to recover her dues from him by enforcing his sale, as it would prejudice the master's rights. But it would be otherwise if the master consented to the marriage. A slave's right in matters of marriage and divorce is one-half of that of a free man. What is meant is that a male

slave is restricted to two wives instead of four, and a slave wife will be irrevocably divorced on pronouncement of two ṭalaks instead of three, one and a half being increased to two in order to avoid a fraction. On the same ground a slave wife's period of probation or 'iddat consists of two courses. A female slave's capacity for marriage is also restricted, that is to say, she cannot marry a man who has already a free wife, though a free man to whom a female slave is married can afterwards be married to a free woman.

He is entitled to the protection of his person

A slave according to the Ḥanafís has a full right to the protection of his person and life, just like a free man, because such a right is based either on the faith of Islám, or on the fact of a person whether a Muslim or non-Muslim residing within a Muslim State. Therefore a person who kills or causes hurt to a slave makes himself liable to retaliation. Similarly a slave who admits having committed an offence of murder, or hurt, or theft incurs the punishment of retaliation or ḥadd, because the right to the protection of his life and limb being his own, he is competent to abandon it. But as a slave has a lower status than a free man the gravity of an offence committed by him is also regarded as less than that of a similar offence committed by the latter. Hence in cases where the punishment is capable of division, such as the number of stripes for the offences of whoredom, and the like, a slave's sentence is half of that of a free man.

A slave incompetent to hold offices of dignity

For the same reason, that is a slave not being possessed of the full dignity of a man, he is not competent to hold offices involving power or privilege such as that of a guardian, Mutwalli or Qáḍí. Nor is he eligible as a witness, for the right to give evidence means a faculty for fixing others with liability which cannot be associated with the degraded status of slavery.

Not a competent witness

Non-Muslims

Since the application of law in the Muḥammadan system is based on Islám a non-Muslim's legal capacity is regarded as defective, or in the language of jurists the application of law in his case is affected by ignorance. What then is the Islámic faith within the meaning of law? In Arabic it is technically expressed

What is Islam

in one word Imán which consists, as I have already said, in acknowledging the authority of One God the Lawgiver, and the truth of Muḥammad's mission as His Prophet. A person whose faith is defective in either respect is not a Muslim.

Non-Muslims are grouped into four classes: (1) Atheists (dahriatun دهرية), that is those who deny the existence of a Creator. (2) Thanawiyatun (ثنوية) or Magians (مجوسي), those who deny the Unity of the Godhead and believe in two gods. (3) Philosophers (falásifata فلاسفة), namely, those who believe in one God, the Creator, but do not believe in the truth of the Prophet's mission. (4) Idol worshippers (wathníyatun وثنية) meaning those who deny the existence of a Creator, as well as the truth of the Prophet's mission. According to some jurists, however, idol worshippers cannot be said to deny the existence of God; they are in fact men who believe in more than one God, and should be placed in the same category as Magians. (5) Those who believe in the existence of one God, the Creator of the Universe, and in the truth of Muḥammad's mission but do not believe that the religion he preached was binding on all, such are some of the followers of Christ (I'sawíatun عيسوية).

Muslims divided into sects

The Muslims themselves are divided into numerous sects. Though all of them believe in the Unity of the Godhead and in the Prophet's mission, they differ from each other on certain doctrinal points. Taking the Sunnís, with whose jurisprudence we are concerned, as the orthodox sect, the rest are more or less heretics from their point of view. It is not necessary to discuss in detail the question, in what does heresy consist. Generally speaking heresy lends itself to a broad division into what may be called speculative heresy and political heresy. To the former class belongs the heresy of the followers of Mu'tazilite theology and divinity, and in the early days of Islám the Khárijis were the most important sect of political heretics

Mu'tazilis Kharijis

[1] 'Durru'l-Mukhtár', vol. iii, p. 312.

The defection of the Shí'ahs was also political in its origin.

Different grades of heresy

The tendency to charge Muslims with unbelief condemned

The Sunnís classify heresies into different grades, according as they recede further and further from their own doctrines. Some, they say, approach or almost amount to unbelief, such as the doctrines of the Mu'tazilís regarding the divine attributes and on the question of free-will and predestination which differ essentially from their own doctrines. Some writers on Muḥammadan theology have shown themselves prone to charge other Muslims with unbelief on grounds which, according to the highest authorities, do not involve any vital principle. The author of 'Raddu'l-Muhtár' quotes a passage from An-Nahar where it is stated that some jurists do not impute unbelief to any heretics whatever, and there are some people who charge each other with unbelief, but the correct law is that when heretical doctrines are opposed to clear and indisputable texts they would amount to unbelief but not otherwise. Ibn 'Ábidín then observes that many writers on religious matters, who do not possess the rank of mujtahids have been profuse with charges of unbelief, but not so the mujtahids. He next quotes a dictum of Ibn Málik, the commentator of 'Al-majmá' to the effect that the testimony of heretics, such as the Rafiḍís (an extreme sect of Shí'ahs who repudiate the Caliphate of Abú Bakr, 'Umar and 'Uthmán), or the Khárijís would be accepted which would not have been the case if they were treated as unbelievers. It is also pointed out that in the writings of mujtahids the testimony of heretics generally is admissible except that of Kitábís. The same writer then expresses his surprise that the author of 'Baḥru'r-Rá'iq' should have made it so easy for charges of unbelief to be preferred against a Muslim, as would appear from the long list which he has drawn up of matters by reason of which a Muḥammadan would become guilty of unbelief. The author of 'Baḥru'r-Rá'iq', however, states that he himself would not charge a Muḥammadan with unbelief for using words of the nature mentioned in the books of fatáwá.[1]

[1] 'Raddu'l-Muhtár', vol. iii, pp. 319-20.

At the present day the Muḥammadan world is divided into Sunnís and Shí'ahs. The latter's separation from the main body is chiefly founded on the question whether Abú Bakr's election as the first Caliph, or religious head of the Muslim community, was lawful or not, and whether the Caliphate should not have been confined to the descendants of the Prophet. This question, which for many centuries past could have had only a theoretical importance led the Shí'ahs to develope a separate science of law of their own, so that the opinion of Sunní jurists on any legal question has no authority among them and vice versa. In jurisprudence the two schools differ mainly on the doctrine of Ijmá', or consensus of opinion, as a source of laws, for it is on this principle that the Sunnís base the justification of Abú Bakr's election to the Caliphate. Some Shí'ah jurists, however, recognize Ijmá' but would confine it to the descendants of the Prophet. The Sunnís themselves are divided into four Schools—Ḥanafí, Sháfi'í, Málikí and Ḥanbalí, but the differences among them are treated as mere matters of opinion especially so far as the administration of law is concerned.

What laws and customs of non-Muslims will be upheld

The application of Muḥammadan law to non-Muslims is entirely territorial, that is to say, it applies only to such of them as live within the jurisdiction of a Muslim State. Let us see what are the principles determining the extent of such application which, as I have already stated, is affected by their ignorance.

Ignorance of a dhimmí or a non-Muslim subject of a Muslim State in matters which do not admit of difference of opinion, such as the Unity of the Godhead and truth of the mission of the Prophet will not be excused, that is to say, the law will not lend its active support to the doctrines of unbelief touching the essentials of faith. But as to such doctrines of his in which difference of opinion is admissible, the law according to Sháfi'í will recognize their validity so far that it will not offer any active objection to them. This principle of toleration is based upon a precept of the Prophet in which he says 'leave alone the non-Muslims and whatever they believe in'.[1] Abú Ḥanífa holds

that, so far as the legal effect of such doctrines is concerned, it will not be affected by the rules of Muḥammadan law. For instance, the drinking of intoxicating liquor is a matter in which difference of opinion is possible in different religions, and according to Sháfi'í the Muḥammadan law will merely abstain from interfering with a non-Muslim drinking alcohol, so far that it will not enforce against him the sentence of ḥadd. In Abú Ḥanífa's opinion, however, the law will also uphold the sale of wine by a non-Muslim, and will hold a person who destroys it liable in damages. Similarly, according to him the law will not interfere with a Magian subject of a Muslim State marrying a person within the prohibited degrees of relationship as reckoned in Islám, and the Court will, if asked by the wife, pass a decree against him for her maintenance. So also, should the Magian who contracted such a marriage afterwards embrace Islám his previous conduct would not be considered a justification for any one to impute unchastity to him, provided he has since separated from his wife. Abú Yúsuf and Muḥammad agree generally with Abú Ḥanífa as to the principle applicable to these questions, but they do not think that the law should order maintenance for a Magian's wife within the prohibited degrees of relationship, because that would amount to lending active support to a practice which has never been lawful except in the days of Adam when it was recognized because of absolute necessity. Abú Ḥanífa's position is justified on the ground that, if the law failed to order maintenance in such a case, the result might be loss of life.

So far as the laws or usages of non-Muslims agree with the Muḥammadan law there is, of course, no difficulty in enforcing them. It is also to be noted that the Muḥammadan State will only take note of such laws and customs of its non-Muslim subjects as have found general acceptance among them and not the opinions of a few isolated individuals. For instance, if some infidels hold that theft or murder is lawful, the Islámic law will not uphold such doctrines. Apparently the writers on Islámic jurisprudence did not consider the possibility of any com-

munity sanctioning such offences against society; or if they did they would perhaps hold that such crimes, though prevalent and even sanctioned by a community of men, could not really have the approval of their religion. Except, therefore, when there is a real conflict of laws in the sense above indicated, the Muḥammadan law relating to punishments and to transactions between men and men applies to the non-Muslim subjects of a Muslim State. As to those injunctions of the Muḥammadan code which impose an obligation to believe in the truth of Islám, they are addressed to the non-Muslims in the sense that, if they do not accept the faith, they will be punished in the next world.

Apostates

Apostacy or change of faith from Islám to infidelity places the apostate outside the protection of law. The law, however, by way of indulgence gives the apostate a certain *locus poenitentiæ*. For instance, he will be first asked to conform to the Faith and, if he entertains any doubt, efforts must be made to remove it by argument. He will be given an option of three days to re-embrace the Faith, before the sentence is passed on him. But since by the very act of apostacy a man loses the protection of law, if even before the chance of re-embracing the Faith has been given to him, a Muslim kills an apostate, it will be considered as an improper act, but he would incur no penalty of the law. So long as the sentence has not been passed on an apostate, he will be allowed, according to the two disciples, to retain possession of his property but according to Abú Ḥanífa, it passes to his heirs at the instant of apostacy.

Heretics

Since heretics believe in the unity of the Godhead and the mission of the Prophet, the Muḥammadan law applies to them, or in other words, their legal capacity is in no way affected. But the enforcement of laws against them necessarily depends upon the power of the Imám to enforce them, that is to say, it is determined by his territorial jurisdiction. For instance, if a sect of Muḥammadans like the Khárijís of the olden days refuse to recognize the authority of the Imám and set up a government of their own

protected by forts and troops, the orthodox laws cannot be enforced against them, though the Imám may lawfully wage war against them in order to reduce them to submission, if they begin hostilities as held by some, and even if they do not as held by the others. If, therefore, a heretic lives within the jurisdiction of the Imám all the orthodox laws will apply to him, although he may hold a different view. Law does not excuse heresy that is to say, will not recognize heretical doctrines, though the ignorance of a heretic is not so gross as that of a non-Muslim.

Persons in death-illness

Sickness does not destroy legal capacity but only brings about mental as well as physical weakness. Hence a sick person is bound to perform acts of worship to the extent that is possible. If illness be such as to become afterwards the cause of death, it is regarded as the preparatory cause of the origination of the rights of the heirs and creditors in the property of the deceased from the inception of such illness, death itself being the effective cause of succession (khiláfat) and inheritance.

What is death-illness

There has been much discussion in our Courts as to what constitutes death-illness. The Muḥammadan law, however, does not seem to present any difficulty as to the principle upon which it is to be ascertained, nor is there any substantial difference of opinion among the jurists on this question. Death-illness is defined as illness from which death is ordinarily apprehended in most cases, provided in the particular case in question, it has actually ended in death. But if the disease be of long standing and does not so increase from day to day that death may be apprehended from it or does not ultimately end in death, it will not be regarded as death-illness. It will, however, be reckoned as death-illness from the date when the patient became bed-ridden thereby, provided he dies within a year of it.[1] The compilers of Al-Majallah lay it down that death-illness is that from which death is to be apprehended in most cases, and which disables

[1] 'Hedáya', vol. ix, p. 389; 'Kifáya', vol. ix, p. 389; 'Inaya', vol. ix, p. 389.

the patient[1] from looking after his affairs outside his house if he be a male and if a female the affairs within her house, provided the patient dies in that condition before a year has expired, whether he has been bed-ridden or not. If the illness protracts itself into a chronic condition and lasts like that for a year, the patient will be regarded as if he was in health, and his dispositions will be treated like those of a healthy person, so long as his illness does not increase and his condition does not change. But if such chronic illness increases and his condition changes so that he dies of it, then such illness from the date of the change in his condition if the change be of the nature above described will be regarded as death-illness.[1]

The definitions as given by the Sháfi'í and Ḥanbalí jurists are also to the same effect, namely, that death-illness is illness dangerous to life, that is, which mostly ends in death provided the patient actually dies of it. Instances are mentioned in the books as to what illnesses are regarded as dangerous, but it is laid down that it is to be left to the judgement of competent doctors to say what diseases would come within the category.[2]

It is stated in *Fatima Bibi* v. *Ahmad Baksh*,[3] that no particular incapacities of a sick person can be said to be infallible signs of death-illness. This may perhaps be granted. The real question, however, in all the cases is whether the illness was of such a character that death would be apprehended from it in a majority of cases, and as laid down by jurists of the Sháfi'í and Ḥanbalí Schools of law, this question is one to be ordinarily determined by medical experts, or by the fact that the patient is incapacitated by the illness from attending to his usual avocations. But as suggested in *Kulsum Bibi* v. *Golam Hossain Cassim Ariff*[4] the test laid down in the case of *Fatima Bibi*, namely, a subjective apprehension on the part of the

[1] 'Al-Majalláh', pp. 264–5.

[2] 'Al-Wajíz', p. 272; 'Tuḥfatul Minhájˈ', vol. iii, p. 36, et seq.; Nailu'l-Ma'árib', vol. ii, p. 11-12.

[3] 31 Cal., 319, p. 327.

[4] 10 C.W.N., 449, p. 478.

patient himself cannot, it is submitted, be decisive of the inquiry and is hardly of much importance. It is a cardinal principle of Muḥammadan jurisprudence that the law takes note only of preceptible facts. The original authorities do not lay down that the fears entertained by the sick man himself form any criterion of death-illness. In fact, it is an event of nature, the character of which cannot depend upon what the patient might think of it. The law in placing an embargo on a sick person's juristic acts puts it on the ground of illness, and not on the apprehension of death by the sick man. The reason or motive underlying the law is that illness weakens a man's physical and mental powers, and he is likely, therefore, as experience shows, to act under such circumstances to the detriment of his spiritual interests by disappointing his heirs in their just expectations. But this is a general presumption on which the law on the point is founded and according to the principles of Muḥammadan jurisprudence, it is not to be proved as a fact in each particular case. The proposition enunciated in 31 Cal., 319, p. 327 has, however, been confirmed by the Judicial Committee of the Privy Council when the case went up to them in appeal.[1]

The rights of the heirs and the creditors attach to the property of a person in death-illness, but in order to give him an opportunity to remedy the shortcomings of life, he is allowed to retain the power of disposition over one-third of his property. The heirs of a person have an absolute right, therefore, to the two-thirds of his estate in the event of his death subject to the payment of debts. Hence when a man is seized with illness which subsequently terminates in death he at the moment of such seizure comes under the interdiction of law with respect to making voluntary dispositions of so much of his property as would be covered by his debts existing at the time and of two-thirds of the remainder. A person is allowed to

[1]See 35 Cal., 271, also *Ibrahim Gulam Ariff* v. *Saiboo* 35 Cal., 1.

marry in such illness if he choses, for he may be in need of it for the perpetuation of his lineage. He cannot, however, fix more than the proper dower because that is not necessary and the general principle is that what is conceded as a necessity must not exceed its limits.

Any disposition which is capable of being revoked if made by a sick man will be operative but is liable to be revoked if need be, such as a bequest. But dispositions that cannot be revoked, such as manumission of a slave when made in death-illness will have effect in the same way as if made in health though only to the extent of one third of the estate of the deceased. In case he was in embarrassed circumstances at the time he was seized with such illness his creditors would be entitled to impeach the transaction to the extent of their rights but a slave whose manumission is thus impeached would become a mukátab. If a sick person pays some of his creditors the other creditors would be entitled to a share in the amount paid. He cannot sell any portion of his property to one of his creditors or heirs though for a proper price but a sale by him to a stranger for proper consideration is valid. Any disposition of his in favour of an heir is altogether void because even the appearance of preference of one heir over the others is prohibited, although there may not be any preference in fact.

Deceased persons

The effect of death on the rights and obligations of the deceased is considered with reference to two aspects, namely, so far as they relate to this world and so far as they relate to the next world. As regards those of the latter class, a man after death is entitled to spiritual reward for his good acts and is subject to spiritual punishment for his transgressions.

As regards rights and obligations relating to this world a person on his death is necessarily released from all obligations which are to be discharged personally. But his liability with respect to any property recoverable from him in specie remains unaffected, for example, anything which he was holding in trust at the time of death will be restored to the owner or the succeeding trustee. Similarly any property of

which he was in wrongful possession may be recovered by the rightful owner. When a deceased person's obligation does not assume the form of liability to restore a thing in specie but is in the nature of a debt, the creditor can have recourse to his estate. Any obligation of the nature of a benevolent act (sila صلة) ceases on a man's death, such as the maintenance of relatives. If during life-time a person committed a wrongful act which resulted after his death in loss to another, his estate will be liable to make it good. For instance, if he had dug a pit in the land of another person without his consent and cattle belonging to the latter tumbled into it after the former's death, the deceased's estate will have to make good the loss, because the cause giving rise to the loss had occurred in his lifetime.

As regards his rights they continue to inhere in him in so far as may be necessary for his last requirements, such as payment of the expenses of his coffin and burial, and his debts and legacies, the legacies to be paid from one-third of the residue which may be left after making the other payments. The expenses of the burial of the deceased take precedence over his unsecured debts but secured debts must be paid off before the property mortgaged or charged, such as with a lien for unpaid purchase-money, can be available even for the payment of his funeral expenses.[1] If the deceased entered into a contract with his slave stipulating that the latter would be emancipated on payment of a fixed sum, it will subsist after his death because if it be satisfied resulting in the slave's emancipation the deceased will be entitled to spiritual reward. Further the benefit of such a contract is mutual so that if the mukátab, that is, the slave with whom the agreement was made dies, his heirs will be entitled to discharge the contractual debt in order that the taint which originated in infidelity might be wiped off and his children might be free.

Since the deceased stands in need of representation so that his last needs, such as burial, payment of his

[1] 'Talwíḥ,' p. 757.

debts and the like might be satisfied, the law has ordained succession.

As to matters with respect to which no need can be predicated of the deceased, the right, in connexion therewith belongs from its inception to his heirs. For instance, retaliation being permitted as an act of revenge for causing the death of a person, necessarily it is the right of the heirs of such person. Hence if a person is fatally assaulted his heirs before his death are entitled to pardon the offender, and as the cause which gave rise to the right of the heirs, namely, the injury was an infraction of the right of the injured to the protection of his person, the latter before his death is also entitled to condone the offence. Abú Ḥanífa held that the right of retaliation does not descend to the heirs.

Application of law sometimes affected by the place of contract

The place of contract, that is, whether it was entered into in the country of Muslims or non-Muslims also in certain cases affects the application of the Muḥammadan law. For instance, a contract which would ordinarily be fasíd or vitiated in law would be ḥalál, that is, unobjectionable from a spiritual standpoint if entered into between a Muslim and an infidel in Dáru'l-Ḥarb, so that the former would be entitled to the benefit which he would not be in Dáru'l-Islám. Thus a transaction in the nature of an aleatory contract between a Muslim and a non-Muslim living under a non-Muslim government is unobjectionable though it would be vitiated in law if entered into within the jurisdiction of a Muslim government, where the laws of the Sharí'at are prevalent. The reason is that the taking of the property of a non-Muslim in Dáru'l-Ḥarb is forbidden to a Muslim who lives under the protection of a non-Muslim State, if he takes it by practising deception, but there is no objection in law to the acquisition of a non-Muslim's property if it be by his consent.

Insurance

For instance, if a contract of insurance is entered into between a non-Muslim partner in trade of a Muslim resident in a Muḥammadan country on the one hand and an insurance Company carrying on business in a non-Muslim country, then if any money

which is realized on the policy is sent on to the Muslim partner, it will be ḥalál or proper for him to take it. Here the contract having been entered into in a non-Muslim country and the person paying the amount of the policy having paid it willingly and without deception, there would be no objection to its passing to the Muslim. The contrary would be the case, if the contract were entered into in a Muslim country even if the amount was paid in Dáru'l-Ḥarb.[1]

[1] 'Raddu'l-Muḥtár', vol. iii, p. 271.

CHAPTER VI

OWNERSHIP

Preliminary observation

I HAVE now exhausted the topics of Uṣúl as discussed by the Muḥammadan jurists of the thirteenth and fourteenth centuries, but as the subject under consideration is the jurisprudence of the Muḥammadans and not merely the science of Uṣúl, I proceed to deal with such other matters as are ordinarily regarded as falling appropriately within the scope of jurisprudence. The science of Uṣúl, as I had occasion to mention, concerns itself mainly with the sources of law, its chief object being to ascertain the right methods and processes by which law is deduced and applied; it deals but incidentally with the general ideas and concepts underlying the various departments of the system. It is, however, necessary to make a more systematic and detailed study of such legal ideas by trying to analyse them and to understand their relations *inter se* in order that we may realize their true juristic significance. The method of study which I mean to adopt in this connexion is that which is indicated by the division of laws into their several departments as made by the Muḥammadan jurists themselves, namely, laws relating to mu'ámalát or dealings among men; munakaḥát or matters relating to marriage, that is, family laws; 'Uqubát, that is, remedies and punishments; Ádábu'l-Qáḍí, that is, rules for the guidance of the magistrate or procedure; and As-Siyar which deals with the administrative laws and the law governing the relations of Muslims to non-Muslims.[1] I do not here propose to deal with questions appertaining to 'Ibádat, or acts of devotion, as they do not come within the purview of jurisprudence, and I have already

[1] See *ante* Chapter II.

dealt with them in so far as they are a subject of Uṣúl. The arrangement which I have proposed has the merit at least of simplicity and is one with which the students of Muḥammadan law are familiar.

Milk or ownership

Some of the most important objects to which a man's worldly desires relate and with reference to which men deal with one another are regarded in law as the subject of milk (ملك) which is usually translated as ownership. The proper subject-matter of milk is physical objects, but the word as used by the jurists covers a wider range of ideas than those included in mere proprietary rights. So long as this is borne in mind there is no harm in adopting the word 'ownership' as the nearest English equivalent of milk.

Milk is defined by Ṣadru'sh-Sharí'at in 'Sharḥi Viqáyáh'[1] as the expression of the connexion existing between a man and a thing (Shayun شيء) which is under his absolute power and control to the exclusion of control and disposition by others and by Taftázání as the power of exclusive control and disposition.[2] The person who has such exclusive power and control is called the málik (مالك) or owner. But the word milk is often used for the thing itself over which the power of the málik or owner extends.[3]

The thing over which the juristic conception of milk extends may be mál (مال), that is, a physical object, or what is connected therewith, namely, usufruct (Manfa'at منفعة) either in the shape of produce of a physical object or of labour and services of man, or muta't (متعة) that is, right to conjugal society. The last forms the subject of munakiḥát or matters relating to marriage and will be dealt with as a subject of family laws.

Different kinds of ownership

When milk refers to mál or physical objects, it is divisible into milku'r-raqba (ملك الرقبة) which may be

[1] See vol. ii, p. 173.
[2] 'Talwíḥ', p. 325.
[3] 'Al-Majallah', p. 20.

described as proprietary rights, milku'l-yad (ملك اليد), that is, rights of possession, and milku't-taṣarruf (ملك التصرف), that is, right of disposition. The first expresses the fact of the owner being specially identified with the thing owned, and it leads to rights of the last two categories and right of disposition has been legalized for the acquisition of right of control and possession.[1]

Conception of property

Mál is defined as that which can be hoarded or secured for use and enjoyment at a time of need,[2] or that to which a man's desires incline and which men are in the habit of giving away to others and of excluding others therefrom. This removes from the category of mál usufruct and right to conjugal society. According to Al-Ḥáwi mál is the name for things other than human beings which have been created for the benefit of men, and which a man can hoard and dispose of at his option, hence a slave which has some of the attributes of property is not property, as it is not lawful to kill him. The author of 'Raddu'l-Muḥtár' observes in connexion with the last definition that the attribute of mál consists in its being fit for the use and advantage of men and not in the power of the owner to destroy it. He further urges that animals are admittedly property though their owner is prohibited from killing them except for proper reasons.[3]

The term mál is generally translated as property, but it has a much narrower significance than the English word which is often used in a very wide sense. The word is properly applicable only to objects which have a perceptible existence in the outside world, that is to say, to things corporeal and tangible. Future produce or munfa'at, for instance, may be the subject of ownership, but is not called mál.

Nothing can be property unless it be such that men can derive advantage from it, that is, it must

1 'Tauḍíḥ', pp. 432-3; 'Talwíḥ', p. 751; 'Baḥru'l-'Ulún' community on 'Musullumu'th-Thabit' also Mullá Nizámuddin's notes (Delhi edition), p. 74.

2 'Talwíḥ', p. 325.

3 See 'Raddu'l-Muḥtár,' vol. iv, p. 3.

be of some use to them. Sometimes the law prohibits the use of a certain thing in any way whatever by a particular class of men; in that case, it fails to possess any use or advantage for them. But such things would still possess the quality of property if they are of use to persons to whom the prohibition does not extend. For instance, the use of wines and pigs which are declared unclean (Najisun bi a'inihi نجس بعينه) is forbidden to a Muḥammadan but as their use is lawful to non-Muslims, they are regarded as property, though to Muḥammadans they have no value. On the other hand, things which are of no use to any one, such as dead bodies[1] or human blood are not property.[2]

Again the value of a thing may be so inconsiderable that the law would not recognize it at all. The Arab jurists put down one fals (a small copper coin) as the minimum. Hence, a handful of earth picked up from another person's ground cannot be the subject of a charge of theft nor would broken crumbs of bread be the subject of a contract of sale.[3]

Things which cannot be turned into property

There are certain things and advantages which the law does not permit to be exclusively appropriated by any one, leaving them to a greater or less extent for the common use of all (al-ashyá'u'l-mubáḥatu'l'umúmíah الاشياء المباحة العمومية) as indispensible to individual and social life. These are air, light, fire, grass, water of the sea, rivers, streams, etc., public roads and commons. The only condition relating to the extent and mode of user of such things is that it should not cause injury to the community.

Light and air

No one can exclude another from the enjoyment of light and air, though their unrestricted access to a human dwelling is allowed to be curtailed to some extent by the necessities of social life.

Fire

What is meant by fire being common to all men is that its light and warmth cannot be exclusively

[1] It might be an interesting inquiry what the ancient Muḥammadan jurists would have said, if they knew of the enormous prices sometimes given for mummies by modern millicnaries and scientists.

[2] 'Hedáya' and 'Fatḥu'l-Qadír', vol. vi, p. 42.

[3] 'Raddu'l-Muḥtár', vol. iv, p. 6.

appropriated. For instance, if a man lights a fire in a desert he cannot prevent other people from utilizing its warmth and heat, though they cannot carry away the cinders.

Similarly if there is grass growing wild on a man's land and the public are not kept off by a boundary wall or a fence or otherwise, no action will lie against a person for cutting it. But if grass has been cultivated or cut it becomes property. Grass

Water is common to all men, so long as it is not separated or cut off from its source of supply, such as by collection in a jar. If the collection be such that the water still remains connected with its source as in a well or a tank it is common property, though to a very limited extent. Water

The right to the use of water is of two kinds, shurb (شرب) or the use of water for the purposes of irrigating the fields, driving a mill, and the like, and shufat (شفة) or right to the use of water for the purposes of drink and the watering of cattle. The more extensive right would, of course, include the less extensive right.

Any member of the public has a right to use the water of the sea, of a large river, or of a small stream provided it is not private property for the purposes of navigation, cultivation or manufacture such as driving a mill. For this purpose he is entitled to draw the water through a sluice or a canal. A necessary limitation to the exercise of such a right arises from the fact that other members of the public have also a similar right. Hence no one can so drain off a public river or stream as to exhaust its water, or so to diminish it as to injure navigation or not to leave a sufficient supply for others.

A stream would be called private if it has its source in the land of certain persons and does not flow beyond but is exhausted there. Otherwise it is public. The right to the unrestricted use of a private stream or a well or a tank belongs to its owner or owners, who may water their fields or mills with it, or use it in any other way they like. As among the owners, themselves, they must enjoy it like any other

joint property, so that one co-owner cannot exclude the others. A member of the public, however, has a right to the use of such water for drinking purposes and for watering his cattle. He may, for this purpose, enter upon the land and bring water from the stream in buckets. But the public have no right at all to water which is not supplied by an uninterrupted current, such as a spring or underground current.

As regards water collected in a well or a tank supplied by a spring the members of the public have a right to take such water for drinking purposes at times of scarcity of water, but such right is to be so exercised as to cause the least inconvenience to the owner of the land.

Common pasturage and forest

The land contiguous to habitations, provided it is not already the property of any one, is left as pasturage or forest for the common use of the residents of the locality. This land corresponding to the common of the English law extends as far as the voice of a man shouting at the top of his voice from the nearest habitation can reach. But land on each side of a large river to the extent of half its width is public property and cannot be turned into private property.

Public roads

A public street is for traffic and generally speaking any other use of it amounts to a trespass, unless it be such as may be necessary and be not obstructive of traffic. For instance, a man is not allowed to expose goods on the road for sale but a man who has his house on the side of the road and wishes to repair the house may place building materials on one side of the road provided it be necessary and does not obstruct traffic. A public road is the common property of the people together with the space above it, so that no individual is permitted to obstruct it to the detriment of others.

Institutions dedicated to the public

Again there may be property which has been dedicated to the public by private individuals by way of wáqf, such as mosques, schools, inns, hospitals and similar institutions. Their use is generally regulated by the terms of the grant and the character of the institutions.

It will be observed that in some of the things mentioned above such as water collected in a well, the

right of the public is very limited while in others, the rights of all the members of the community stand on an equal footing.

Subject to the above-mentioned limitations, most objects of nature may become property, but until they are turned into property they are open to the use of all, for example, waste land (Mawát موات), Ṣayd (صيد) or game, that is, animals in a state of nature, fish in the sea or a river or a deep tank, and trees of forests and so on. These are called Mubáḥát (مباحات) or *res nullius*. We shall presently consider how these things are made property.

Moveable and immoveable property

There are two principal classes of property, moveable (manqúl منقول) and immoveable (ghairu manqúl غير منقول). By immoveable property is primarily meant land, and along with it all permanent fixtures, such as buildings. Land and buildings are also called (aqár اقار) or landed property. The characteristic of moveable property is that it may be removed from one place to another, and may be destroyed which can rarely happen to immoveable property. It is because of this liability of moveable property to destruction that a buyer of such property before he has received possession of it cannot sell it, because in case it happens to be accidentally destroyed in the meantime, he would not be able to give possession. But this does not hold good in case of immoveable property.[1] Again a moveable property generally speaking perishes in the very act of user, that is, it cannot be used for an indefinite length of time, or permanently without it ultimately wearing out and vanishing. But this is not the case with land which can be made to yield produce or used in other ways, such as by building on it without its being consumed. Hence, while land can be dedicated as wáqf, moveables except some specified articles and those with respect to which a custom has arisen of making wáqf, cannot, in the strict theory of the law be, according to many jurists, the subject of wáqf.[2]

[1] 'Hedáya', vol. vi, p. 137.

[2] See *post* Chapter VII.

Whatever is fixed or attached to land is for many purposes treated as part of it until detached or separated. Therefore, when land is transferred all fixtures pass with it, and the alienation of fixtures before severance becomes subject to the doctrine of mushá, which means the mixing up of the rights of more than one person in the same thing.

Moveable property is classified as follows:—makílát (مكيلات) or things which are ordinarily sold by measurement of capacity, such as wheat and barley; mauzúnát (موزونات) or things which are ordinarily sold by measurement of weight, such as gold, silver, oil; 'adadiyát (عدديات) or things which are sold by tale such as fruits; madhrú'át (مذروعات) or things which are estimated by linear measurement, such as a yard of cloth. All articles of the nature of makílát, mauzúnát, 'adadiyát, and madhrú'át are also comprehensively called muqaddarát (مقدرات). Gold and silver are also called nuqúd (نقود) or price. Besides the above-mentioned articles other moveables are mostly 'u'rúḍ (عروض) or goods, such as articles of furniture and ḥaiwána't (حيوانات) or animals.

Similars and dissimilars

But the classification of property which is of the greatest importance in the Muḥammadan law is one into mithli (مثلي) and qímí (قيمي), which are generally translated respectively as similars and dissimilars. An article is said to belong to the class of similars if the like of it can be had in the market without there being such difference between the two as people are apt to take into account, in their dealings. If such articles are ordinarily sold by weight or capacity, they are called similars of weight or capacity, such as gold, silver, grain, oil and the like. If they are sold by tale they are called similars of tale.

A thing belongs to the class of dissimilars if the like of it is not available in the market or if it be available but with such difference between them as people are wont to take into account in fixing the price.

The test is that these things are not ordinarily sold by weight or capacity such as land, houses, animals, and furniture, clothes and the like.

Determinate and indeterminate property

Connected with the division of things into similars and dissimilars, is the division of property into 'ayn (عين), that is, specific or determinate and dayn (دين) or non-specific or indeterminate property. The chief distinguishing test is whether, when a man is to get certain property from another who either borrowed it from him or took it by force, he is entitled to recover it in specie or not; if he is, then it is called specific or determinate, and if he is not, it is called non-specific or indeterminate.

Articles of the class of similars cannot, as a rule, be recovered specifically, and are thus regarded as dayn or indeterminate property. Hence, gold and silver in the shape of coins or otherwise, grain, oil, and the like are dayn or indeterminate property. Therefore, if a man sells an article for one hundred dirhams out of a bag of money pointed out to him by the buyer, he does not become entitled to be paid out of the identical bag but his claim will be satisfied on being paid an equivalent amount.[1] Similarly if A having a hundred maunds of rice in his godown agrees to sell to B a hundred maunds of rice but without specification, B will not be entitled to ask A to deliver to him the rice which is in his godown. So also a man that has lent another a sum of money is not entitled to ask for the identical coins lent by him. But similars may be made determinate by specification, for instance, when a quantity of wheat secured in certain bags is sold or when a thing is sold for the money contained in a particular bag, the wheat and the money would then become determinate and capable of specific recovery.[2]

Generally speaking, therefore, all indeterminate property rests on the mere responsibility or obligation of the person from whom it is recoverable. In this respect it stands on the same footing as a debt, which is also called dayn.

[1] 'Al-Majalláh', p. 22.
[2] Ibid., p. 22.

Use and enjoyment of property

It is in the very conception of property that its owner may use and enjoy it as he chooses. His rights in this respect, generally speaking, are only limited by similar rights of others and subject to such burdens as may be imposed by the State. Limitations upon an owner's right of user and enjoyment are mostly imposed with reference to land, because the mode in which a man uses his land often affects his neighbours. The general principle is that the owner of land is entitled to use it and enjoy it in the manner that suits him best even if it causes inconvenience or injury to his neighbours, provided he does not destroy the neighbour's property or makes it useless to him. For instance, if a man sets up a shop next door to his neighbour's and sells the same class of goods he may cause him considerable injury but nevertheless this is not such a loss as the law would attempt to prevent. But suppose he sets up a factory next to a man's residence and the mode in which business is carried on in the factory causes such a nuisance that his neighbour cannot live in ordinary comfort or carry on his ordinary occupation, the law will interfere. If, however, a man himself goes to a nuisance he cannot complain. That is to say if in a place a certain business or trade of a noisome character is already established a new-comer must put up with the inconvenience. What is or is not a nuisance is determined on the principle whether an act or the manner of doing an act causes manifest and serious injury (ḍararun fáḥishun ضرر فاحش) to the neighbouring property having regard to the use to which it is devoted. If the act threatens the very existence of the neighbouring property as when a man so collects water in his own land or so digs in it as to weaken the support of the adjacent land or building the injury would undoubtedly be regarded as manifest and gross. Similarly, if a man so builds on his land as to obstruct altogether, the light and air of his neighbour's house this will also be regarded as a nuisance.[1]

Nuisance

[1] 'Fatḥu'l-Qadír', vol. vi, pp. 414-5 and 'Al-Majalláh', pp. 194-7.

The burdens imposed by the State upon immoveable property are mostly in the shape of taxes and revenues. The subject will be considered hereafter.

Some of the rights incidental to property may be temporarily suspended or curtailed either by the act of the owner or by the law without affecting ownership. For instance, an owner may pledge the thing or let it out and so long as he does not pay off the debt or the lease does not expire he is not entitled to possession though he is still the owner. Similarly a minor and a lunatic are not allowed to have possession of their property until their disability has ceased, nor have they any power of alienation. And as already mentioned, the law absolutely forbids the destruction of a slave's life and also puts a limitation on the right, to destroy other kinds of living property, such as cattle. Sometimes the power of the owner to destroy his property may be suspended or curtailed having regard to the rights of others. For instance, if he has pledged a thing he cannot destroy it before paying his creditor.

Some of the rights incidental to ownership may be suspended or curtailed

Ownership may be sole or joint. When property is owned by two or more persons in undivided shares it is described as shirkatu'l-milk (شركته الملك). Each of the co-owners has a right to his share in every portion of the property. The Muḥammadan law as a general rule does not recognize joint tenancy in the sense of the English law. Each co-sharer is entitled to dispose of his share and on his death it descends to his heirs and does not pass to the survivor. From the very nature, however, of undivided property no individual co-owner can have exclusive possession of or dominion over the thing and there is thus a 'confusion of rights' or mushá'. This as we shall see considerably affects a co-owner's powers of disposition over it, particularly when the intended disposition is of a voluntary nature.

Sole and joint ownership

The principle which regulates the enjoyment of joint property is that each co-owner is to use and enjoy it in proportion to his share, by such arrangement (tahayu تهيؤ) among themselves as they may agree to and the nature of the property may admit of. Suppose it is a house each may reside in it using the common

entrance pathways and right to water and the like. If the property is productive the income is to be divided. But if one co-owner derives an income from the joint property by the application of his own skill, labour or money, then the other co-owner who has looked on cannot ask for a share of the profits, but if any loss is caused to the joint property itself, the co-owner who has caused the loss by the use which he has made of it will be held liable. Supposing he has raised crops on the joint land or being one of the heirs has traded with the money belonging to the estate before partition, he cannot be asked to account for the profits though he would be responsible for any loss he may have caused to the joint property. Each co-owner of a joint property is to bear the expense of repairing and maintaining it to the extent of his share.

Enjoyment of joint property by all its owners being practicable only if they agree among themselves, the law gives to each one of them, the right to ask the Court for partition (Qismat قسمة) unless they can agree among themselves to make an amicable partition.

Rights connected with property or easements

A man may have no right in a property but may have rights connected with it, such as a right of way (ḥaqqu'l-marúr حق المرور), a right to the flow of water (ḥaqqu'l-majrá حق المجرى) and a right to discharge rain water over another's land (haqqu'l-masíl حق المسيل).[1] These rights correspond to easements in English law. An easement is to be enjoyed as in the past and cannot be altered or enlarged. It is lost by disuse.[2]

Pre-emption

The Muḥammadan law also recognizes in connexion with immoveable property a certain right in restraint of the power of alienation of the owner called the right of shufa' (شفعة) which is usually translated as pre-emption.[3] Shufa' literally means adding and in law

[1] 'Al-Majalláh', p. 199; 'Hedáya' and 'Fatḥu'l-Qadír', vol. vi, pp. 411-5.

[2] 'Al-Majalláh', pp. 198-200.

[3] Holloway, J., points out in 6 H.C. Rep., p. 30, that the use of the word pre-emption is not quite accurate and that the right of shafa' corresponds more nearly to *jus retractus* of the German Law.

it means the acquiring a vendor's property for the price for which the vendor has sold it.[1]

When does the right arise

The right is not extended to transactions other than sales such as gifts, nor even to sales, which are not absolute and immediately operative and binding, for instance, pre-emption does not exist in case of sales with an option and invalid sales. It extends to hibá-bil-evaz as it has all the attributes of a sale. Some Málikí jurists would apparently extend the right to leases.[2]

The right of pre-emption comes into operation only when the vendor has actually sold the property for until the contract of sale has been entered into the matter resting solely upon his intention cannot be said to be free from uncertainty.[3]

Persons entitled to pre-emption

It is recognized in favour of persons having interests connected with the property subject of sale. All the Schools of law generally,[4] hold that the owner of an undivided share has such an interest and the Ḥanafís concede it also to a person enjoying in common with the vendor certain immunities connected with the property, such as private rights of way and water and to a neighbour owning the adjacent property.[5] These persons are called pre-emptors and their right consists in compelling the owner of the property to sell it to one of them in substitution for a stranger or a person who has no such interest. The reason why this right is allowed is that the introduction of a stranger is likely to give rise to dissensions and inconveniences and the principle on which it is based is that each co-sharer having a right in every particle of the property one co-sharer selling his share would thereby affect the enjoyment of his share by the other co-owner and this he cannot do without his consent. The extension of the right to a neighbour by the Ḥanafís is by way of concession having regard to the policy of the law on the subject.

[1] 'Al-Majalláh', p. 153.

[2] 'Fatḥu'l-Jalíl', p. 291.

[3] 'Hedáya', vol. viii, p. 304.

[4] 'Hedáya', vol. viii, p. 294; Fatḥu'l-Qaríb, p. 374; 'Nailu'l-Ma'árib', vol. i, p. 141; 'Fatḥu'l-Jalíl', p. 291.

[5] 'Hedáya', vol. viii, p. 294; 'Al-Majalláh', p. 141.

Rules are laid down in order to regulate competition among the three classes of pre-emptors. The principle is that preference should be given to the strength of a claim as measured by the closeness of connexion, hence, the co-sharer in the property itself is preferred to the co-sharer in the easements connected with it and the latter to the owner of adjoining premises. If there be more than one pre-emptor of the same category they have all an equal right according to the Ḥanafís, but according to the Sháfi'ís and Ḥanbalís in whose view, the question could only arise among co-owners, the right of each is in proportion to his share.[1]

Exercise of the right subject to strict conditions

The author of 'Hedáya' points out that the right of pre-emption being weak in its nature it is liable to be lost if not insisted on. Hence the law requires that there should be no room for uncertainty in the expression of his intention by the pre-emptor. The conditions of the recognition of the right are, that the pre-emptor must not have consented to the sale because pre-emption in its very nature is a right adverse to the vendor and the purchaser and that the right to pre-empt must be asserted and enforced with promptitude, because it is in defeasance of the purchaser's right.[2] As soon as the pre-emptor receives information of the sale he must decide immediately and assert his claim (ṭalabu'l-muwáthíbat طلب المواثبة) and follow it up by repeating it in presence of two witnesses before the vendor or the purchaser or on the spot (talabu't-taqrír wa'l-ishhád طلب التقرير والاشهاد) and he must then without loss of time enforce his right in court unless the buyer has surrendered the property in the meantime (ṭalabu'l-khuṣúmat طلب الخصومة). According to some jurists, namely, Muḥammad and Zufur, a lapse of one month would be a sufficient bar. If, however, there is a good excuse for the delay, such as absence from the locality or want of information and according to

[1] 'Raddu'l-Muḥtár', vol. v, p. 152; 'Fathu'l-Qadír', vol. viii, p. 302 'Nailu'l-Ma'árib', vol. i, p. 141.

[2] 'Fatḥu'l-Qadír', vol. viii, pp. 305, 297; Cf. Peacock, C.J.'s remarks in B.L.R. Supp. vol., p. 35.

Sháfi'í and Ḥanbal[1] even ignorance of the rule which requires prompt action his rights will not be affected. If he has been induced to desist from making his demand by misrepresentation with regard to the property sold or the price his right will not be lost. The pre-emptor must be prepared to pay the price for which the premises has been sold, to the buyer. But if he has been induced to pay a higher price than was actually paid by the purchaser, he will be entitled to a refund of the excess or to withdraw from the bargain.

The right of pre-emption placing as it does an embargo on the free disposing power of owners of property some Ḥanafí jurists have suggested legal devises by which it might be evaded though the employment of these devises is condemned as abominable, the Málikís,[2] Ḥanbalís[3] and Shafi'ís do not authorize such expedients. According to the Ḥanafís, Muslims and non-Muslims equally have the right of pre-emption, but the Ḥanbalís[4] do not recognize such a right in a non-Muslim against a Muslim.[4]

The Anglo-Indian Courts recognize the right of pre-emption when the question arises between Muḥammadans except perhaps in Madras.[5] It is also recognized among the Hindus but mostly when there is a custom on which it is based. When a question arises among Muḥammadans, the Muḥammadan law of pre-emption is generally applicable and in other cases it is applied with such modifications and variations as might have been introduced by local custom.

Possession

Let us now consider the attributes of possession (Yad, qabḍa يد , قبضة) in Muḥammadan law for not only is the right to possess an important element of ownership as already mentioned, but possession is also a means of acquiring ownership and even mere *de facto* possession when dissociated from ownership

[1] 'Nailu'l-Ma'árib', vol. i, p. 141.
[2] 'Fatḥu'l-Jalíl', p. 295.
[3] 'Nailu'l-Ma'árib', vol. i, p. 142.
[4] Ibid., p. 140.
[5] *Vide* remarks of Holloway, J., in 6 Mad. H.C. 26, p. 31.

is invested with many of the attributes associated with ownership as against all except the owner himself. What is possession? It may be actual (haqíqí حقيقي) as when a man grasps a thing in his hands or puts it in his pocket. But with most things this is not possible, for example, land, a house, a ship, even a table or a chair. Possession in such cases must be symbolical (ḥukmí حكمي), for instance, by occupation as by a man occupying a space in his own house or placing a servant to guard it or locking its door. What is necessary to constitute possession is the intention to exclude other persons coupled with the power to carry it out. Suppose a friend comes into my house to see me, it cannot be said that he is in possession of the house as he has no intention to exclude me from it. Hence, it is that the law speaks of the possession of a licensee as possession of the owner. But suppose a man who lays a claim to the house which is in my occupation comes in and turns me out of it in assertion of that claim, he will be said to be in possession. If he did not come in sufficient force to be able to turn me out though having that intention my possession would not be affected. Possession whether actual or symbolical must be distinguished from a right to possess. An usurper, for instance, is regarded as in possession not only against strangers but against the owner himself.

Rights attached to de facto possession

Let us consider the nature of the rights which the law attaches to the mere fact of possession compendiously expressed as milku'l-yad or possessory rights. Even the owner cannot recover his property from a man who is in possession although by wrong without the aid of the Court. When he comes to Court he will find that his opponent having managed to obtain possession has secured important advantages. He has to sustain the burden of proof and there will be certain presumptions in favour of the man in possession (dhu'l-yad ذواليد) whose position is said to be confirmed by outward circumstances (ẓáhiru'l-ḥál

(ظاهر الحال). If the question arises whether the wrong-doer in possession has caused any loss to the property, the Court will accept his statement as opposed to the allegation of the owner. And according to at least one version of the Ḥanafí law on the point, he cannot be made liable for the mesne profits. The longer the wrong-doer is in possession he strengthens his position while that of the owner is proportionately weakened. According to the modern interpretation of the Muḥammadan law the owner may find after a certain lapse of time that the Court will not hear his cause at all or refuse to give him any remedy. Even if his suit is heard, and he establishes his right he may possibly find that he has been improved out of his property. Suppose it is his land that the defendant has been holding possession of in bona fide assertion of a title however wrong and the latter has made improvements on it by way of addition, such as by building or planting trees on it. If the value of such improvements exceeds that of the land the man in possession will have the option to keep it by paying its value to the owners. Apparently even if the man in possession does not assert a title but has made improvements the owner cannot have the land with the improvements without paying for them, and if they are such that they cannot be removed by the usurper without injury to the land and the owner is not willing to sustain that injury and is not at the same time able or willing to pay the value of the improvements, the usurper will have the option to keep the land on paying its price. With regard to moveables if the usurper has made such improvements as to alter the quality of the thing, such as by dying an undyed cloth, the owner has to pay compensation to the usurper for the improvement, if he wants the article itself, otherwise he can only recover the price.

As regards all other persons who cannot show a better title than himself, the man in possession enjoys the same protection of the law, as if he was the owner. If another person wrongfully takes the property from his possession or injures it, he can sue for recovery of

the property or damages.[1] He may also defend his possession by the use of force if necessary.

Responsibility of a usurper

As against the rightful owner, however, the wrong-doer's possession of the thing rests entirely on his responsibility. That is to say if it perishes or is damaged in his hands even without any fault of his, he would be held liable. A person is said to be in wrongful possession or a usurper (ghâṣib غاصب) if he takes or keeps a thing without the permission of the owner and with the intention of depriving him of it either permanently or temporarily. A man may lawfully come into possession of a thing as by a contract and yet if he keeps it when the contract has expired with the object of appropriating it, he becomes a trespasser or usurper.

Possession by virtue of a right

But if the man who is, in fact, in possession does not hold it adversely but on behalf of the owner his possession will be treated as of the owner himself. In some cases, however, a person may be in possession of another's property neither adversely to him, that is, with the intention of permanently depriving him of it, nor professing to hold it on his behalf but in pursuance of his own right as is the case with a lessee or a pledgee. Here according to Muḥammadan law, the lessee or the pledgee and not the owner will be held at any rate for most practical purposes to be in possession. The owner has a right to possession on a certain contingency, namely, payment of the debt or expiry of the lease. Hence a voluntary disposition, such as a gift, which requires delivery of possession to complete it, of a property under pledge or lease remains in suspense until it has been freed and delivered to the donee.

As regards the right of a pledgee or lessee to present possession, it is so far as we have seen in his own right that the owner cannot take it from him unless the claim under which he holds the property has come to an end. But with reference to the preservation of the property itself his position is that of a trustee.

[1] 'Durru'l-Mukhtár', vol. v, p. 136.

Possession may be complete or incomplete. Possession is said to be complete when all but the owner or his servants or agents are totally excluded and no other person has a right to possession of the thing at the same time. For instance, possession of the co-owner of an undivided share or mushá' is incomplete, inasmuch as the other co-owner has a right to possession over every particle of the property. Complete and incomplete possession

Ownership of usufruct which is mostly created by contract implies a much narrower range of rights than that of property. The powers of alienation of an owner of rights of this class are more limited and his right to their protection is also imperfect according to the Ḥanafís as already indicated. The rights and powers attaching to ownership of usufruct are mostly defined by the contract of the parties and will be considered in connexion with the subject of contracts. Ownership of usufruct

CHAPTER VII

ACQUISITION OF OWNERSHIP

SECTION I—ORIGINAL ACQUISITION AND PRESCRIPTION

Modes of acquisition

EVERY human being has a right as inherent to his status to make such use of his physical and mental faculties as he chooses, provided he does not interfere with similar liberty of others. It is by the exercise of this inherent right that rights and obligations connected with property are mostly acquired, transferred or extinguished.

Ownership, as stated in 'Al-Majalláh', is acquired either by (1) iḥráz (احراز) that is securing or taking possession of things not already owned by another, or in other words by original acquisition; (2) naql (نقل) or transfer by the owner; and (3) khalf (خلف) or succession. The last mode of acquisition belongs to the department of family law.

Original acquisition

Such physical objects as are not intended for common use and have not already been appropriated by some one may be secured as property. The nature of 'securing' by means of which *res nullius* is converted into property depends upon the character of the thing. For instance, trees growing on mountains are regarded as *res nullius*; if a person cuts such a tree or has it cut by his servants or by employing labourers he will be deemed to have done enough to secure it as his property.

Similarly game is secured when it is disabled from running away or escaping. But so long as stratagem is needed to reduce it into that condition, it cannot be said to be secured. For instance, fish which is in water so deep that skill is required to catch it would be regarded as game and not the property of any individual.

Grass is also secured in the same way as trees. Water is secured by separating it from the source of its supply as by collecting rain water in a jar or a reservoir. But supposing a man digs a well or a tank and collects water therein from the underground current, such water cannot be said to be fully secured as it is not isolated from the source of its supply.

Waste land (mawát موات), that is, land which is not the property of any one, nor forms part of the pasture or forest belonging to a village, can be secured by a man as his private property if he revives it (yaḥi يحي) with the sanction of the head of the State. Land is said to be revived if it is actually brought under cultivation or prepared for the purpose as by irrigation or by protecting it with a boundary wall or fence.

Prescription

According to the strict theory of Muḥammadan law a thing that belongs to another cannot be acquired by mere possession however long, in other words there can be no acquisition of property by prescription. But the same result has, to a great extent, been achieved indirectly in modern times, by the lawyers of Turkey and Egypt recognizing the power of the Sulṭán to forbid the Qáḍí to hear suits instituted after the lapse of a certain time. They argue that the head of the State who appoints a Qáḍí may limit his jurisdiction to a particular class of cases and thus exclude from the jurisdiction of the Court suits which have been instituted after a lapse of certain time.

Though property cannot, according to the original theory, be acquired by mere prescription the law permits acquisition of rights connected with property in the nature of easements by prescription. For instance, a right of way over another's land or a right to discharge rain water and according to the compilers of 'Al-Majalláh' also a right to a certain amount of privacy for females. The right to privacy, it may be mentioned, appears not to have been favoured by ancient jurists. No time seems to be fixed for the acquisition of a right of easement, but the user must be ancient. For instance, a person building a new house

near another's land cannot discharge the rain water of his premises over such land.

SECTION II—CONTRACT

Contracts

The most important and frequent mode of acquisition of ownership is transfer by an act of the person having the ownership to another person. Such transfer is effected by means of a contract, which as a technical term has a wider signification in the Muḥammadan law than in the English law.

Conception of contract in Muhammadan law

The corresponding Arabic word for contract is 'aqd (عقد) which literally means conjunction, tie. In law it means conjunction of the elements of disposition, namely, proposal (ijáb ايجاب) and acceptance (qabúl قبول). Analysing it in further detail the conception of a contract in the language of the jurists will be found to involve four causes (a'lal): (1) fáa'lia (فاعلية) or that which appertains to the persons making the contract, (2) Mád'día (مادية) or that which appertains to the essence, namely, proposal and acceptance, (3) Súaría (صورية) or that which appertains to the outward manifestation and (4) Gháyia (غائية) or that which relates to the result aimed at.[1] In other words a contract requires that there should be two parties to it, that one party should make a proposal and the other should accept it, that the minds of both must agree, that is, their declarations must relate to the same matter, and the object of the contract must be to produce a legal result. Proposal and acceptance are the constituents of a contract so that, if either of them be wanting, there can be no contract. For instance, if A offers to sell or to make a gift of certain property to B but B does not accept the offer the sale and the gift will fail.

It is not a necessary part of the conception of a contract that there should be a mutuality of advantage, at any rate, of a pecuniary character. For instance, a hibá or gift is a form of contract though the pecu-

[1] 'Sharḥi-Viqáya', vol. ii, pp. 4–5.

niary advantage is entirely on one side, that is, on the side of the donee.

The dominant idea of a contract in Muḥammadan law is that it establishes a tie of legal relations arising from the consent of the minds of two persons to deal with each other in respect of certain rights of theirs. For instance, when A sells or gives an object to B, the former consents to pass on his proprietary rights therein to the latter who consents to take the property with whatever obligations might be incidental thereto, such as the liability to pay taxes if the subject-matter of the transaction be land, to take care of and to feed if the thing sold or given be an animal and in the case of a sale, also to pay the price. In the case of a gift, on the other hand, there is the moral obligation of gratitude on the part of the donee towards the donor, and the Muḥammadan law does not ignore the moral aspect of a transaction.

The question of creation of legal relations is treated in the Muḥammadan legal theory as distinct from the question of completion of such relations. The latter depends on the nature of particular transactions. For instance, if it is intended, by a transaction to effectuate a transfer of a physical object, the legal relations in such a case will not, strictly speaking, be said to be completed until the transfer has actually taken place. In certain cases, however, the law relaxes the principle taking the declaration of consent by both the parties, as a complete creation of legal relations and compels each party to carry out what he declared he would do. This it does only when a contract involves a mutuality of advantage as in a sale because in such a case generally speaking there is no danger of injury to any one and the necessities of every-day business call for it. For obvious reasons, however, the law does not step in to complete what has been left incomplete by the parties in a case where there is no mutuality of pecuniary advantage as in a simple gift and leaves it to the party who is making the sacrifice to complete it by actually delivering possession of the thing. But an exception to this is sometimes allowed as in a contract of suretyship. In such a contract which is defined as

the adding of the surety's liability to that of the person originally liable, the consideration that passed to the latter is considered sufficient to support the new promise. The case of a pledge has given rise to a difference of opinion, some holding that the money lent is opposed to the promise to repay and the delivery of the property to the lender is to be regarded as something separate for which there is no consideration; others hold a different view. A wáqf is also regarded as a contract and some jurists hold that there should be a mutwalli to accept the grant on behalf of the beneficiaries.

Formation of a contract

The formation of a contract according to Muḥammadan law does not, generally speaking, require any formality. All that is required, as we have seen, is declaration of consent by each party. The declaration that is first made is called proposal and the second declaration is called acceptance. The proposal and acceptance must be made at the same meeting (mujlis), either in fact or what the law considers as such. Suppose a man proposes face to face to another to sell his horse to him, if the person addressed leaves the place without signifying his acceptance the offer comes to an end, because there is no obligation on the owner of the horse to keep his offer open. But if the offer is communicated by means of a messenger or a letter, the meeting for the purpose of acceptance is held to be at the place and time the message reaches the person for whom the offer was intended. If the promisee then signifies his acceptance the contract is concluded. The acceptance must be in terms of the proposal, that is to say, the two minds must be in agreement, otherwise there is no real consent.

In this connexion I may point out that the books speak of certain words as being plain (ṣureeh) and certain other words as being allusive (kanáya) in relation to particular kinds of disposition. What is meant is that when a man has used plain language, there is no need for inquiry as to what he meant, but such an inquiry becomes necessary when he has used ambiguous language. It is not to be supposed that so far at least as contracts and dispositions relating to property are concerned that the mere utterance of

certain words without the corresponding intention as understood in Muḥammadan law, would effectuate a transfer of property or create any obligations. I have dealt with this question fully elsewhere.

Conditions of a contract

The validity of a contract like that of other juristic acts depends first of all on the legal fitness of the persons entering into it. If the persons making a contract or disposition have not the necessary capacity it would be void altogether. As the essence of a contract is consent, the law insists on the possession of understanding for the validity of any form of contract, but for voluntary dispositions it further requires maturity of understanding in the donor. Another essential of a valid contract like that of any other juristic act is the fitness of its subject-matter (maḥal); if the subject-matter is not fit for the purpose, the contract relating thereto will be void altogether.

In this connexion it is important to bear in mind that the basic idea of alienation according to Muḥammadan jurists is the physical transfer of a thing by its owner to another. This idea has been widened in some respects by juristic equity to meet the exigencies of a growing society, but is still perceptible throughout the entire law governing transfer of property. Hence it is, that contracts of lease and hire (ijára) which are regarded as a sale of the future usufruct and of salam and istisna are treated as exceptions to the general rule governing contracts.

The same idea pervades the law relating to voluntary dispositions. The subject-matter of a gift or wáqf, for instance, must be tangible property in existence at the time of the disposition and the donor or the grantor must divest himself at once of his proprietary interests. A bequest, it is true, holds good not only in respect of such property, but also debts and choses in action; this is so because, as the jurists point out, it has the sense of succession.

Moreover, it is this theory which makes most of the rules restrictive of the powers of alienations intelligible; for instance, the general rule of law that there can be no sale unless the subject-matter of it is in existence at the time of the contract. What

is considered of importance in connexion with the question of fairness or unfairness of a bargain is not merely the abstract state of mind of the buyer, but the state of his mind with reference to the subject-matter. In fact, consent without a knowledge of the thing to which it refers is, as I have said elsewhere, regarded as incomplete. For this reason, the buyer of a property has certain 'options' given to him to get rid of the bargain even after it has been concluded, and he has received delivery of the property. These are called options of defect ('ayb) and of sight (rúyat), that is to say, if the buyer had not seen the property at the time of purchase, or even if he had seen it but a defect came to light afterwards he can cancel the bargain. The question here to be considered is not whether any fraud was practised upon him, or that the defect might have been known if he had used ordinary diligence, but whether the buyer has obtained what he really consented to buy. If, therefore, he bought with all defects he will have no option.[1] As regards the position of the vendor it is somewhat different. What he receives is consideration or value, and every one is at liberty to place such value upon his property as he chooses and the law cannot interfere, unless it is in a position to infer deception as when the price is grossly inadequate. The buyer, on the other hand, consents to buy something specific; and that is why the Muḥammadan law lays so much stress on the question as to which of the two things in exchange shall be deemed to be the price and which the thing sold. If both the articles of exchange be of the nature of price as in a sale of gold for gold, then there is no question of valuing the thing sold, and each party should get equal the quantity of the other. Otherwise there would be manifest unfairness which the law does not allow.

Conditions and limitations which may or may not be embodied in a contract

As regards conditions and limitations which may be lawfully embodied in a contract or disposition, one must have regard to the nature of the transaction itself. A condition which is repugnant to a

[1] 'Al-Majalláh', p. 49.

contract or transfer but is of advantage to one of the parties would make the transaction vitiated if made an inseparable part of it. A gift or an ordinary sale, for instance, is an out and out transfer of the proprietary rights *in presenti* and if it, therefore, be expressed to take effect from a future date the transaction will be vitiated. Similarly a gift or a wáqf must be an absolute and unconditional transfer and hence, according to the more generally accepted view, cannot be made subject to an option. On the other hand, if the condition be such that the nature of the transaction admits of it, it will be upheld. For instance, it being of the very nature of a testamentary disposition that it should be contingent, on the death of the testator, the law permits a devise of the fee simple of a property to one person subject to a gift of the life estate to another. But as in Muḥammadan law the general rule is that no property can at any time be without an owner, the first taker must be in existence at the time of the testator's death. No successive estates can be created by an *inter vivos* gift, or by sale as in their very nature, they are a transfer of the entire rights of the owner to the donee or the buyer. A wáqf, however, stands on a different basis. Its very idea is permanent detention of the property and not a transfer of it, properly so called, so that what remains for disposal is only the usufruct which necessarily is to be enjoyed by men in perpetuity, without any one acquiring any estate or interest in the property itself. The beneficiaries of a wáqf are merely stipendiaries. The need for such tying up of property was first felt in connexion with mosques and charitable institutions, but the principle being once recognized it was necessarily extended to other laudable objects. The difficulty, according to Muḥammadan jurisprudence, was to obtain the power to tie up property, once that was secured the only limitation which is insisted on as regards the object of such a disposition is that it must not be opposed to the policy of the Muḥammadan law.

A condition in aid of a contract is valid, such as a sale with a condition that the vendor will have

possession of the property until the price is paid, or a sale on condition that the buyer should pledge something with the vendor as security for the price. Similarly any condition which it is customary to embody in a contract will be upheld, for instance, sale of a garment with a condition by the vendor that he will mend it or of a lock on condition that the vendor will fix it on the door.

A condition which is not of advantage to either party is regarded as a surplusage and cannot be enforced. In other words a condition which is superimposed upon a contract but not made an inseparable part of it would fail, if it is repugnant to the nature of the real transaction. For instance, a gift to a man with a condition that he is to enjoy the property in a particular way would be treated as a surplusage.

Joint contracts

As more than one person may be joint owners of a property similarly parties to a contract on each side may be more than one person. In such a case under the Muḥammadan law the benefit under the contract, for instance, the property to be received belongs to all in common but for the purposes of securing fulfilment of the contract each one is agent of the other. Hence each of the joint promisees is entitled to bring a suit on the contract without making the others parties but all will be entitled to whatever is realized to the extent of their shares. No one, however, may do anything which might affect injuriously the rights of others. For instance, one joint creditor cannot grant time to the debtor.

A classification of contracts

In Muḥammadan law contracts having regard to their principal features may be thus classified:—

1. (1) Alienation of property: for exchange, namely, sale, (2) without exchange, namely, heba or simple gift, (3) by way of dedication, namely, wáqf, (4) to create succession, namely, bequest.

2. Alienation of usufruct: (1) in exchange for property, namely, ijára, which includes letting things moveable and immoveable for hire, contracts for rendering services, such as for the carriage of goods, safe custody of property, doing work on goods and domestic

and professional services, (2) not being in exchange for property, for example, accommodate loan (á'riat) and wadiyut (deposit).

3. Contracts, (1) for securing the discharge of an obligation, namely, pledge, suretyship, (2) for representation, namely, agency and partnership.

4. Alienation of marital services, namely, marriage.

Having regard to the conditions which may be imposed by the parties, some contracts may not be made dependent on a contingency or referred to a future date, such as marriage, sale, gift, and generally speaking also wáqf, and some which may, such as lease, suretyship, bequest and the like.

Dependent rights cannot be transferred

A dependent right or a right *in personam*, whether arising under a contract or by the violation of a right cannot, according to the general rule, be a subject-matter of transfer. The reason is that, in the first case, it has its origin in the express consent of the person of incidence and in the second case by implication of law. It can be dealt with, however, by the promisor's consent. Such a transfer is called ḥawálat (حوالة) which corresponds to novation. The nature of this transaction may be thus explained. A has a debt owing to him from B and A himself owes a debt to C. All the three agree that C instead of realizing his dues from A and A his from B, C shall realize his due from B. A negotiable promissory note or a bill of exchange (suftaja سفتجة) would, therefore, according to the ordinary rule, be invalid. But if a custom of negotiability of such notes or bills is found to exist in a particular country, so that the debtor would know as an implied term of his liability that he may have to discharge it at the instance of the transferee of his creditor, the transaction would be upheld though it may be regarded as improper because the consent of the debtor to the transfer is merely a matter of implication from the existence of the custom.

Hawalat

Negotiable promissory notes and bills of exchange

A dependent right may, however, devolve on a third person by the operation of law, such as by succession or insolvency.

Sale

A sale (bai' بيع) is defined as an exchange of *mâl* or tangible property for similar property.[1] But as in ordinary affairs of life this is not always possible, the law dispenses with the actual production and making over of the thing except in certain cases which I shall mention presently and accepts the consent of both the parties to make the exchange as a substitute thereof guaranteeing to compel each party to make good what he has promised. Upon acceptance being expressed which may be either by word or conduct the contract of sale is completed; and it is not necessary for this purpose that possession of the property subject of the sale should be delivered.

It is clear from the definition of sale that nothing which does not answer the description of *mâl* can be the subject of sale. For instance, mere rights cannot as a general rule be sold;[2] but according to one version of the Ḥanafí law, which is said to be accepted by the Ḥanafí Doctors as correct, an exception is made in favour of a right of way because it is connected with lasting specific property. If, however, a custom exists for the sale of any particular class of rights connected with property as the custom which is said to exist in Balkh of selling a right to the use of water for purposes of drink or watering cattle such a sale would be upheld on the general ground that custom overrides analogy, or, as the author of 'Ḥedáya' puts it, custom is the arbiter of analogy.[3]

Different kinds of sale

Sales having regard to the nature of the subject-matter are of four kinds: (1) bai' (بيع) or sale property so called, when a determinate article is sold for a price, (2) barter (muqá'íḍa مقايضة), that is, when a determinate article is sold for another determinate article, (3) ṣurf (صرف) that is, sale of price for price, and (4) salam (سلم), that is, sale of price for a determinate thing.

[1] 'Kífa'ya', vol. v, p. 455.
[1] 'Ináyah', vol. vi, p. 65.
[3] 'Ḥedáya', vol. vi, p. 78; 'Fathu'l-Qadí', vol. vi, p. 65.

To determine which is the subject of sale or thing sold (mabía' مبيع) and which is consideration or price (thaman ثمن) is a matter of some nicety and difficulty in the Muḥammadan system. One reason why importance is attached to this question, is that the thing sold is recoverable in specie but not the price; if the thing sold perishes, the sale becomes void but not if the price perishes. Another reason, as already stated, is that, it is by this means that the fairness of a bargain is judged. Dissimilars are always treated as mabía' or the thing sold and not as price. Of similars some are always regarded as price, namely, gold and silver. Of other similars when the thing is specified in the contract, such as a particular bag of wheat it is regarded as the thing sold. If it is not specified but the property to which it is opposed in exchange is a dissimilar or a specified similar, the former would be regarded as the price.[1]

Conditions relating to sale

The conditions relating to the subject-matter of valid contracts of this nature generally are that it must be (1) in existence except in the case of a salam sale and (2) capable of delivery of possession, except in a contract of istiṣna. Hence, sale of a runaway slave or of fish in a tank is not allowed.[2] The subject-matter must be known and certain, otherwise the sale will be bad.

These conditions come within the general rule that, if a transaction be of such a nature that it involves deception of one of the parties, in other words in which there is an element of speculation, it will not be upheld. For instance, sale of milk in the udder of a cow is not valid. For the same reason right to a passage for the flow of or discharge of water[3] cannot be sold if the channel cannot be defined with certainty. This is the principle on which transactions in the nature of gambling which were prevalent in Arabia in the pre-Islámic days, such as Muzábana, Munábadha, etc.,[4] and in fact all wagering or aleatory contracts are declared to be invalid.

[1] 'Kifa'ya', vol. vi, pp. 258-9.
[2] 'Ḥedáya', vol. vi, pp. 49-57.
[3] Ibid., pp. 65-6.
[4] See *ante*, p. 14.

Salam

In Arabic, the word salam means advance. When a man advances the price for certain goods to be delivered in the future on a fixed date, the transaction is called salam. The goods so paid for in advance need not, as I have said, be in existence at the time of the contract, but the law will be satisfied if they are delivered on the date fixed. In this form of contract the price must be paid at the time of the contract and the date of the delivery must be mentioned. The subject-matter of a salam sale may be all articles including those which are sold by weight or measurement of capacity except gold and silver, which, as we have seen, are regarded merely as price; in fact, all things which are capable of being definitely described as to quantity, quality and workmanship may be dealt with by this form of contract. Animals cannot be sold in this way according to the Ḥanafís, because they cannot, it is said, be definitely described or specified, but Sháfi'í holds otherwise. The latter jurist in fact puts a wider interpretation on the law regarding salam than the Ḥanafís and he would allow such a contract if the subject of sale be existent and capable of delivery at the time specified. The Ḥanafís, on the other hand, would require that the article bargained for must have a continued existence from the time of the contract until delivery. Further, the Sháfi'ís do not insist for the validity of this form of contract that the time for delivery of the thing must be fixed. According to Abu Ḥanifa such a contract must fulfil seven conditions. The genus of the article sold must be mentioned such as wheat or barley, its species such as whether grown on land irrigated by rain-water or canal, the quality, whether coarse or fine, the quantity such as so many maunds, the date of delivery, and the place where it is to be delivered if the article be such as to necessitate expense of carriage. In a salam sale none of the parties can reserve an option of rescinding it, because one of its conditions is that the price must be paid in advance, but the option of cancelling the sale for a defect in the subject-matter is allowed. The article bought

under a contract of this kind cannot be disposed of by the purchaser before it has been delivered to him.

Istiṣná' is another form of contract in which the strict rule regarding the existence and delivery of the article or the price is still further relaxed. A transaction of this kind consists in ordering an artisan or a manufacturer to make certain goods answering to a given description. Even the Ḥanafís do not in a contract of this nature insist that the price should be paid in advance and it is obvious from the very nature of the contract that the subject-matter of it must be non-existent at the time it is entered into. The legality of this form of contract is based on a custom which has prevailed from the time of the Prophet himself and is also justified having regard to the necessities of business. There seems, however, to have been some discussion among the doctors as to whether it is to be regarded as a contract of ijára, that is, hire or of sale and the accepted view is that it partakes of the nature of both. For instance, a contract of this kind lapses on death of one of the parties just like a contract for personal services, but on the other hand, the man who has ordered the goods is entitled to refuse to accept it if he finds that they are not in accordance with the order. Istisna'

When an article which is of the species of price, that is, gold or silver is sold for an article of the same kind, the law requires that there must be mutual delivery and that each of the articles subject of the transaction must be equal in weight to the other. In this connexion, it makes no difference whether gold or silver is sold in the shape of coins or ornaments or otherwise. They are treated always as price, because that is the very nature of these metals. When gold is sold for silver or vice versa the law not only insists upon equality in the bargain but requires that there must be delivery of both the articles at the time of the contract. These strict conditions as to sale of gold and silver are the effect of the application of the doctrine of Ribá (ربوا). But the doctrine is not confined to transactions in gold and silver. Surf

Riba

Ribá literally means increase, but it is generally translated as usury or interest in the English books on Muḥammadan law. The doctrine of ribá is intended to be applied to certain transactions of sale and its principle is applied also to loans for a loan in Muḥammadan law is but a species of sale, the amount to be repaid being in exchange of the amount lent. As the law regarding ribá is of considerable importance and lies at the root of many of the restrictions which hamper freedom of contracts in Muḥammadan law, it is necessary that we must understand the scope of this doctrine. The real authority for the doctrine is a tradition reported from the Prophet in these words. '(Sell) gold for gold and silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt of the same kind for the same kind and the same quantity for the same quantity, from hand to hand and if they differ from each other in quality sell them as you like but from hand to hand.' The tradition seems to conflict with what 'Umar the second Caliph is reported to have said, namely, that the Prophet died without having made any clear pronouncement on the question of ribá which is left vague and ambiguous in the Qur'án where all that is laid down is that God has forbidden ribá. The Sunnís generally have, however, accepted the tradition.

But the question of the scope of the doctrine is one on which the greatest difference of opinion exists among the jurists and the practice of the Muḥammadan world also considerably varies in this respect. It is, therefore, pre-eminently a doctrine in the application of which the circumstances of the time and the practice of the people of different countries should be given the greatest weight.

Let us now see how the doctrine is expounded by the ancient jurists. The Ḥanafí doctors have interpreted the tradition to mean that whenever an article belonging to the description of similars of capacity or of weight is sold or exchanged for an article of the same species, neither party is allowed to receive anything in excess of the quantity sold by himself, in

other words absolute equality in quantity is insisted on. The Sháfi'ís hold that the law of ribá only applies to articles of food and such things as constitute price, namely, gold and silver.

The principal rules that have been deduced are that when one similar is sold for another similar there must always be immediate delivery of both the things, though equality is not insisted on if they differ in species. If the articles opposed to each other in a sale are not of the same genus or are not measured by quantity then excess or profit is lawful and so also delay in the delivery of one of the articles, such as a sale of wheat for money. If the articles are not similars of measurement by capacity or weight but they agree in being of the same kind then delay in delivery is not allowed but any excess or profit is not prohibited. For instance, sale of cloth of a particular kind for cloth of the same kind must be from hand to hand but one party may lawfully receive more than the other.

The general rule being that ribá applies to articles which are sold by the weight or measurement of capacity, suppose the practice changes with reference to the mode of sale. In the case of those articles which in the time of the Prophet were sold in either of the two ways such as wheat, barley, dates and salt which were sold by measurement of capacity, and gold and silver which were sold by weight, any change in the mode of selling these articles will not exclude them from the doctrine of ribá. As regards other articles the usage of the market is to determine, whether a particular article comes within the principle of ribá. The doctrine of ribá, however, does not according to many jurists apply to a transaction between a Muḥammadan and a non-Muḥammadan in Dárul hurb. But this view, is opposed by Abú Yúsuf and Sháfi'í. The exception is based on a tradition reported from the Prophet.[1]

The rules relating to ribá could not fail in its application to cause considerable hardships and inconveniences to the people. The lawyers, therefore, set to

[1] 'Ḥedáya', vol. vi, pp. 177-8.

devise means by which to get over them. Several expedients of this character are mentioned in the books, the best known of which as already mentioned

Bai'u'l-wafa

is Bai'u'l-wafa (بيع الوفاء). Its immediate origin is traced to the time when the inhabitants of Bukhára got largely into debts and could not liquidate them in the ordinary way and the lawyers had to resort to the well-known maxim of Muḥammadan law 'needs of men whether general or particular stand on the same footing as absolute necessity (i.e. in justifying relaxation of the rigour of law)'. This transaction is regarded as valid[1] though perhaps improper.

Bai'u'l-wafa is a sale on condition that when the vendor returns the purchase-money the buyer will return the property. It partakes of the character of a valid sale inasmuch as the buyer is entitled to the income of the property and of a vitiated sale as both the parties are entitled to annul it and of a pledge or mortgage inasmuch as the buyer cannot sell or otherwise dispose of the property. It may be observed here that if Bai'u'l-wafa can be regarded as valid there seems to be no reason why dealings in Government Promissory notes, shares in limited liability companies and other securities of a like nature should not also be lawful especially as such transactions are nowadays commonly practised by the Muḥammadans and have become a matter of necessity.

Effect of a valid sale

On the conclusion of a valid contract of sale the property in the thing sold passes to the buyer and the vendor becomes entitled to the price. This is, however, subject to the power of revocation under certain 'options'. But until the buyer has paid the price he cannot demand delivery of the property and the property remains subject to a lien for unpaid purchase-money. If, however, the sale was on credit the vendor would have no lien.

All expenses incidental to the delivery of the thing sold are to be paid by the vendor and those incidental to the payment of the consideration by the buyer.

[1] See 'Al-Majalláh', p. 58.

The cost of conveyance is to be met by the buyer and of registration by the vendor.[1]

When a thing is sold it includes (1) whatever is included by custom, (2) everything which is part of the thing sold or which cannot be separated therefrom without directly affecting the object of the sale, (3) all fixtures, (4) all that comes within the scope of the words of conveyance and, (5) all accessories which have accrued to the property after the conclusion of the contract such as fruits of trees.

Revocation of sales

A contract of sale is liable to be revoked (faskh فسخ) for a number of causes, for instance, in pursuance of an option stipulated for (khayárush-sharṭ خيار الشرط) or of an option of defect (khayáru'l-'aib خيار العيب) that is, when the purchaser of an article subsequently to the bargain discovers a defect or if some part of the thing purchased perishes before delivery or if fraud causing loss of property has been perpetrated (khayáru't-taghrír خيار التغرير) or by common consent (iqá'la اقالة).[2]

Gift

The Muḥammadan law defines hibá (هبة) or a simple gift *inter vivos* as a transfer of a determinate property (mál) without an exchange. Juristically it is treated as I have said as a contract, consisting of proposal or offer on part of the donor to give a thing and of acceptance of it by the donee. Until acceptance the gift has no operation.

Delivery of seisin

As already indicated, a further condition relating to this kind of disposition is that the donor should complete his intention by delivering seisin of the property to the donee. This is in accordance with the Ḥanafí and Sháfi'í view and also the accepted Málikí view.[3] Until possession has been given the property remains entirely at the disposal of the donor and on

1 'Al-Majalláh', p. 42.

2 See 'Ashbáhwa'n-Naẓáir', p. 525.

3 See 'Fatḥu'l-Jalíl', pp. 395-6. There is a version of Málikí's opinion to the contrary as reported in 'Hedáya', vol. vii, p. 480; but the generality of Málikí lawyers take the same view as the other Sunní Schools.

his death it will descend to his heirs. But the words of gift are not treated as entirely ineffective even before delivery of possession, so that if possession is given afterwards in pursuance thereof, there need not be a renewal of the gift.[1]

Gift of Musha'

As regards the nature of possession to be given the Ḥanafí view is in one respect narrower than that of the other Sunní Schools. The possession to be delivered must be separate and exclusive, otherwise the gift will be treated as vitiated or invalid. Hence gift of an undivided share (mushá') in a thing capable of division is vitiated. Mushá' (مشاع) which literally means confusion is used in law to denote the mixing up of the proprietary rights of more than one person in a thing as in joint ownership, where each co-owner has a right until partition in every particle of the property. But as the words of gift are not altogether ineffective subsequent delivery of separate possession after partition has been effected will be held sufficient to make the gift complete.[2] For the same reason, in the opinion of the Ḥanafí lawyers gift of standing trees and crops apart from the land, of wool on the back of sheep and the like stand on the same basis as a gift of mushá'. The Sháfi'ís, however, and apparently also the Málikís uphold a gift of an undivided share,[3] and the Judicial Committee of the Privy Council considering the doctrine of mushá' to be inapplicable to the conditions of a progressive society have held that it should be confined within the strictest rules.[4] It may be pointed out that even according to the strict Ḥanafí law gift of an undivided share in a thing which is not capable of division without impairing its utility is valid provided such possession is given as the nature of the property admits of.[5]

There are certain exceptions to the general rule regarding delivery of seisin. For instance, if the

[1] 'Hedáya', vol. vii, p. 481; *Mahomed Budish Khan* v. *Hosseini Bibi*, 15 Cal., 684 (P.C.).

[2] Ibid.

[3] 'Hedáya', vol. vii, p. 488; 'Al-Wajíz', vol. i, p. 249.

[4] *Ariff's* case, 34 I.A., 167, p. 177; *Mumtaz Ahmad's* case, 16 I.A., 207, p. 215; *Mullick Abdool Ghaffer's* case, 10 Cal., 1112.

[5] 'Hedáya', vol. vii, p. 489.

donee is already in possession of the subject-matter of the gift or the donor being in possession of the property himself or through some one who holds it on his behalf as a trustee or agent makes a gift of it to an infant child or ward of his, no formal change of possession is needed.[1] But if the person in possession held the property in his own right or in assertion of a right adversely to the owner, such as a pledgee, or a trespasser, the guardian according to Ḥanafí law will have to obtain possession first before making the gift.[2]

Nature of possession to be given

It is not necessary that actual physical possession should be given and the law considers constructive possession to be sufficient. If the donor vacates possession in pursuance of the gift, though the donee may not take actual possession the gift will be held to be perfected. What is required is that the donor should empower the donee and put him in a position, to take possession. For instance, if the donor makes a gift of a piece of cloth and the donee who is present says: 'I have taken possession of it', according to Abú Ḥanífa, this will be sufficient to satisfy the law. The kind of possession to be given depends upon the nature of the property, for instance, if the key of a house is made over that would be regarded as delivery of the seisin of the house.[3] It has been held that where a person makes a gift of her house to her daughter and delivers possession, the continued residence of the donor with the donee in the house the subject of the gift will not invalidate the gift.[4]

The law also imposes certain restrictions as regards the property which may be made gift of. In the first place the property must be in existence at the time of the gift so that, gift of oil in the sesame or of butter in the milk would not be valid. It must also

1 'Hedáya', vol. vii, pp. 492-3.

2 Ibid., vol. vii, p. 493; see also 23 Bom., 682.

3 'Baḥrur-Raíq', vol. vii, p. 311; 'Durru'l-Mukhtár' and Supp. to 'Raddu'l-Muḥtár', vol. ii, p. 318.

4 See 30 Mad., 305.

be determinate property ('ayn) so that gift of a debt owing to the donor is not valid unless he has authorized the donee to realize it from the debtor and the donee has actually done so, thus turning it into determinate property.[1] But a debt may be made gift of by the creditor to the debtor; such a transaction, however, is really a release. The general rule according to the Sháfi'í and Málikí authorities is that such property can be made gift of, as can be sold, that is according to Muḥammadan law.[2] The Courts in this country[1] have for a long time upheld gifts of landed property in the occupation of tenants and lessees and of Government securities.[3] As I have suggested a general practice to that effect would make such transfers valid even according to the strict principles of law.

Scope of gift

The idea of a gift in the theory of Muḥammadan law is transfer of the corpus of a thing to the donee. If, therefore, the words of gift show an intention on the part of the donor to transfer his entire rights, any words imposing limitations or conditions repugnant to full ownership on the part of the donee would be treated as surplus-age. For instance, if the donor has said: 'I give you this thing for thy life' the Ḥanafí, the Sháfi'í and the Ḥanbalí jurists would regard it as a gift of the fee simple. On the other hand, if the words of gift relate only to the usufruct of a thing, the law would prima facie treat them as having the effect of a loan as when a donor says 'this house of mine is for thee as a gift by way of residence or for thy residence as a gift'. According to the Málikí law,[4] a life estate can be created by an *inter vivos* gift and so also the donor may reserve the usufruct or use of a thing for himself for life or for a limited period of time and subject thereto make a gift of it. The latter result may be achieved in Ḥanafí law[5] by a hibá made on condition of an exchange, the donor making it a condition that the donee shall maintain him as long as

1 'Raddu'l-Muḥtár', vol. iv, p. 558.
2 'Tuḥfatu'l-Minhájj', vol. ii, p. 342.
3 *Mullick Abdool Gafoor* v. *Mulika*, sec 10 Cal., p. 1112.
4 'Fatḥu'l-Jalíl', pp. 396–400.
5 'Al-Majalláh', p. 135.

the donor lives or give him something in exchange or pay off his debts. The gift and the condition, in such a case, would both be valid.

Gift cannot be made conditional

Again a gift must be an out and transfer *in praesenti*, and, therefore, it cannot be so made as to take effect from a future date. Nor can it be made conditional. For instance, the donor saying to the donee 'if I die before you this property is yours' such a gift which is called ruqba (رُقبة) would be bad. A conditional gift, however, must be distinguished from a gift with a condition; while in the former case the gift itself is void, it would be valid in the latter case and the condition except when it is by way of stipulation for an exchange would fail. Suppose a woman says to her husband 'if I die then thou art released from my dower', it would not be a valid gift or release of the dower to the husband, as it is made conditional.

Conditions relating to the donee

A gift *inter vivos* may be made to some definite individual who can take possession of the thing either himself or through his agent or guardian, or to some object of charity. An absolute gift to charity is called ṣadaqa (صدقة). It may be pointed out that a ṣadaqa differs from a wáqf in this, that in the former the subject-matter is transferred out and out, while by the latter the corpus is made inalienable and only the income is available to be spent in charity. When a gift is made to an individual the donee must be actually in existence at the time of the gift, so that gift to a child *en ventre se mare* is not valid.

It has been held that a deed creating a life interest with remainder over and a gift to unborn persons are void under the Muḥammadan law.[1]

Revocation of a gift

According to the Ḥanafís a gift being a disposition of property without consideration it can be revoked by the donor even after possession has been delivered to the donee, who however until such revocation may lawfully exercise proprietary rights over it. The right to revoke a gift is called raja't (رجعة). The position

[1] 36 Cal., 431.

of the Ḥanafí jurists on this point seems to be inconsistent but is insisted on, in spite of a tradition which condemns revocation of a gift. This tradition they construe as having the effect merely of making such revocation abominable or improper. They at the same time allow numerous exceptions which deprive the general rule of all effective operation. A gift cannot be revoked under the following circumstances:—

(1) If the gift is to any of the donor's ascendants or descendants, brothers or sisters or their children, uncle or aunt;

(2) When the gift is made during coverture to the husband or wife of the donor as the case may be;

(3) If the subject-matter of a gift be land, and the donor erects a building on it or plants a tree in it, or if the property be so improved that the increase cannot be separated, for example, when the subject-matter of the gift is an animal and the donor fattens it by feeding, or if the thing given has been so altered that a different name would be applied to the new substance, for example, when wheat is turned into flour;

(4) If the donee has sold the property subject of the gift to another or parted with it by gift followed by delivery of the property;

(5) When the thing given has perished in the hands of the donee;

(6) If either the donor or the donee has died;

(7) If the gift be to charity or Ṣadaqa;

(8) If the donee or somebody on his behalf has given to the donor something in exchange for the gift and the donor has taken possession of it.[1]

Again the revocation must be explicit and confirmed by the order of a Judge, because, the law on the question being one on which jurists have held different opinions, the declaration of it by a Qáḍí is necessary to remove the doubt. But if none of the conditions enumerated above have happened the order will be made as a matter of course. The Sháfi'ís and Ḥanbalís allow revocation of a gift perfected by possession, only

[1] 'Hedáya', vol. vii, pp. 494–506; 'Al-Majalláh', pp., 136-7.

when the donee is a child of the donor[1] and according to accepted Málikí view, revocation of a gift after delivery of seisin is not permissible at all.[2]

A simple hibá or gift is to be distinguished from Ḥiba bi Sharṭi'l-'iwaḍ (هبة بشرط العوض) or gift on condition of an exchange. For instance, A gives a house to B on condition that B will give to A a garden belonging to B. Such a transaction partakes of the nature both of gift and sale. It is regarded as a gift in its inception, so that it will not be valid with respect to an undivided share (mushá'), and neither party will acquire any right in the thing given to him before delivery of seisin. After delivery of possession by each party the transaction has all the incidents of a sale, so that neither party can revoke his act, the right of pre-emption will attach to the property and either party can return for defect the article which he has received.[3] Ḥiba bi Sharṭi'l-'iwaḍ must be distinguished from hibá or gift on receiving something in change which is generally called hiba' bi'l-'iwaḍ (هبة بالعوض). For instance, A makes a gift of a house to B receiving from B a ring in return without the exchange being made a condition of the gift; the only effect of the exchange in this case would be to prevent the revocation of the gift; otherwise the transaction has all the incidents of a simple Gift.

Waqf
Its definition

According to Muḥammadan law the very conception of property involves the idea of its being owned by some one possessed of full powers of disposition over it, though such powers or some of them may be in suspense for a temporary cause. But as an exception to this general rule the law recognizes the validity of a wáqf (وقف) which is a form of alienation by which a property passes from the ownership of the person making the disposition without its being transferred to the

1 'Tuḥfátu't Mináj', vol. ii, p. 345.
See Nailu'l-Ma'árib, vol. ii, p. 10.

2 'Fatḥu'l-Jalíl', p. 401.

3 'Fatáwá 'Álamgírí', vol. iv, p. 550 *et seq.* See also 13 C.W., 160 where a sale is distinguished from hiba' bi'l-'iwaḍ.

ownership of any human being. Wáqf literally means detention and is constituted by the appropriation or tying up of a property in perpetuity so that no proprietary rights can be exercised over the corpus but only over the usufruct. The Muḥammadan jurists of the eighth century appear to have been considerably exercised as to the legality of this kind of disposition. Abú Ḥanífa was strongly opposed to it, but the necessity which was felt for permanent settlements of property for the poor and for other charitable objects pious and useful, at last triumphed over his opposition. Those who supported it could point to mosques, and inns for travellers as examples of property which had been from time immemorial recognized as inalienable. Those jurists, however, who did not like to treat wáqf as an exception to the general principles of Muḥammadan law applicable to property held that in fact the ownership of a property subject of wáqf passes to God and becomes revested in Him as He is originally the owner of all created things. But as God is above using or enjoying any property, its usufruct must necessarily be devoted to the benefit of human beings.[1]

The objects of Waqf

The motive of law in authorizing wáqfs is to enable the wáqif or donor to secure spiritual advancement in the life to come and also popularity in this life in the same way as by gifts and bequests but in a higher degree. But according to the general principles of Muḥammadan law regarding dispositions of property, a wáqf would be legally valid, even though the proper motive might be wanting; for instance, a non-Muslim may make a wáqf for meritorious purposes, but he does not thereby make himself entitled to spiritual reward as he does not believe in the one God who alone can bestow such rewards.

The object which is sought to advance by a wáqf must not be opposed to the general religious policy of Islám, so as to involve sin, such as the building of churches and temples, the encouragement of offences against society, such as highway robbery and the like, and must be charitable in the

[1] This is the view of Abú Yusuf and Mahomed. See 'Hedáya' and 'Fatḥu'l-Qadír', vol. v, pp. 416-22.

very general sense of being of some benefit to men.[1] The ultimate object or objects of a wáqf must be of a lasting nature so that the income of the property as it accrues may be availed of. Therefore if a wáqf is intended to be confined to a limited or terminable purpose, or for a particular period of time, it will be bad, for instance, a wáqf for fifty years. If, however, the specified objects be limited or happen to fail, but a general charitable intention is to be inferred from the words of the grant, the wáqf will be good and the income or profit will be devoted for the benefit of the poor, and in some cases, to objects as near to the objects which failed as possible. This rule is analogous to the doctrine of cypres of the English law. A specified purpose may fail from various causes, such as its non-existence, for instance, when a wáqf is made for A's children and thereafter for the poor and no children are born to A, or for uncertainty, such as a wáqf for A *or* B and then for the poor.

The scope of waqf

The very design of a wáqf being to create a perpetuity, the law imposes no limitation of time within which the objects or uses must come into being. In this respect the grantor is practically unfettered in his discretion in disposing of the income in any way he chooses by the grant. He is under no restraint, subject to what has been stated above, as to the nature of the uses or estates that he may create. The general principle is that the directions of the grantor are as binding and effective as the rules enacted by the lawgiver. The enjoyment of the income may be secured for a number of objects to take successively, whether in existence at the time of the grant or not, provided the first taker be in existence. For instance, the gift may be for the children of Záid for their lives, then for the children of Omar for their lives and their descendants in succession and on their expiry for the poor or the uses may be made contingent on a certain event. The beneficiaries may be an indefinite class of men or an institution, in which case the disposition must be

[1] In 18 Mad., 201, and 31 All., 136, questions arose as to what uses would be superstitious according to the Sunní law.

intended to relieve human wants or sufferings; for instance, a wáqf cannot be made generally for the inhabitants of a particular town without specifying the poor among them, nor for the support, say, of a club for rich men but wáqfs for Madrassahs, hospitals, rest-houses for the relief of travellers, or of soldiers engaged in a holy war, etc., would be good. The beneficiaries indicated may also be individuals or a limited class of men, such as the children or descendants[1] of A, in which case it makes no difference whether they are rich or poor, because so far as the gift to them by way of wáqf is concerned, the law treats it to that extent as a hiba' or simple gift. The difference between a wáqf of the latter category and a hiba' would be this, by a wáqf mainly for the benefit of one's family the residue on the expiry of the family goes to the poor or some other unfailing purpose of that character, while a donee under a hiba' takes the property absolutely. The Muḥammadan jurists think that every family is liable to become extinct some time or other; but even if they are wrong on that point it would make no difference in their view as to the validity of a wáqf for the benefit of the donor's family or descendants, as such a grant is regarded as an act of charity and, further, the residue, if any, would go to the poor. I may observe here that charity in Muḥammadan law is understood in a much wider sense than in the English law. In Muḥammadan law it includes any good act. The validity of wáqfs for the donor's family is established by an absolute unanimity of opinion among all the Schools of law Sunní as well as Shí'ah and among the jurists of each School; hence this may well be regarded as a clear case of Ijmá' based on unanimity of opinion, which in itself, as we have seen, is an authoritative source of laws apart from the texts or the reasons on which it may be founded.

Waqf for donor's family

So far, however, as the Anglo-Indian Courts are concerned, a wáqf according to them as repeatedly

[1] It is doubtful whether according to the Judicial Committee of the Privy Council the descendants of an individual would be regarded as a limited class, see 22 Cal., 619.

held by the Privy Council[1] must be a substantial dedication to charity, charity being understood in the sense analogous to that of the English law thereby excluding all settlements for the benefit of the donor's children, kindred or posterity, or in favour of a succession of individuals as not coming properly within the scope of wáqf. The rulings, however, concede by way, as it were, of compromise that so long as the grant to charity is substantial and not illusory, provisions of a terminable nature if made out of the property for the grantor's family would not invalidate the wáqf.[2]

Property which may be dealt with by waqf

But, though the law is practically unfettered with respect to the objects of such a grant, the accepted juristic theory is certainly very narrow as to the forms of property which can be properly settled in wáqf. The property must first of all answer the description of mál or tangible property, as in the case of a gift so that wáqf of a mere right to the usufruct such as a rent charge is not allowed. In the next place it must be productive or capable of being used without the substance being consumed. This rule excludes moveable property generally including money. A few specified articles[3] and such moveables with respect to which a prevalent practice (ta'ammul) to make wáqf has been established in the particular country in which the grantor resides are exempted from the operation of the rule. It has been held in *Kulsom Bibi* v. *Ghulam Husain Ariff*, 10 C.W.N., p. 449, and 9 Bom. L.R., 1337, and 33 Mad., 118, following 9 C.L.R., 66, and dissenting from 24 All., 190, that wáqf of shares in a joint stock company and of Government promissory notes is not valid. This view is undoubtedly in agreement with the strict conception of wáqf in Muḥammadan law, but it may be a matter for further consideration whether it is in accord with the principles of construction and

[1] See *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundar*, 17 Cal., 498 (P.C.); *Abul Fata Mahomed Issak* v. *Rasamaya Dhur Chowdhry*, 22 Cal., 619 (P.C.).

[2] See 22 Cal., 619; 14 All., 375.

[3] Such as war horses, camels and swords which are taken out of the rule by force of certain traditions.

application of Muḥammadan law as enunciated by the Privy Council. As the validity of a simple gift of Government securities and of shares in companies is well established, it may be argued that the same principle should be analogically applied to wáqfs, especially as the doctrine of ribá has never been recognized by the British Indian Courts. The above restrictions regarding the property which may be made the subject of wáqf are based on juristic deduction and not on any positive text, and it may also be said that they should not be followed to the letter as they are obviously unsuited to the modern circumstances of life.

In some respects, however, even a wáqf *inter vivos* is less restricted with regard to the nature of property which can be made subject of such settlement than other forms of disposition. For instance, if the property at the time of making wáqf belongs to the grantor, it is no objection to such a disposition that other persons have some interest in it, such as a lessee or mortgagee. And according to the accepted view of the Ḥanafí law in India and of the other Sunní Schools generally, a wáqf unless it be a dedication in the nature of a mosque or a similar institution may be validly made of an undivided share in a property.[1]

Creation of a waqf

The creation of a wáqf does not require the use of any particular words, but the intention to settle the property in perpetuity must be made clear whether by the use of the word wáqf or otherwise. If a wáqf is in the shape of an institution for public use, such as a mosque, a rest-house for travellers, a burial ground and the like, some act is necessary by which dedication to public use may be inferred. Opinion is considerably divided among the jurists on the question whether delivery of possession to a trustee at the time of making a wáqf is necessary in law, but the weight of juristic opinion seems to lie in favour of Abú Yasuf's view according to which delivery of possession is not necessary.[2]

[1] 'Fatáwá 'Álamgírí', vol. ii, p. 466; 'Hedáya', vol. v, p. 425; 'Al-Wajíz', vol. i, p. 244; and 'Fatḥu'l-Jalíl', pp. 377–8.

[2] 'Fatáwá 'Álamgírí', vol. ii, p. 455. Cf. 31 Bom., 250, p. 257; 15 All., 321, p. 323.

A wáqf like a gift cannot be made conditional or contingent on a future event. It is, however, open to a man by his will to direct his executor to make wáqf of certain property on his death, or to say that certain property of his will be wáqf after his death and such a disposition will be valid. But it will be subject to all the conditions of a testamentary gift, that is to say, the testator can revoke it before his death and the disposition will have effect only out of one-third of the estate.[1]

Once a wáqf is properly made it cannot be revoked and any repugnant conditions would fail.

Superintendence and management

The wáqif or donor may himself act as mutawallí (متولي) or trustee of the wáqf, or appoint a competent person in that behalf. In the latter case the wáqif may lay down such rules of management as he considers proper. But once he has appointed a mutawallí the donor cannot interfere in the management unless he has reserved to himself such power in particular matters. In default of appointment of a trustee by the donor the Court shall appoint a proper person, and the maxim of the Muḥammadan law as of the English law is that no trust shall fail for want of a trustee.

In all questions relating to the office of mutawallí the interest of the trust is to be the ruling consideration and it has been laid down by the Judicial Committee that the descendants of the donor have no absolute right to the office of mutawallí.[2]

The Court has general power of supervision over a wáqf and may always remove an incompetent or a dishonest mutawallí despite anything to the contrary laid down by the donor.

The Court in exercise of such general powers of supervision may pass orders authorizing dealings with wáqf property if beneficial for the wáqf.[3]

The main principles on which a wáqf should be administered are that the directions of the donor

[1] 'Raddu'l-Muḥtár', vol. iii, p. 395; *Baqar Alí Khan* v. *Anjuman Ara Begum*, 25 All. 236, p. 252.

[2] *Shahar Banoo* v. *Aga Mahomed Jaffer Bindaneem*, 34 Cal., 118 (P. C.); see also 35 I.A., 151.

[3] See 36 Cal., 21.

should be carried out and all that may be necessary for the preservation of the trust should be done. As regards the first it may be observed that, conditions which are inconsistent with the nature of the gift itself, or violate some well-established policy of the law, would apparently be inoperative, but otherwise the general rule governing wáqfs, namely, that the directions of the donor must be treated as the enactments of the lawgiver should be followed. Questions have been raised but not yet decided, whether a founder of a mosque which as a legal institution is a place for public worship and open as such to all classes of Muḥammadans of whatever persuasion, could validly lay down a condition that it should be used by a particular sect alone, or in other words whether the law admits of limited dedication of an institution like a mosque.[1] That all acts, which are necessary for the preservation of the trust should be done, may be taken to be an absolute rule, but questions as to what is or is not beneficial to a trust—if it is not a matter of necessity —have to be decided in the light of the provisions, if any, in the deed of gift and the general rules of law having regard to the circumstances of each case.

Bequest

A bequest (waṣiyat وصية) or will is defined as a transfer to come into operation after the testator's death. The testator is called Múṣi (موصي) and the legatee or devisee is called Múṣalahú (موصي له) and the executor is called Waṣí (وصي). The executor is the successor (Khalífa) of the deceased by appointment, while the heirs are his successors by the law. According to the general theory of law deduced by analogy a bequest should not be valid at all, because the testator does not part with his rights until after his death, when such rights have substantially ceased. In fact if a transfer is made by the owner of a property to take effect from a future date, but while his ownership in the thing is still subsisting, it would be void, such as, a contingent gift or sale. *A fortiori*, therefore, a transfer which is referred to a period after death should be void according to

[1] See *Ata-ullah* v. *Asimu'llah*, 12 All., 494, also 7 All., 461, 18 Cal., 448, and 35 Cal., 294.

analogy. But juristic equity, having regard to men's spiritual wants in the next life, has sanctioned bequests to enable the testator by means thereof to make up for his short-comings during this life in good and pious works. Further a man's rights in his property are not altogether lost on his death but subsist even thereafter to the extent of his needs at that time, such as his burial and the payment of his debts. Juristic equity in this case is based on texts of the Qur'án and Ḥadíth.

Limitations on testamentary dispositions

The law considers that one-third will be sufficient for the purposes indicated above. Another reason why it limits testamentary dispositions to one-third is that the rights of others are affected thereby, for as soon as a man is seized with death-illness, his heirs acquire a right to his property which becomes perfected on his death. Again, the principle on which the legality of a testamentary disposition is based being in defeasance *pro tanto* of the rights of the heirs generally, the law requires that such dispositions should be for the benefit of non-heirs alone. A further reason why a bequest in favour of an heir is not allowed is that it would amount to giving preference to some heirs over others thus defeating the policy of the law which has fixed the portion of each in the inheritance and bringing about disputes among men related to one another. If the other heirs consent to a bequest to one of them or to a bequest of more than of one-third of the estate, the above reasons no longer hold good and the bequest as made will be valid. The same would be the result if there be no heirs. Consent of the heirs, however, must be given after their rights have become perfected, that is, after the death of their ancestor. Any waiver before that is of no effect in law, because at that time they had a bare right or possibility, which would turn into reality only after death, and a man's consent to lose a possibility does not amount to his consenting to lose an actual right. It has been held that the consent of the heir need not be express.[1]

According to the Ḥanafís consent of the other heirs is regarded strictly as a waiver, as it removes the bar

[1] 26 Bom., 497.

in the way of such disposition by reason of the existence of their rights, while it is treated by the Sháfi'ís as transfer by the heirs of their property, because such consent they say is the cause of the disposition taking effect. The former, therefore, hold that the heir legatee in whose favour the waiver is made derives his title from the deceased while the latter hold that he derives his title from the consenting heirs.

Acceptance by the legatee

According to the Ḥanafís generally a bequest before it becomes operative must be accepted by the legatee, because a bequest confers a new proprietary right on the legatee unlike inheritance, which is purely a succession to the interests of the deceased the latter vesting in the heirs by the operation of law. But as pointed out in 'Raddu'l-Muḥtár',[1] the law regards as a sufficient acceptance if the legacy be not rejected by the legatee. Proceeding upon juristic equity the law allows one exception, to the principle that a bequest confers a new right on the legatee, namely, that if before such acceptance the legatee dies the legacy would go to his heirs. The reason on which juristic preference is founded is that the bequest so far as the testator is concerned became perfected on the latter's death, and it remained in suspense so far as the legatee's acceptance was concerned. They also rely upon the analogy of a sale in which an option is reserved in favour of the buyer to revoke the same; if the buyer dies without exercising his option the property descends to his heirs, and the same they say, is the case here. According to one version of Sháfi'í's opinion and also in the view of Zufar a bequest is just like inheritance, being purely in the nature of succession to the rights and interests of the deceased.

A bequest speaks from death

It is of the very essence of a bequest that it speaks from the testator's death so that if a legatee dies before the death of the testator, the legacy in the opinion of all lapses to the estate.

Scope of a bequest

A bequest may be made in favour of a specified individual living at the time of making the will

[1] See vol. v, p. 453.

either actually or in the eye of law such as a child *en ventre sa mere* provided the child is born within six months of the making of the will. The reason why a bequest in favour of an embryo is valid but not a hibá or gift *inter vivos* is that a bequest even according to the Ḥanafís is partly in the nature of succession and as a child born within six months of its father's death inherits so a bequest in its favour should be valid.

A bequest may be in favour of a class of persons such as the family of so and so; it will then be operative in favour of such members of the class as may be living at the time of the testator's death. Hence, a person born after six months of the making of the will takes no benefit under it, if the legacy was given to him individually by specific description such as the child in the womb of so and so, but he will take it, if the legacy was given to him as a member of a class provided he was born at the time of the testator's death. A bequest may also be made in favour of a charity such as a mosque, a school and the like.

A bequest like a gift may be made by a Muslim in favour of a non-Muslim and vice versa.

As the object of a will is to provide succession to the rights of the testator, whatever property or rights were held by or accrued to him and would otherwise descend to his heirs, except the right to retaliation, can be given away by will. In this respect testamentary alienations enjoy a freedom which is denied to dispositions *inter vivos*.

Hence determinate and undeterminate property, whether in the testator's possession or not, the usufruct or produce of a thing, whether in existence at the time of making the will or not, and debts and choses in action can be disposed of by a will. As a will speaks from death it has effect with respect to such property as is found to belong to the testator at the time of his death even though it might not have existed before.[1]

The law allows that one person should by a will be given the usufruct, or use of a property, and on

[1] 'Durru'l-Mukhtár' and 'Raddu'l-Muḥtár', vol. v, pp. 451-2.

his death another person should have the corpus provided the first devisee was in existence at the time of the making of the will and his successor was in existence at the time of the death of the testator. For instance, a testator may direct that A should live in his house or enjoy its rent or have the use of his slaves either for a fixed period of time or as long as he lives and that after him B should have a similar use or right of enjoyment; the devise will be held to be good according to its terms and after the death of A and B the house or the slave will lapse to the estate.[1] Thus, annuities may be created by a will. That is to say, a testator may direct that out of the property so much a month should be given to A and so much to B or to one in succession to the other.

A bequest of the use of a thing can also be made in favour of a pious object such as a bequest of the use of a horse in religious wars, in which case it would be treated as a testamentary wáqf and would be subject to the same restrictions as other testamentary dispositions.[2] The author of 'Durru'l-Mukhtár', however, thinks that such a bequest should be differentiated from a wáqf, and the author of 'Raddu'l-Muḥtár', adds that if a bequest of the usufruct of a property be made in favour of a pious or charitable object it would not have the sense of wáqf, but should be construed as a gift of the corpus for the benefit of the objects mentioned.

Making of a will

A man may make his will either orally or by writing, and no formalities are required.[3] But so far back as the days of Qáḍí Khán written testaments appear to have come into general vague as is clear from his opening chapter on the subject. And having regard to what he narrates as the opinion of Abú Ḥanífa and Abú Yúsuf on the question of proper attestation of a will, written wills could not have been uncommon even in the days of the founder of the Ḥanafí School.

[1] 'Hedáya', vol. ix, pp. 409-11; 'Fatáwá 'Álamgírí', vol. vi, p. 188 et seq.

[2] 'Durru'l-Mukhtár', vol. v, p. 484; and 'Tanwiru'l Absar', and Raddu'l-Muḥtár', vol. v, p. 484.

[3] 28 All. 715, p. 718.

Executor

The person appointed to carry out the directions of the testator is called the executor. His duty is to pay the funeral expenses, the debts and the legacies and to administer the estate generally. He is empowered to collect debts and other dues to the estate. As the office of an executor entails a burden, appointment to it cannot be made without the consent of the designated person. When an executor has accepted the office he can neither resign it nor be removed by the Court without sufficient cause, for he is the person in whom the testator reposed his confidence. The executor may bequeath his office to another. If more than one executor have been appointed all must act jointly and if the office of one of them becomes vacant the Court will appoint a competent person in his place. But in matters of urgency, such as burial of the deceased and preservation of the estate one of the executors can act alone. If no executor has been appointed by the testator the Court must appoint some one to give effect to the will.

Construction of wills

Rules are laid down for the construction of wills; the cardinal principle underlying them is to ascertain the intention of the testator and a construction which validates a bequest is to be favoured. In *Suleiman Kadir* v. *Dorab Ali Khan*,[1] it is suggested that a bequest should be distinguished from the mere expression of a wish or a direction.

Revocation of bequests

A bequest being a voluntary disposition, it follows that the testator during his lifetime has a right to revoke it, because all such dispositions may be revoked until they are perfected. In other words a bequest until the testator dies is mainly a proposal which can be withdrawn by him any time before death. There is, however, one exception to this, that is, when a man by will directs that a particular slave of his should be emancipated on his death, such a slave becomes mudabbar and the testator can no longer revoke such conditional emancipation. Revocation of a bequest may be made by words or by conduct such as the doing an act destructive of the proprietary right

[1] 8 Cal. 1, p. 6.

of the testator in the thing bequeathed. Some bequests may be revoked either by express declaration or by conduct, such as a bequest of a specific thing to a legatee may be revoked in so many words by a subsequent will or a codicil or by sale of the thing and the like. Some bequests can only be revoked expressly and not by conduct such as a pecuniary legacy.

Not only may a testament be revoked by an act of the testator, but it may become void on the happening of certain events, such as the testator becoming insane.[1]

Ijara or letting and hiring

Contracts with reference to usufruct whether it be the produce or use of property moveable or immoveable or the labour and services of men are classed under the general designation of Ijára (إجارة) which means letting and hiring. Ijára is defined as the sale of ascertained usufruct in exchange for some ascertained thing.[2] It includes leases, contracts of bailment and for personal and professional services. Usufruct is said to be ascertained when the period of use and enjoyment of the thing by the hirer is fixed.[3]

Use of the property by the lessee or hirer

As to the mode and extent of user or enjoyment of the thing subject of ijára, if the matter is defined by the contract, the hirer or lessee is entitled to make the identical or similar use of it or less but not more. For instance, a blacksmith hiring a shop for his business may use it for that purpose or for any other purpose which is not more injurious.

As to whether the use of the thing subject to such a contract should be allowed to persons other than the hirer, the principle is, that if the thing be such, that in the use of it by one person rather than by another a difference is ordinarily made, the use of it will not be allowed to any person other than the one mentioned in the contract. For instance, if a horse is let to A for his use, he cannot allow it to be used by B. But when a thing is such that it does not make any difference who uses it, any restriction would be ineffective

[1] 'Durru'l-Mukhtár' and 'Raddu'l-Muḥtár', vol. v, p. 462.
[2] 'Al-Majalláh', p. 60.
[3] Ibid., p. 66.

If A, for instance, takes the lease of a house for his own residence, he can allow B to live there or sublet it to another person.[1]

A contract of ijára is constituted by proposal and acceptance like a sale. But unlike a sale its operation may be referred to a future date and may be made conditional. A contract of this kind even after it has been validly constituted is, like a sale, subject to the options of defect and sight.[2]

A contract of ijara, how constituted

The condition of a valid ijára is that the period should be specified; otherwise it will be held to be vitiated and the hirer would be liable only for proper hire or rent. The same would be the case if the hire or the services to be rendered be not specified in the contract.

The property subject of ijára is a trust in the hands of the lessee or the bailee, who will not therefore be held liable if it is destroyed or damaged without his fault.[3]

Property in the hands of the lessee or bailee

If a lessee has caused damage to the premises, the lessor may apply to the Court for cancellation of the lease.

In the absence of an agreement to the contrary, such works in connexion with the demised premises as are necessary for keeping them fit for use and occupation are to be done by the lessor, such as repair of the house. The removal of dirt and accumulations and keeping the premises clean is a duty imposed upon the lessee.[4]

When a contract of hire refers to the labour and services of a man, it may either be exclusive as with a servant or only partial as with a broker, a common carrier and the like. Though a Muslim can sell his labour or services he cannot do so permanently so as to turn himself into a slave.

Scope of a contract for services

One person may hold a property in trust (amánat امانة) for another, sometimes by express contract and sometimes by the implication of law arising out

Trust

[1] 'Al-Majalláh', pp. 63, 84.
[2] Ibid., pp. 74-5.
[3] Ibid., p. 87.
[4] Ibid., p. 77.

of a contract or otherwise; for instance, an article in the hands of a bailee or agent, or an 'arîyat, that is, a commodate loan in the hands of the person to whom the property is lent, or a property belonging to one person in the hands of another person into whose custody it has come, but not by means of a contract or wilful taking.[1] The person who holds property in trust is called a trustee or amin (امين).

Trustee's responsibility

When a trust perishes in the hands of the trustee, but not by reason of anything done by him and without his fault he will not be liable, but in the case of a bailment for hire the bailee must show that the loss or damage could not have been avoided by reasonable care. The owner is liable for the maintenance of the trust property and whatever income accrues from it belongs to him.

Deposit

When a person places his property in the possession of another by a contract for safe custody, it is called wadîyat (وديعة) or deposit and is a trust in the hands of the depositee. Such a contract can be terminated at the option of either party.

Commodate loan

'Arîyat (عارية) or commodate loan is defined as the giving by a person of a thing to another person without receiving anything in exchange intending that the latter should enjoy the usufruct.

Pledge

Pledge (rahn رهن) is defined as placing a property (mál) under detention and suspension in consideration of a right available against its owner and which may be satisfied out of that property. It is merely a security.

Both moveable and immoveable properties can be the subject of a pledge, but according to Ḥanafîs differing from Sháfi'îs and Málikîs an undivided share in immoveable property cannot be pledged.[2]

A pledge is constituted by a contract, which is not completed according to the Ḥanafîs until possession has been given of the property to the pledgee. That is to say, a promise by a debtor to pledge his

[1] 'Al-Majalláh', p. 118, et seq.
[2] 'Hedáya', vol. ix, pp. 82-6.

property for the satisfaction of a debt cannot be enforced. The Málikís, however, take a different view holding that such a contract is as binding as a contract to sell.[1]

Pledgee's rights

The pledgee is entitled to have possession of the pledge until the debt is satisfied. Though this right to possession is in the nature of detention, the pledgee's right to have recourse to the pledge for satisfaction of his debt has precedence over the rights of other creditors of the pledgor. The pledgee is not entitled to the use of the pledge nor to its produce or profits except with the permission of the pledgor[2] unless the contract was of the nature of baíu'l-wafá. The reason is that an ordinary pledge is merely a security.

Responsibilities of the pledgee and the pledgor

According to the Ḥanafís the property pledged is a trust in the hands of the pledgee who is therefore responsible for its safety and preservation and insures the same, so that if the pledge perishes in the hands of the pledgor and it be of equal or greater value than the debt, the debt will be extinguished and the pledgor will be entitled in the last case to have recourse to the pledgee for the balance. On the other hand if its value was smaller, the creditor would be entitled to demand from the debtor payment of the difference between the debt and the value of the pledge. The same will be the result in their opinion in case of depreciation. The pledge being the property of the debtor, the charge of its maintenance falls on him, while the charge for its safe custody falls on the creditor who cannot therefore tack it to the loan.

Remedies of the pledgee

If the debt is not paid the mortgagee can ask the Court to have the pledge sold and the debt satisfied out of the sale-proceeds. He cannot sell it himself unless he has been expressly authorized in that behalf by the debtor. The debtor might also authorize a third person to sell the mortgaged property for non-payment of the debt. Such a power once conferred either on the mortgagee or on a third person cannot

[1] 'Hedáya', vol. ix, p. 66.
[2] Ibid., vol. ix, p. 79; 'Al-Majalláh', p. 115.

be revoked.[1] The Muḥammadan law does not recognize foreclosure unless perhaps in a transaction of the nature of baiu'l-wafá which, however, in theory partakes more of the nature of sale than of security. The existence of the security does not bar the other remedies of the creditor, such as attachment of the person of the debtor. The creditor cannot, however, demand any other remedy unless he produces the security, so that it may be realized for the satisfaction of the debt.

The pledgor's proprietary interest in the pledge being subject to the rights of the pledgee, the former's power of dealing with the property is restricted to that extent. Therefore though he can sell the property, the sale remains in suspense until it is consented to by the mortgagee and the sale-procceds will be treated as security in place of the property sold.

Suretyship

A contract of suretyship (Kafálat كفالة) consists in the adding by one person of his responsibility or liability to that of another person in respect of a demand for something.

The contract may be for the production of a person, the discharge of a pecuniary obligation or debt, the delivery of property and the like.[2]

It may be absolute, conditional or contingent on a future date.

It is of the very nature of a contract of suretyship that the creditor or obligee can call upon either the original debtor or the surety to perform the obligation, and a demand from one would not affect his right of demand from the other if the obligation remains unfulfilled. So that if the agreement be that the original debtor should be released from his obligation, it would not be a contract of suretyship, but of Hawalat or transfer of an obligation.

Any diminution of the liability of the original debtor or any concession to him accrues to the benefit of the surety, so that if the original debtor is released from the debt, the surety will be discharged and if

[1] 'Al-Majalláh', p. 116.
[2] Ibid., p. 90.

the debtor is granted time, the surety will also be entitled to time. But the reverse does not hold good. That is to say, if the surety is discharged or a concession is made in his favour, the liability of the original debtor will not be affected.

Agency (وكالة, Vakálat) consists in the delegating by a person of his business to another and in substituting him in his own place. The latter is called the Vakíl or agent and the former is called muwakkil or principal.[1] It is constituted by proposal and acceptance. It is an obvious condition of such a contract that the agent must be able to perform the act delegated to him, so that a child without discrimination and a lunatic cannot be an agent. Agency

Agency is allowed in all matters of business, such as sale and purchase, letting and hiring, borrowing, advancing money on pledge, bailments, making gifts, composition, release, admission, litigation, demanding right of pre-emption, partition, payment of debts, possession of property and the like and also for entering into a contract of marriage. But the law does not recognize any agency except in so far as it consists in dealing with the rights of the principal, that is to say, there can be no agency in torts or crimes so that the tortfeasor or criminal cannot be heard to excuse himself by saying that he acted as agent of another.

In matters of commodate loan, pledge, bailments, lending, partnership and modariba, unless the agent contracted expressly on behalf of the principal his act will not bind the principal. But in a sale, hire or composition the contract need not be expressed to be on behalf of the principal. When it is not expressed to be on behalf of the principal the latter will have the benefit of the contract, but the agent alone will be deemed to be the contracting party so far as the enforcement of rights and liabilities under the contract, is concerned. In other cases the right of enforcement will accrue both to the principal and the agent. To what extent does an agent's act bind the principal or accrue to his benefit

An agent in a suit can make admission of a claim on behalf of the principal in presence of the Judge

[1] 'Al-Majalláh', p. 235.

but not otherwise. He cannot, however, admit a claim if he has been prohibited from so doing by his principal. He is not ordinarily an agent for the purpose of taking possession of the property which is the subject of a decree in favour of his principal.

Property in the hands of an agent

The property which an agent for the purpose of sale or purchase or paying a debt or taking possession of a certain thing takes possession of, on behalf of the principal will be regarded as a trust in his hands. If the property is lost without any fault of his he would not be liable.

Agent's duty towards his principal

The agent must conform to the directions of his principal, otherwise the latter will not be bound. He must observe all the conditions and restrictions laid down by the principal. The agent in performing his commission is to do his best for the benefit of the principal. He is not, therefore, allowed to buy for himself the property which he has been commissioned to sell or to buy. An agent cannot appoint another person to do the act delegated to him without express sanction of his principal.

Termination of agency

The principal can discharge his agent whenever he likes and similarly the agent can withdraw from the agency whenever he likes, and the agency *ipso facto* comes to an end on the death of either party, or on the business being accomplished. But if the rights of others have intervened; for instance, if a debtor pledged his property and at the time of the contract or before the expiry of the time for payment of the debt, appointed an agent to sell the pledge, he cannot afterwards dismiss him without the consent of the pledgee nor will the agency in such a case lapse on the death of the principal, nor can the agent having once accepted the agency divest himself of it. Even after discharge an agent retains his authority to bind the principal by his acts so far as third parties are concerned, until the fact of such discharge is notified.[1]

Partnership

Two or more persons may combine to carry on business on condition that the capital and the profits will be shared among them. Such a combination is called

[1] 'Al-Majalláh', p. 248.

partnership in contract (shirkatu'l-'aqd شركة العقد) as distinguished from partnership in property or joint ownership (shirkaṭu'l-nulk شركة الملك).[1]

Conditions of a contract of partnership

It is of the essence of a contract of partnership that each partner should have a share in the profits so that if one is to be paid a fixed remuneration he will not be deemed a partner. Further, the share of each partner in the profits should be specified, otherwise, it would be regarded as fásid or vitiated.

Different kinds of partnership

Partnerships generally are of two kinds, one in which all the partners stand on an absolutely equal footing, in respect of their contribution to the stock, their share in the income and so on, and the other in which such absolute equality is not stipulated for. The first is called shirkatu'l-muáfaḍat (شركة المواضة) and the second is called shirkatu'l-'anán (شركة العنان). In a partnership on a basis of absolute equality each partner is a surety of the other, and an act or admission made by one binds the others without any special authority. But this is not so without a special stipulation in the case of an unequal partnership. In both kinds of partnership each partner is agent of the other in all matters coming within the scope of the partnership.

The law allows the partners to value each other's skill and labour as they like, that is to say, even if one contributes an equal or smaller share of the capital, a larger share of the profits may be reserved for him. Nor is it necessary that each partner should work himself for he may engage at his own expense other persons to do his part of the labour.

Having regard to the common stock a partnership may be of three kinds: (1) in capital (shirkatu'l-amwál شركة الاموال), that is, where each partner brings in some capital in the shape of money and all the partners contribute their labour and skill, agreeing to share the profits among themselves; (2) in labour (shirkatu'l-'amal شركة العمل), that is, where the common stock is joint labour and skill, for example, two tailors or a tailor

[1] 'Al-Majalláh', pp. 214–33.

and a dyer carrying on business in partnership; and (3) partnership in credit (shirkatu'l-wájáb شركة الوجوه), that is, where two or more persons having no capital agree to buy and sell on credit and to divide the profits. In a partnership in labour one partner or both may contribute the shop or the implements with which the business is to be carried on.

If one person contributes the entire capital and the other skill and labour it is called a partnership of mo-ḍariba (مضاربة) if they are to divide the profits between them; if in such a case the owner of the capital (rubbu'l-mál رب المال) or the other party is to take the entire profits, it would not be a partnership at all but contracts respectively of baḍá't (بضاعة literally capital) and loan (qarḍ قرض). When one partner contributes land and the other his skill and labour in cultivating such a partnership is called muzára'at (مزارعة). If there be a partnership with respect to the trees belonging to one partner, the other partner agreeing to look after and to cultivate them, it is called musáqát (مساقات).

Powers and liability of partners

As regards the powers of the partners each is regarded in law as agent of the other. But this would be so only in a limited sense in an unequal partnership in the absence of an express contract to the contrary. For instance, each partner in a partnership with capital can sell partnership goods for cash or credit but only a partner who has charge of the goods can buy goods either for cash or credit. No partner can lend partnership property except with the permission of the other, but he may borrow without such permission on partnership account. A contract, generally speaking, is to be enforced by or against the partner who was actually a party to it. The partnership goods are to be regarded as a trust in the hands of the partner who has the custody.

In an unequal partnership the loss is to be sustained by each partner in proportion to his capital, any stipulation to the contrary notwithstanding. In

moḍariba the loss will be borne by the owner of the capital alone. In a partnership in credit the partners may reserve an unequal share in the goods bought and the liability will be in proportion to such share.

Each partner may dissolve the partnership at his pleasure provided he gives notice to the others. A partnership is also dissolved by the operation of law on the happening of certain events such as the death of a partner, or his becoming a lunatic. But in the latter case the partnership will continue as between the other parties supposing there were two or more partners besides the one who has turned lunatic. Dissolution of partnership

CHAPTER VIII

FAMILY LAW

Conception of a family

THE central idea in the family law of the Muḥammadans is the institution of nikáḥ (نكاح) or marriage. It is through marriage that the paternity of children is established and relationship and affinity are traced. The Muḥammadan family is based on the patriarchal principle and there are also indications in this department of Muḥammadan law to show that the family as a social unit was evolved among the Arabs out of the larger unit of tribes.

It has been seen that, among the pre-Islámic Arabs, a woman's legal status was of too precarious a nature to have been an important factor in the conception of family life. Their social system was dominated by the tribal idea and families were regarded as so many sub-divisions of tribes. It was by the strict enforcement by Islám of the institution of marriage in social life that the tribal system was effectively changed into the family system.

But it must be borne in mind that the Muḥammadan law does not allow the conception of a family life to overshadow its fundamental principle, namely, individual responsibility and liberty. Each member of the family is endowed with full legal capacity and the law does not sanction any joint family system of holding property as is prevalent among the Hindus. Whatever authority the law vests in the head of the family is based either on contract or on necessity for the protection of those members of the family who are unable to take care of themselves. Apart from certain conjugal rights of the husband and the wife, the idea of commensality or residence in a common house does not form any part of the Muḥammadan

legal conception of a family; the family relations are founded on consanguinity and affinity.

Theory of marriage

The Muḥammadan law has ordained the institution of marriage sanctioning thereby sexual relations between two members of the opposite sexes with a view to the preservation of the human species, the fixing of descent, restraining men from debauchery, the encouragement of chastity and the promotion of love and union between the husband and the wife and of mutual help in earning livelihood.[1] The Muḥammadan jurists, therefore, regard the institution of marriage as partaking both of the nature of 'ibádat or devotional acts and mu'ámalát or dealings among men. It is founded on contract for which the consent of both the parties is essential. The relations between two members of the opposite sexes which marriage legalizes are, however, so subtle and delicate and require such constant adjustment involving the fate and well-being of the future generations that in their regulation the law considers it expedient to allow the voice of one partner more or less predominence over that of the other. This which is regarded as involving the practical subordination of one of the partners to the other is spoken of as the alienation of conjugal society (muta ﻣﺘﻌﻪ) by the subordinate partner to the predominant partner with the effect of placing the marital freedom of the one at the disposal of the other. As regards the next question, that is, which of the two partners should have the right to predominence, the law decides in favour of the husband, because generally speaking he is mentally and physically superior of the two; and some theorists would treat the dower payable to the wife as consideration for the alienation of her marital freedom. The husband does not, therefore, lose his marital freedom merely by a contract of marriage. The lawgiver has, however, deemed it expedient to place certain limitations on such freedom having regard to the necessities of social life from time to time.

The Muḥammadan law undoubtedly contemplates monogamy as the ideal to be aimed at, but concedes

[1] 'Tauḍíḥ', p. 71, and *ante*, p. 95.

to a man the right to have more than one wife, not exceeding four, at one and the same time, provided he is able to deal with them on a footing of equality and justice.[1] This is in accord with the scheme of Islámic legislation which sets up certain moral ideals to be gradually realized by the community positively forbidding only such acts as must clearly be injurious to social and individual life at all times. As for the other prevalent practices and institutions of the people which did not come up to the ideal of Islám, the positive law places such restrictions, limitations and conditions on them as are calculated to remove the existing abuses. That this is so would seem to be especially clear from a comparison of the provisions of the Muḥammadan law relating to family life and also those relating to torts and crimes with the customs which in such matters prevailed in Arabia and most other parts of the world at the time of the promulgation of Islám.

It also follows from the above theory regarding marriage that the husband has a right to dissolve the marriage as by such dissolution he only gives up his own right. But as marriage is founded on contract and the above rights of the husband arise by implication of such contract, it is open to a woman at the time of marriage or subsequently thereto to stipulate for their curtailment or to get some of them transferred to herself, such as the right to dissolve the marriage.

It is of the nature of the contract of marriage that it cannot be made contingent on a future event. Nor can marriage be expressly limited for a time. The reason is that, if marriage were allowed for a limited period of time, it would fail to fulfil most of its essential purposes.

How marriage is contracted

A marriage like any other contract is constituted by proposal and acceptance and does not depend for its validity upon the observance of any religious rite or ceremony. But, according to the Ḥanafís, the proposal and acceptance must, in a contract of marriage, be witnessed by two properly qualified witnesses;

[1] See 'Tafsír-i-Mada'rik', pp. 161-2.

otherwise the marriage would be invalid. According to the Málikís the presence of witnesses is required only for the sake of publicity.

The law imposes certain restrictions on the right of a person belonging to one sex to enter into marital relations with a person of the opposite sex.

Persons between whom marriage is forbidden.

Such prohibition is in some cases of a perpetual nature as when it is based on the ground of consanguinity, affinity or fosterage. Persons so prohibited from intermarrying are called muḥárím (محرم). By reason of consanguinity a man cannot marry any female ascendant or descendant of his or the daughter of any ascendant how high soever or of any descendant how low soever, or the daughter of his brother or sister or the daughter of a brother's or sister's daughter, and so on. On the ground of affinity he is debarred from marrying a woman who has been the wife of any ascendant of his, any ascendant or descendant of the wife if marriage has been consummated, or of any woman with whom he has had unlawful connexion and any woman who has been the wife of his son or grandson. Generally speaking fosterage induces the same limits of relationship prohibitive of marriage as consanguinity.

There are again obstacles to intermarriage of a temporary character. For instance, radical difference in religion, such as between Islám which is a monotheistic religion and polytheism is a complete bar to intermarriage, but when both the man and the woman are followers of some revealed religion, the disability is only partial. Hence a Muslim cannot marry a polytheistic woman but a Muḥammadan man can marry a Christian woman or a Jewess, though a Christian or a Jew cannot marry a Muslim woman. This distinction is drawn between the case of a Muslim man and a Muslim woman because if a Muslim woman were allowed to marry a Christian or a Jew, there would be a likelihood of her being converted to the faith of her husband, while there could be little apprehension of a husband adopting the faith of his Christian or Jewish wife. This bar, as I have said, is a temporary one, for it can be got rid of by the woman embracing Islám. There is a further obstacle to intermarriage

of a temporary nature but exclusively affecting a man who desires to have more than one wife at the same time. This is expressed in the rule which prevents a man from having at the same time more than four wives or two wives so closely related to each other that if one of them had been a man, there could have been no intermarriage between them on account of such relationship. For instance, a man cannot marry the aunt or niece of his wife and the prohibition against a man combining in marriage two sisters seems to be covered by the rule. Again a woman who is observing 'iddat is forbidden to marry until such period of probation has come to an end.

Void and vitiated marriages

Marriage between persons who are permanently prohibited from intermarrying is bátíl or void, such as with a man's own sister, niece or the like and marriage between persons whose disability to intermarry is for a temporary cause, such as marriage of a woman during her 'iddat or marriage in violation of the condition requiring the presence of two witnesses, is fásid or vitiated. The author of 'Raddu'l-Muḥtár'[1] regards the marriage of two sisters at one and the same time as an instance of a fásid marriage, but it was held to be void in the case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon* (23 Cal., 130).

A bátíl marriage will be treated as if it was never contracted and thus no legal effects would flow from it. A fásid marriage, although it may be annulled by the Court when the fact is brought to its notice, is treated as capable of giving rise to certain legal effects, for instance, the parentage of the child born of such marriage will be established from the husband, he will be liable for proper dower if consummation has taken place and the wife will have to observe 'iddat on separation.

Capacity to enter into a marriage contract

According to the Ḥanafís, every person who is not a minor whether male or female, maiden or thayyiba (that is, a girl who has had sexual intercourse), is competent to contract marriage and cannot be given in marriage without his or her consent whether by

[1] vol. ii, p. 380.

the father or any other relative. The Sháfi'ís and Málikís agree with the Ḥanafís so far as boys and thayyibas who have attained majority are concerned; the former, however, hold that a minor thayyiba is competent to contract marriage and a maiden even if she has attained majority cannot marry without the consent of the guardian, while the Ḥanafís in each of these two cases hold the contrary view. Thus with the Ḥanafís, so far as the females are concerned, minority is the test whether the intervention of a guardian is necessary or not and with the Sháfi'ís the test is whether a girl is a maiden or thayyiba. The difference between the two Schools on this point though not perhaps of much practical significance, involves a question of principle. The Ḥanafís allege that the Sháfi'í's refusal to acknowledge the right of a maiden of full age to contract marriage of her own will amounts to a breach of a cardinal principle of Muḥammadan law, namely, that the legal status of a grown-up female is as complete as that of a male.[1]

Guardianship for purposes of marriage is allowed because of necessity, for a proper and suitable match may not always be available.[2] It is extended by the Ḥanafís to the father and grandfather and other relatives; among the latter the order of priority is the same as that in respect of their right to inherit. But when a minor is given in marriage by a guardian other than the father or the grandfather, he or she can, in the exercise of what is called the option of puberty (Khayáru'l-bulúgh خيار البلوغ), refuse to be bound by the marriage and ask the Court to pass a decree annulling the marriage. This absolute option does not exist in the case of a marriage contracted by the father or the grandfather in whose favour the law rises a presumption that they must have acted in the best interests of the minor.[3]

Guardianship for purposes of marriage

The Málikís would confine the right of matrimonial guardianship to the father, whose right is

[1] See 'Sharáu'l-Viqáyah', vol. ii, p. 21, and 'Hedáya', vol. iii, p. 157, et seq. 'Al-Wajíz', vol. ii, p. 5; 'Fatḥu'l-Jalíl', p. 8.

[2] 'Hedáya', vol. iii, p. 173.

[3] Ibid., vol. iii, p. 175.

expressly recognized by a tradition and the Sháfi'ís would also recognize the right of the grandfather by giving an extended application to the words of that text. The Ḥanafís in recognizing the right of matrimonial guardianship in other relatives as well base it on what in their opinion, is the policy of the law.[1] In the absence of the father or the grandfather among the Sháfi'ís and the Málikís and of the other relatives as well, among the Ḥanafís, the guardianship for the purposes of marriage vests in the Sulṭán or the Qáḍí.

Even in the case of a marriage contracted by the father or grandfather as guardian, the presumption that it is for the benefit of the minor is not conclusive and such a marriage is liable to be set aside in certain cases, where it is plainly undesirable and injurious to the minor. For instance, according to the Sháfi'ís,[2] if a minor girl is married by the father to a person who is not her equal it will be invalid according to some jurists and according to other Sháfi'í jurists she will have the option to get rid of the marriage on attaining majority. There is a difference of opinion among the Ḥanafís as to the circumstances under which a marriage contracted by the father can be set aside. The accepted view seems to be that if the father was not a man of proper judgement and was of reckless character, and married his minor daughter to a man of immoral habits it is liable to be set aside. According to Abú Yúsuf and Muḥammad, an evidently unequal and undesirable marriage or a marriage for less than the proper dower of a minor female, or marriage for an excessive dower of a minor male if the deficiency or excess be gross, is not Ṣaḥi'ḥ or valid but Abú Ḥanífa holds a contrary view.[3]

Unequal marriages

Apart from the question of guardianship the law confers on certain relatives of a female of the age of majority to object to a marriage contracted by her with a man who is not her equal. The law recog-

[1] 'Hedáya', vol. iii, p. 175.
[2] 'Al-Wajíz', vol. ii, p. 8.
[3] See 'Hedáya', vol. iii, pp. 194–5.

nizes this power of intervention in order to save the family from social disgrace.

Equality is generally had in regard with reference to the following matters: (1) lineage, (2) character, (3) property, (4) profession, (5) status, such as of a freeman, a freedman or a slave and perhaps (6) education. The condition of equality is insisted on only with respect to the husband and not the wife.

Conjugal rights

Marriage confers important rights both on the husband and the wife against each other, subject to any especial stipulations which the parties might have entered into at the time of marriage or afterwards.

The husband has the right to insist that the wife should live in his house and afford him access, abstain from undue familiarity with strangers, obey him in all reasonable matters and be faithful to him. He can control her freedom of movement within certain limits and correct her for unseemly behaviour. This restriction upon her liberty is, however, measured by the necessities of his own right. He cannot, therefore, refuse to afford her opportunity to see her relatives. The exercise of most of his rights by the husband will be suspended if he does not satisfy the corresponding rights of the wife. Similarly, if he treats her with such cruelty as to endanger her personal safety she will not be bound to live with him. The husband has also the right, as we have seen, to dissolve the marriage at his discretion.

Under the Muḥammadan law the husband does not acquire any right to or control over his wife's property by the fact of marriage. Whatever property she had at the time of marriage remains absolutely her own and at her disposal and she is under no disability to acquire property by reason of coverture. That is to say, a woman's legal capacity is no way affected by marriage, except as regards contracting conjugal relations with others.

The husband's right to divorce or to marry another wife may be effectively though indirectly clogged by a stipulation fixing the dower at the time of marriage at a sum out of all proportions to the means of the husband as is the custom in India. It may also be lawfully stipulated in so many words, as is often done

that if the husband marries another woman the latter will be divorced at the instant of such marriage. The wife may also, as already mentioned, stipulate for power to dissolve the marriage.

The wife has a right corresponding to that of the husband to demand the fulfilment of his marital duties towards her.[1] She is also entitled to be provided with proper accommodation separate from the husband's relations and to be maintained in a way suitable to his own means and the position in life of both. If he refuses or neglects to maintain her she can pledge his credit. She has also a right if the husband has more than one wife to be treated on terms of strict equality with the others. She is further entitled to the payment of her dower. If such portion of her dower as is payable before dissolution of marriage has not been paid and she has not yet surrendered her person, she may refuse her conjugal society and according to Abú Ḥanífa she may do this even after surrender.

Dower

Mahr (مهر) or dower as it is usually translated is either a sum of money or other form of property to which the wife becomes entitled by marriage. It is not a consideration proceeding from the husband for the contract of marriage, but it is an obligation imposed by the law on the husband as a mark of respect for the wife as is evident from the fact that the non-specification of dower at the time of marriage does not affect the validity of the marriage.[2] She or her guardian may stipulate at the time of marriage for any sum however large as dower. If no sum has been specified she is entitled to her proper dower (mahru'l-míthl مهر المثل), that is the dower which is customarily fixed for the females of her family.

The wife's right to dower becomes complete on the consummation of marriage either in fact or what the law regards as such, namely, by valid retirement (الخلوة الصحيحة),

[1] 'Al-Wajíz', vol. ii, p. 20.

[2] 'Hedáya', vol. iii, p. 204; 'Kifáyá', vol. iii, p. 204; and Baillie's 'Digest', part i, p. 91.

or on the death either of the husband or the wife. In case of dissolution of marriage by the husband or of separation for some cause imputable to the husband before there has been consummation or valid retirement, the wife becomes entitled to half the specified dower and if no dower has been specified to a present called muta't (متعة). In case the separation was due to some cause imputable to the wife herself, she will not be entitled to any dower or present if there has been no consummation of the marriage. If a marriage has been annulled on the ground of invalidity, the wife will not be entitled to more than her proper dower.

Having regard to the time when it becomes payable dower may be mua'jjal (معجل), that is, immediately exigible or prompt, or muajjal (مؤجل), that is, deferred. Whether a dower should be entirely or in part exigible or deferred depends on the contract of the parties and in the absence of any contract, on the custom of the country. Even during the subsistence of the marriage the wife is entitled to demand so much of her dower as is exigible, but she is not entitled during the continuance of the marriage to demand the deferred portion of the dower.

Dissolution of marriage

The law as we have seen concedes to the husband the right to dissolve the marriage. He can, therefore, put an end to the marriage at his uncontrolled option and the wife may do the same if the husband has conferred such a power upon her. The dissolution of marriage by the husband's own act, that is, by his making a declaration to that effect in appropriate words is called ṭaláq (طلاق), which is usually translated as repudiation, divorce. The husband cannot, however, exercise the right unless he is of mature age, and possessed of understanding.

Divorce

Ṭaláq or divorce is strongly condemned by the Muḥammadan religion and it should not be resorted to unless it has become impossible for the parties to live together in peace and harmony, but once it is pronounced it is upheld as valid, although there may be no good cause for it. It is described in a precept

of the Prophet as the worst of all the things which the law permits (ابغض المباحات).[1]

It is a maxim of Muḥammadan jurisprudence that the law cannot deprive any one of his rights except for hostility to the authority of law. But if the exercise of a particular right is likely to lead to abuses the law would guard against such a contingency by imposing conditions and limitations. There are certain limitations imposed by the law upon the right of the husband to dissolve the marriage. The object of these rules is to ensure that the husband was not acting in haste or anger and that separation became inevitable in the interests of the husband and the wife and their children.

Ṭaláq or repudiation is of two kinds, raja'i (رجعي) or that which permits of the husband resuming conjugal relations and báyan (بائن) or that which separates. The former is generally translated as revocable and the latter as irrevocable or absolute. A divorce which is revocable in the inception becomes absolute or irrevocable if the 'iddat or period of probation is allowed to elapse without the husband having revoked his act either by express words or conduct.

The most approved form of repudiation (احسن) is, that the husband should pronounce the sentence once during a tuhr (طهر) or period of purity of the wife and then let the divorce become absolute by expiry of the period of probation. The next best form (حسن) is to pronounce one sentence of repudiation during a period of purity for three such periods so that on the third pronouncement the repudiation would become irrevocable. In the first form there is a greater guarantee than in the second against hasty and ill-advised action. But if divorce be pronounced while the wife is not in a state of purity or if divorce is at once expressed to be irrevocable such as the husband saying 'I have divorced thee irrevocably' or by the pronouncement of three sentences at one and the same

[1] 'Fatḥu'l-Qadír', vol. iii, p. 326.

time, the husband saying three times 'I have divorced thee' or saying at one and the same time 'I have divorced thee thrice', the result will be irrevocable divorce though the law regards a repudiation in this form with disapproval as being an innovation (bida't بدعة).

Even after an irrevocable divorce the law permits the parties to remarry, but in case the divorce was by pronouncement of three sentences or a triple divorce, the law adds as a condition precedent to reunion that the woman should be married to another man and such second marriage should have been lawfully terminated after consummation (taḥlíl تحليل) and the period of probation on account of the second marriage should have expired. The professed object of the law in adding this condition is to discourage such divorces.

It was also evidently the object of the precept of the Prophet wherein he says that in three things, namely, marriage, divorce and manumission, jesting is not allowed to dissuade men from trifling with such solemn affairs of life. The interpretation put upon the tradition, however, is that a divorce pronounced even in jest holds good and the juristic principle on which the rule is sought to be based is that a divorce regarded from the point of view of the wife means her restoration to liberty, which the law always favours. Some Ḥanafís, as we have seen, would carry the doctrine still further by force of analogy holding that divorce under compulsion is also binding. But on this question they are opposed by a formidable array of great jurists like Sháfi'í, Málik, Ḥanbal, 'Umar ibn 'Abdu'l-Azíz, Ibn 'Umar, and Qáḍí Shuraih.[1] Similarly divorce pronounced in a state of intoxication brought about by the husband's own voluntary act is also valid according to the generality of Ḥanafí jurists, but not according to Málik and Ṭaḥáwí and at least one version of Sháfi'í's opinion. I may remark that the interpretation of the law of divorce by the jurists, especially of the Ḥanafí School, is one flagrant instance where because of their literal adherence to mere words and

[1] 'Hedáya', vol. iii, p. 344; Fatḥu'l-Qadír, vol. iii, p. 344.

a certain tendency towards subtleties they have reached a result in direct antagonism to the admitted policy of the law on the subject.

Ila, Zihar

In some cases the conduct of the husband will have the effect of a repudiation, though he did not use the word ṭaláq or any other expression with the intention of dissolving the marriage. This is, when he swears that he will have nothing to do with his wife and in pursuance of such oath abstains from her society for four months. The legal effect of such conduct would be a single irrevocable divorce. This is called Ílá (ایلاء). Ílá must be distinguished from Ẓihár (ظہار) which consists in the husband expressing his dissatisfaction by comparing his wife to the back of his mother or some other female relative within the prohibited degrees of marriage. Such imprecation has not the effect of a divorce, but only makes the husband liable to make atonement (kaffárat کفارۃ) for his improper behaviour.

Dissolution of marriage by the wife

The husband, as I have said, may confer on the wife the power of pronouncing ṭaláq, and thereby dissolving the marriage. Once he has conferred such power, he cannot afterwards revoke it and it will depend upon the wife whether to exercise the power or not. Such conferment of power is called tafwíḍ (تفویض) or delegation. The delegation may be in three forms: (1) al'ikhtiár (الاختیار), the husband saying 'choose thyself' or 'divorce thyself', (2) al'am'ru bil yadé (الامر بالید), the husband saying 'thy business is in thy hands', and (3) al'mashí'at (المشیۃ), the husband saying 'if thou wishest, divorce thyself'. If the husband confers the power of dissolving the marriage on the wife in exchange for money or property, it is called khula' (خلع) or mubárát (مبارات), that is, mutual release.

Pronouncement of divorce

Divorce like any other juristic act may be effected by express words (ṣureeh) or by allusive words (kináyah), whether spoken or in writing. The word ṭaláq in its different grammatical forms is regarded as express and other expressions which may be construed

as meaning repudiation of the marriage by the husband, but are also capable of other meanings, are regarded as allusive. When express words are used no question can arise as to what was meant, but allusive expressions require construction. In cases of the latter class the husband is entitled to say whether he meant divorce or not, and his word must be accepted. Another important question which arises in this connexion is whether the language used has the effect of a single or triple divorce, and rules are laid down for determining such questions.

Separation

Apart from the dissolution of marriage by the husband or by the wife in exercise of the authority derived from him, the law allows of a marriage being dissolved in certain cases by a decree of the Court. It is called furqat (فرقة), literally separation. If a decree of separation be for a cause imputable to the husband, it has, generally speaking, the effect of a ṭaláq. If the decree for separation be for a cause imputable to the wife, then it will have the effect of fas'kh (فسخ) or annulment of marriage. The difference between the two cases mostly consists in their effect on the liability to payment of the dower or observance of the 'iddat.

For instance, if the husband charges his wife with adultery, the Court after giving certain oaths to the wife and the husband will pass a decree of separation. This procedure is called Lián (لعان). If the husband is impotent or wanting in the male organ, the Court at the suit of the wife will annul the marriage. In these cases the separation will have the effect of ṭaláq. On the other hand, if the wife in exercise of her right of puberty, or on ground of inequality gets the marriage set aside, it will be regarded as due to a cause proceeding from the wife. So also if the husband sues for annulment of the marriage on the ground of serious malformation in the wife, the decree for separation will be deemed to be for a cause proceeding from the wife. If one of the spouses apostatizes that will also be a cause for separation.

In connexion with the law of divorce it should be pointed out in fairness to the jurists that the wide interpretation which they have given to the traditions bearing on the subject was evidently influenced by their anxiety to avoid the evil of the pre-Islámic customs which empowered the husband to divorce the wife as often as he chose, which had the effect of depriving the wife of her conjugal rights, without setting her free from the matrimonial ties of a man who had ceased to regard her with affection and respect. The rules enunciated by the jurists have undoubtedly been effective in preventing the power of repudiation being used merely for purposes of oppression, but it may well be said that they have made divorce too easy. At the same time it must be remembered that the law admits of proper precautions being adopted to guard against the latter evil inasmuch as it is open to the wife or her friends either at the time of marriage or afterwards to stipulate against the exercise of the power of ṭaláq. The practical result is that the realization of the ideal aimed at by marriage in the Muḥammadan law as a bond of life-long union has been left to be achieved by the people in the course of their progressive social development in conformity to the surrounding conditions and circumstances. In India, for instance, it may be greatly doubted whether divorce among the Muḥammadans as a body is more frequent than in Europe or America, whose law permits of divorce only by the decree of the Court, while among the upper classes of Indian Muḥammadans divorce is almost unknown and I think it may be safely asserted that the cases of divorce among them are rarer than even in England. In Arabia, on the other hand, divorce, I believe, is very frequent.

I may also observe here that a similar effect of leaving many of the incidents of marriage to be settled by the contract of parties is noticeable in connexion with questions relating to monogamy. If we leave out of account that class of the people who, owing to abnormal conditions of society, are not, generally speaking, influenced by the ideals of law and

religion or by healthy public opinion, monogamy is certainly the general rule and not the exception among the Muḥammadans, while polygamy is regarded by them as a safeguard, however, undesirable in itself, against greater social evils.

'Iddat

Even on dissolution of the marriage tie whether brought about by an act of the husband or of the wife under his authority or by an event of nature such as death of one of the parties or by a decree of the Court, the marital relations cannot be said to cease altogether. In fact the affairs of conjugal partnership would not be completely wound up until a certain time called the period of probation or 'iddat (عدّة) has expired. 'Iddat literally means counting and in law it means the time during which the wife must wait after the cessation of marriage before she can marry again. 'Iddat has been ordained with a view to ascertain correctly the paternity of the child that may be born to the wife after the termination of the marriage. When dissolution of the marriage has been brought about by ṭaláq, 'Iddat will be imposed only if there has been consummation or valid retirement. The period of probation for a woman, who has been divorced, is according to the Ḥanafís the period covered by three menstrual courses and according to the Sháfi'ís and Málikís the period covered by three intervals and in the case of an old woman or of a girl of immature age it is three months. 'Iddat of a widow is four months and ten days, of a pregnant woman whether divorced or a widow the period of probation does not end until delivery. Until 'iddat is over the woman cannot marry again and she has a right to reside in her former husband's house and if she was divorced to be maintained by him.

Paternity

One important incident of the institution of marriage is that it settles the paternity (نسب) of the child born in wedlock. The provisions of Muḥammadan law in this matter are extremely liberal. There are several reasons for this. The paternity of a child determines, in the first place, whether the child is to be treated as a Muslim or non-Muslim, a freeman or

a slave. Further, if the law is not able to ascertain the father of a child, it is likely to perish for want of some person who can be made responsible for its support and maintenance. The marked leaning of Muḥammadan law in favour of legitimation is also partly due to the fact that the Arabs who were noted for their pride of birth and genealogy condemned a man whose parentage is unknown (majhúlunnusab) to considerable social disgrace and is partly traceable to the custom of adoption which prevailed among the Arabs.

The parentage of a child is determined on the principle that it always follows the marital bed (firásh). The father of a child born in wedlock is presumed to be the husband of the woman giving birth to it and a child which is born after six months of marriage and during its continuance is said to be born in wedlock. The legal effect of marriage in fixing the paternity of a child also continues according to Ḥanafís for two years and according to Málikís and Sháfi'ís[1] for four years after separation by divorce or death of the husband. These are the maximum periods of gestation according to the different schools. Any child that is born to the woman within that period is presumed to be begotten by her previous husband. But this presumption is liable to be rebutted as when the woman has married another husband and the child is born after six months of such marriage. The minimum period of gestation is six months. A child born within six months of marriage cannot, therefore, be legitimate. The husband is entitled to claim the child born in wedlock as his and according to the Ḥanafís contrary to the Sháfi'ís even if he had no access to her. If he wishes to repudiate a child so born he can only do so by the procedure of laán already mentioned. That is to say, if he swears before the Qáḍí that the child is illegitimate and fruit of adultery, the Court will pass a decree not only dissolving the marriage but declaring the child to be illegitimate.

Even if there has been a legal defect in the marriage making it fásid or invalid, paternity of the child

[1] 'Hedáya', vol. iv, p. 180; 'Fatḥu'l-Qadír', p. 180.

would be imputed to the man who begot it on the woman with whom he believed he was legally entitled to have connexion though such belief was founded on a misapprehension of the law or of facts.[1]

Acknowledgement

Even when a man whose marriage with the mother of a child is not proved acknowledges him as his, the law will establish the paternity in him provided the child is of discretion and accepts the position and there is nothing in the circumstances to make such relationship impossible or to disprove it. For instance, if the respective ages of the man acknowledging and the person acknowledged be such that it is physically impossible that the latter could have been the child of the former or that it is shown that he is in fact the child of somebody else or well known to be so or that the person acknowledging could not have been married to the mother of the person acknowledged when the latter was born the acknowledgement will have no effect in law. Acknowledgement (iqrár إقرار) is regarded as sufficient proof of legitimacy.

Maintenance of children

Children have a right to maintenance primarily against their father. This right continues in the case of a boy until he is able to earn his livelihood or if he is disabled so long as his disability lasts and in the case of a girl until she is married. If the father be poor and the mother is well-to-do, she will be ordered to maintain the child, but she will have a right of recourse to the husband when he has sufficient means. If the mother is also poor, but the father's father or father's brother is rich, he will be directed to maintain the child, but he will be entitled to recover the expense from the father when he acquires sufficient property. If a child who has been weaned is possessed of property, then the father will be entitled to discharge the expenses of maintenance out of the property.

Of poor relatives

The poor though under some restrictions are also entitled to have recourse to their relatives for maintenance. This right is available only against men falling within the prohibited degrees of relationship and in the order of proximity of such relationship.

[1] 'Hedáya', vol. iv, p. 183.

As regards poor and disabled parents and grand parents, the son or the grandson is bound to maintain them even if he is not well-to-do. But a person is not bound to maintain any other poor relative unless he is in easy circumstance himself and the destitute relative is helpless by reason either of infancy or infirmity or is an unmarried or widowed female.

Guardianship

Guardianship or wilayat (ولاية) is a right to control the movements and actions of a person who, owing to mental defects, is unable to take care of himself and to manage his own affairs, for example, an infant, an idiot, a lunatic. It extends to the custody of the person and the power to deal with the property of the ward. The rights of guardianship of person and of property may sometimes, however, centre in different individuals. Guardianship has been instituted solely for the benefit of the minor and cannot, therefore, be said to be the absolute right of any one in the sense that the Courts will be bound to recognize it apart from the question whether in any individual case it will promote the welfare of the minor or not.

Guardianship of person

It is primarily the right of the parents to have the custody (hizánat حضانة) of the children. The law gives the custody of a child which is too young to be independent of another's help in feeding, clothing and the like—for a boy the limit is fixed at seven years and for a girl when she attains puberty—to the mother or a near female relative. The female relatives in order of precedence in this connexion are the mother's mother, the father's mother, sisters, sister's daughters, the aunts and so on.

As the right to the custody of an infant is recognized solely for the infant's benefit, an infant will not be entrusted to or permitted to remain under the guardianship of the mother or any other woman above named if, in the circumstances of her life, the law would presume that the physical or moral welfare of the child would not be safe in her care. For instance, if she has married a man who is not closely related to the minor or lives a life of open immorality or her occupation be such as to make it difficult for

her to look after the child properly the law will not give her the custody.

After a boy has attained his seventh year or a girl has attained puberty, the right to his or her custody belongs to the father, subject of course to the consideration of the welfare of the child, because at that age they have to be educated and require such protection as women are not expected to give. The father is also entitled to make provision for the custody of such a child after his death by appointing a proper guardian or executor in that behalf. Failing the father or his executor the paternal grandfather has the right of custody and failing him other agnates. In the absence of any proper natural guardian the care and custody of a minor devolve on the Court.

Guardianship of property

The right of guardianship with respect to a minor's property belongs, in the first place, to the father, and on his death it devolves on his executor if he has appointed one, and on the latter's death to his executor. In their absence the guardianship of property belongs to the grandfather and then his executor. Failing them the Court is charged with the superintendence of a minor's property.

The guardian is entitled to hold the property of the ward and to manage it as people of ordinary prudence manage their own affairs. He can do all acts on behalf of the ward which are entirely beneficial to the latter, such as acceptance of a gift, and the like and he is not entitled to bind the ward by any act which is absolutely injurious to the latter's interest so that the guardian cannot make a gift, a wáqf or a testamentary disposition of the ward's property, nor pronounce divorce on behalf of the ward. As regards transactions which may be profitable or may result in loss, such as sale or purchase, the guardian can enter into them and such transactions will be binding on the minor unless they have resulted in a gross and evident loss in which case according to Abú Yúsuf and Muḥammad whose view on this point seems to have been accepted in preference to that of Abú Ḥanífa the transactions will be set aside.

Inheritance

One important branch of the family law of the Muḥammadans is that relating to inheritance. The death of a person brings about a transfer of most of his rights and obligations to persons who are called his heirs and representatives. The transmissible rights include all rights to property, usufruct, rights connected with property, many dependent rights, such as debts and choses in action, rights to compensation, etc., and the transmissible obligations are, generally speaking, those which are capable of being satisfied out of the deceased's estate. What is left after the last needs of the deceased have been satisfied, namely, after the payment of his funeral expenses and the discharge of his obligations and debts is to be distributed according to the law of inheritance.

The rules regulating inheritance in the Muḥammadan system are based on the principle that the property which belonged to the deceased should devolve on those who by reason of consanguinity or affinity have the strongest claim to be benefited by it and in proportion to the strength of such claim. The deceased may, however, leave behind more than one person so related to or connected with him that it would be difficult to say with regard to any one of them that his claim should altogether supersede that of the others. It is laid down in the Qur'án 'of thy parents and sons thou dost not know which of them are the nearest and of most benefit to thee.'[1] The Muḥammadan law in those cases distributes the estate among the claimants in such order and proportions as are most in harmony with the natural strength of their claims. I propose here to set out the important rules of this scheme of succession, which is a most elaborate and scientific attempt to adjust the claims of the different relatives of a deceased person on an equitable basis.

Obstacles to succession

There are certain impediments to succession—(1) slavery, because a slave being himself the property of another as I have mentioned elsewhere, cannot hold property at all; (2) homicide, so that a person killing

[1] 'Qur'án: Súratu'n-Nisá''.

another does not inherit from the latter; (3) difference of religion; (4) difference of territorial jurisdiction (دار) either actual or constructive, so that a subject of a non-Muslim country cannot inherit from a non-Muslim subject of the Muslim State, nor a non-Muslim sojourner in the Muslim State from a non-Muslim subject and vice versa.

Different classes of heirs

Of the heirs there are some whose shares or portions have been fixed in the Qur'án. These are called Aṣḥábu'l-farà'iḍ (اصحاب الفرائض) or 'sharers' as commonly translated. They are altogether twelve in number, four males and eight females: father, father's father how high soever, half brother by the mother, the husband, the wife, daughter, son's daughter how low soever, full sister, consanguine sister, uterine sister, mother and true grandmother, that is, grandmother in whose line of relationship to the deceased no false grandfather intervenes. True grandfathers are those between whom and the deceased no female intervenes; other grandfathers are called false grandfathers.

Sharers

The shares of the 'sharers' in the inheritance are either one-half, one-fourth, one-eighth, two-thirds, one-third, or one-sixth. The husband has one-fourth when there is a child or son's child how low soever and one-half when there is no child or son's child; the wife has one-eighth when there is a child or son's child and one-fourth when not; the daughter's share is one-half when only one and no son, and if there are two or more daughters and no son, they take two-thirds between them; the son's daughter takes one-half if only one and there is no child or son's son; if there are two or more son's daughters they take two-thirds when there is no child or son's son, and the son's daughter takes one-sixth when there is one daughter or a higher son's daughter and no son; the sister takes one-half when only one and there is no son or son's son how low soever, father, daughter, son's daughter or brother and if there are two or more sisters, they take two-thirds under the same circumstances; the consanguine sister takes one-half when only one and there is no son, consanguine brother

or sister, if there are two or more consanguine sisters under the same circumstances they take two-thirds and the consanguine sister takes one-sixth when there is one full sister but no son, etc., or consanguine brother; the mother's share is one-sixth when there is a child or son's child or two or more brothers or sisters and one-third when not, but she takes one-third only of the remainder after deducting the wife's or the husband's share when there is wife or husband and the father; the true grandmother has one-sixth when she is not excluded; the father takes one-sixth; the grandfather's share is one-sixth when he is not excluded and the uterine brother or sister gets one-sixth when only one and no child or son's child, father or true grandfather, and if there are two or more of them they will get two-thirds in the same circumstances.[1] Under certain circumstances some of the sharers become residuaries or take both as sharers and residuaries.

Residuaries The next class of heirs are called 'aṣba (عصبة) which is ordinarily translated as 'residuaries', because they take the residue after such of the sharers as are not excluded have been satisfied. The residuaries are of three kinds: (1) residuary in his own right, (2) residuary in another's right, and (3) residuary with another. To the first category belong all male relations in the chain of whose relationship to the deceased, no female enters. They are divided into four classes: (1) parts (juz جزء) of the deceased, that is, his sons and grandsons how low soever then, (2) roots (aṣl اصل) of the deceased, that is, his father and grandfather how high soever, (3) parts of the father of the deceased, that is, brothers, brothers' sons how low soever, and (4) parts of the grandfather of the deceased, that is, paternal uncles and their sons how low soever. Residuaries in another's right are those females who as sharers are entitled either to one-half or two-thirds and who become residuaries, if they coexist with their brothers. For instance, if the heirs of a deceased person are his widow, brother and sister, the widow will get one-

[1] Rumsey's 'Law of Inheritance', pp. 17-21.

fourth and of the remaining three-fourths, the brother will get two portions and the sister one portion as residuaries. A residuary together with another is a female heir who becomes residuary because of her co-existing with another female heir, for instance, when there is a sister along with a daughter. Besides residuaries by consanguinity there are residuaries for especial cause, namely, patrons of freemen. If there be no residuary then the residue returns to the sharers by consanguinity in proportion to their shares.

Distant kindred

The next class of heirs are known as (dhaui'l-arḥám ذوي الارحام) or distant kindred. They include all relations who are neither sharers nor residuaries; they inherit only if there are no sharers or residuaries. Sháfi'ís and Málikís, however, do not include such relations in the category of heirs at all.

The distant kindred are divided into four classes: (1) those that are descended from the deceased, for instance, children of daughters and children of sons' daughters, (2) those from whom the deceased is descended, for instance, the excluded grandfather or grandmother, (3) those that are descended from the parents of the deceased, namely, the sisters' children and the brothers' daughters, and (4) those that are descended from the grand parents of the deceased, namely, paternal aunts, maternal uncles and aunts. Among heirs of this category succession is regulated in the order of the above classification.

Other heirs

The next class of heirs in the order of succession are mawla'l mawalát (مولي الموالاة) or successor by contract, that is, a person with whom the deceased entered into a contract that he would be his heir, such person undertaking on his part to pay any fine or compensation to which the deceased might become liable. Then a person whom the deceased had acknowledged as a relation through another. If there be no heir of any of the above classes, then the estate goes to the person or persons to whom the entirety has been left by the deceased's will, otherwise to the public treasury (baitu'l-mal بيت المال).

Exclusion

Then in order to regulate the number of relations who might inherit together the doctrine known as that of exclusion (ḥujub حجب) is applied. There are some persons, however, who are never totally excluded; the son, the father, the husband, the daughter, the mother and the wife. Exclusion may be sometimes partial. Exclusion is based on two principles: firstly, a person who is related to the deceased through another is excluded by the presence of the latter, for instance, the father excludes the grandfather, brother, and sisters and the son excludes the grandson, and this principle is extended among the residuaries so as to give preference to the proximity of degree, for example, a son excludes another son's son; secondly, the nearest in blood excludes the others, hence a relation of full blood always takes in preference to a relation by the father only, for instance, a brother excludes a consanguine brother or sister. To the first rule there is one exception, namely, that the mother does not exclude brothers and sisters from inheritance and the second rule is subject to the exception that uterine relations are not excluded on that ground. A person who is himself excluded may exclude others. It is also a general rule that when there is a male and a female heir of the same class and degree the latter will take only half of the former.

CHAPTER IX

TORTS AND CRIMES

SECTION I—TORTS

Distinction between torts and crimes

THE line which divides the two kinds of wrongs, torts and crimes, is sometimes very narrow or as the Muḥammadan jurists put it there are some matters in which the rights of the public and of individuals are combined. The test is, to whom does the law grant the remedy, the public or the individual. If to the latter, the wrong which gave rise to the remedy will be regarded as a tort, and, if to the former, it will be called crime. I shall deal with torts first which mostly arise from infringement of a man's rights to the safety of person, to freedom of action and to protection of property.

Prevention and self defence

I may here mention that the law does not require a person whose right to the safety of person or property is attacked to wait until the harm has been done, but allows him under certain conditions to prevent and to repel the attack by defending himself or his property. The principle on which the right of self-defence (دفع) is based in Muḥammadan law is that, when a man takes up arms against another, he loses the protection of law. This right is available not merely to the person whose life or person is threatened, but also in certain cases to the bystanders. The extent of the right is measured by the necessity of the occasion, so that a person exercising it is not allowed to inflict, if he can avoid it, more harm than is required for warding off the threatened injury. Similarly, if the person threatened can have recourse to the assistance of law in time to prevent the harm, he cannot take the law in his own hands. Otherwise, the law allows a man even to inflict death for the

protection not only of his life and limb but even property; for instance, if a thief runs away with the stolen property at night the owner is entitled to follow and to kill him if necessary in order to rescue it.[1]

On the same principle in cases of trespass or nuisance on land, the owner of the property has a right to prevent or to abate it himself. For instance, he may remove an erection made by his neighbour projecting over his land and occupying any portion of the space upwards. For similar reasons a member of the public is entitled to have any projection over a public road removed, because every one has a right to use it and no one has a right to the exclusive user of the road or of the space above it.[2]

The law also confers power on individual citizens to prevent the commission of certain offences which are punishable by the State as being an infringement of the right of the community. That is to say, when a person sees that such an offence is about to be committed, he may take the law in his own hands but only so far as it may be necessary to prevent its commission.

Different kinds of tort

The Arabic word for torts generally, is janáyat (جنايۃ), but the word janáyat is mostly applied, in the parlance of lawyers, to injuries illegally inflicted on the human body whether such injuries have caused death, grievous hurt or merely simple hurt. Torts with reference to property may either be in the nature of usurpation or appropriation (ghaṣab غصب) or destruction or damage (talaf nuqṣán تلف نقصان). Infringement of a man's right to freedom of action is caused either by coercion of his will (ikráh اكراہ) or by misleading his judgement, that is, by fraud (taghrir تغرير).

These rights, subject to such modifications as may be induced by a defect in legal capacity as mentioned elsewhere, are inherent to the status of every human being and generally speaking the liability of a person violating them is absolute and unqualified.

[1] 'Hedáya', vol. ix, pp. 166–7.
[2] Ibid., pp. 289–40.

Injuries to person and property

The principle is that the law looks to the loss caused to the person injured and is not, as a general rule, concerned with the moral culpability of the person by whose act it is caused. Thus if injury to a man's person or property is caused directly by an act of another person without the intervention of any other extraneous cause (al-itláf mubasharatun الاتلاف مباشرة), the law holds the latter responsible whether such act was intentional or accidental. Nor would it make any difference if the person who caused the loss happened to be an infant or a lunatic.

But suppose the injury or loss was the combined result of two or more causes (al-itláf tasabbuban الاتلاف تسببا), the question then arises to which of the causes will the loss be attributed in law. In this connexion one must bear in mind the different significations of the technical terms effective cause, preparatory cause and condition as already explained.

Principles of liability

When the two causes preparatory and effective are both acts of free agents but independent of each other, the general rule applies fastening liability on the person whose act is the immediate or effective cause of the loss. For instance, two witnesses swear before the Qáḍí that the husband of a certain woman had conferred on her the power to dissolve the marriage and two other witnesses swear that she subsequently exercised such power, and the Qáḍí thereupon passes a decree declaring the marriage to be dissolved. Afterwards if both sets of witnesses retract their testimony admitting that they swore falsely, the testimony of the witnesses who deposed to the exercise of the alleged power would be regarded as the effective cause of the Qáḍí's decree, and they would be liable for the wrong. But if one of the two persons each of whose acts is the cause of the loss is morally culpable and the other acted as an innocent agent, the responsibility will be fastened on the former and not on the latter; for example, a man hires labourers to dig a well in the ground of another and the labourers do so without knowing that the ground belongs to a third person, the employer of the

labourers will alone be liable; a man orders another to kill a particular animal and the latter thinking that the animal belonged to the person giving the order kills it, here, though the person killing the animal will, in the first instance, be liable, he will have a right of recourse against the person giving the order.[1]

Coercion

If the immediate cause was not the act of a free sentient agent, but was brought about by an act of a human being, the general rule is, that the loss will be imputed to the latter. For instance, if a man collects water on his land and then discharges it on his neighbour's land causing damage thereby, the former will be held responsible for any loss which might have been suffered by the latter. The rule, however, is not absolute and is subject to certain necessary limitations.

For instance, if a person does something in the ordinary exercise of his rights, he will not be held to insure the safety of the person and property of other persons exercising similar rights and will not, therefor, be responsible for any injury which may result in consequence of the act. A Muslim suspends a chandelier in a mosque of the locality in which he lives as a pious gift, and it happens to come down and kill one of the worshippers, no liability would attach to him, because he had a right as an inhabitant of the locality to enter the Mosque and to decorate it if he so desired.[2] *A fortiori* if a person does something on his own land, as for instance, lets his cattle graze thereon or digs a well and a person entering upon such land unware of any danger meets with injury being hurt by the cattle or by falling into the well, the law will not ordinarily hold the owner of the land liable.

But if a person in the exercise of a right does an act which involves risk to the person or property of others who are at the place where the act is done by virtue of a similar right in themselves, he will be held to insure the safety of those other persons. For

[1] 'Hedáya', vol. ix, p. 247.
[2] Ibid., vol. ix, p. 250.

instance, if a man carries timber along a public road and the timber falls on a passerby and causes damage to his person or property, he will be held responsible in damages.[1] In all such cases the question to be considered is whether in its particular circumstances the man doing a lawful act was under an obligation to take care or not. If the act in itself was wrongful, the person doing it will always be held to have been acting at his own risk. For instance, a public road is meant for traffic and any other use of it amounts to trespass. Hence, if a man makes a projection on a public road and the projection falls on a passerby and injures him or damages his property, the owner of the projection will be responsible.[2] But if a man rides on a public road and his horse kicks at a passerby and kills him, he will not be held responsible; on the other hand, if a man ties his horse on a public road and it kills a passerby, he will be liable for damages.

Sometimes injury to a person may have been due to a cause proceeding from another, but the person injured could have avoided it if he had used ordinary care. For instance, a shopkeeper sprinkles water on the portion of the public road in front of his shop, and a passerby, who, if he wanted, could have avoided that part of the road, chooses to walk over it and falls down and injures himself, the shopkeeper will not be held responsible, because the injury is due to the man's own act.[3]

Coercion

Coercion whether exercised by threats of violence or confinement or by actual application of force is an infringement of a man's right to freedom of action. In another place we have considered the effect of coercion on the validity of the act done under its influence and the responsibility of the doer of the act. Let us now see how Muḥammadan jurists regard the responsibility of the coercer towards the person coerced and any third persons who have been affected by the act. The question has to be considered with reference to acts of utterance and conduct.

[1] 'Hedáya', vol. ix, pp. 249-50.
[2] Ibid., vol. ix, p. 240.
[3] Ibid., vol. ix., p. 245.

The general principle according to the Ḥanafís is that if the act was done under duress of the extreme form, the volition of the coerced would be regarded as vitiated and if such act can be properly attributed to the volition of the coercer then the law would treat the volition of the former as if it did not exist and refer the result to the volition of the latter. In other words the person coerced would be regarded as a tool or instrument of the coercer. On the other hand, if what has been done is not capable of being imputed to the coercer, he will not be held responsible. In the last category are included all legal acts constituted by utterance, such as contracts and admissions, because it cannot be conceived that one person, namely, the coercer should pronounce them, through the mouth of another, namely, the coerced. But if loss has been caused to the doer by his being coerced to do an act of utterance, the coercer will be liable to compensate him. Suppose A coerces B to manumit his slave, the slave will be emancipated as the act is irrevocable, but A will be liable to B for the price.

As regards acts belonging to the class of conduct, that is, wrongs, there are some with respect to which it may be said that a person doing them under coercion acted as the instrument or tool of the coercer and there are others with respect to which this cannot be predicated. The principle according to Ḥanafís is this, if the extending of the liability for the act to the coercer, will necessarily involve a change in the subject-matter of the wrong, the law will not allow such extension, otherwise it will. Take the case already cited in which X is compelled by Y to sell and deliver possession of his property to Z. The sale itself being a disposition requiring consent is invalidated by coercion, but the delivery of property to Z cannot be imputed to Y, for he not being the proprietor delivery on his part would not be of the thing sold but of something unlawfully taken.[1] If the imputing an act to the coercer would not involve a change in the object to which the act relates then the coercer alone would be

[1] 'Talwíḥ', p. 796; and *ante* p. 235.

fixed with liability. This would be so in all cases of torts against the person or property of a third party. For instance, if A compels B to murder C the deceased C's heirs will have a right of retaliation against A alone. The reason is that a man's own life is dearer to him than that of any other's and as B killed C to save himself he cannot be said to have acted intentionally. This is the opinion of Abú Ḥanífa and Muḥammad, while according to Zufar the person whose hand actually caused the death will be liable to retaliation. In the opinion of Abú Yúsuf, however, the extreme sentence will not be enforced either against the coercer or the coerced but that the latter will be made to pay blood-money. The rule according to Sháfi'ís is that the coercer would be liable in all cases where the act is capable of being imputed to him, such as acts of conduct and not when the act cannot be imputed to him, such as acts of the class of utterance which, if done under coercion, are according to them altogether void and so no loss can be said to have been caused by the coercer.

Fraud

I have already referred to the principles governing the validity of acts induced by fraud. Here I wish to indicate the general principles on which the responsibility of the person committing a fraud towards the victim of the fraud is based. In many cases questions as to whether the conduct complained of was fraudulent or whether it influenced the action of the person complaining of it, and if so whether such conduct was the cause of any loss would not arise under the Muḥammadan law inasmuch as it lays down positive rules as to the circumstances in which a party to a transaction who has suffered loss should be relieved. For instance, if in a transaction of sale, as already pointed out, one party suffers loss owing to some fact not being known to him, such as a defect in the goods bought, the Muḥammadan law would at once relieve him without inquiring whether he acted with his eyes open or whether the other party actively and knowingly practised any deception on him. In other cases the law is based on two principles: if any loss of property has been caused to the victim of a fraud, he is

entitled to compensation from the wrong-doer, and a person committing a fraud should not be allowed to derive any advantage from his own wrong.

Remedies

The remedies for torts as recognized by the Muḥammadan law are retaliation (Qiṣá'ṣ, Qawd قود قصاص) and compensation (diat, irsh, دية ارش) in cases of infringement of a man's right to the safety of person; and restitution and compensation are the remedies provided for the violation of a man's proprietary rights and for other wrongs of a similar character.

Retaliation was sanctioned by the usages of the people of Arabia and of most other ancient peoples and was largely in vogue in Arabia at the time of promulgation of Islám. The principle of compensation was also recognized by the Arabs. Islám, while recognizing retaliation as the basic principle of remedial right, favours compensation as being a principle which is most consistent with the peace and progress of society, and lays down rules for the purpose of confining retaliation within the narrowest possible limits. The theory set up is, that retaliation is not solely a private right, but that the right of the public is also mixed up in it. Hence the State takes charge of its supervision and imposes strict conditions with a view to prevent the injury caused to the wrong-doer being in excess of what was inflicted by him.

Retaliation is allowed only in cases of wilful destruction of life or limb or of such bodily injury as is capable of definite ascertainment. It consists in the infliction by the person injured or by his heirs in case he is dead, of similar injury or death on the wrong-doer. Suppose A has wilfully destroyed a limb of B's, or made it useless by the injury he has inflicted on B, the corresponding limb of A may be destroyed in retaliation, that is, a hand for a hand, an eye for an eye, a tooth for a tooth, and the like. On the other hand, if a person has caused fracture of another man's bone, retaliation will not be sanctioned, for it is not possible to be sure that the injury to be inflicted in return would not exceed what has been suffered and there is always a risk to life. No such difficulty

arises in the case of murder for one life in the eye of law is equivalent to another. According to Ḥanafís the life of a slave stands on an equal footing with that of a freeman, of a woman with that of a man, of a non-Muslim subject with that of a Muslim.

The law, though it recognizes retaliation in theory, discourages this form of remedy in every possible way. For example, if there be the least doubt as to the wilful character of the offence or the proof retaliation will not be ordered.

Retaliation being the right of the person injured or of his heirs, they can compound with the offender for money, or, if they chose, pardon him. Whenever retaliation for murder or hurt is compounded, the money payable as consideration can be realized only from the offender himself. So also when compensation is ordered in cases where there is a doubt as to the wilful nature of the homicide. Similarly, when the hurt caused has not resulted in death, the wrong-doer alone can be called upon to pay compensation.

But when death has been caused by negligence or mistake, the offender's Akilas (عقيلة), that is, his tribe or regiment or the inhabitants of the town to which he belongs, are to pay the blood-money to the heirs of the deceased. The reason is, that it is the duty of a person's Akilas to watch over his conduct and the law presumes that the wrong-doer would not have acted in the way he did unless they neglected their duty. On the same principle if a dead body is found in a certain locality with signs of violent death on it, the heirs of the deceased are entitled to call upon fifty inhabitants of the place whom they may select to take the oath that none of them killed him (قسامة). If they take the oath then all the inhabitants will have to pay blood-money; otherwise they will be imprisoned. Similarly, if a dead body is found at the door of a man's house, he will be given the oath and if he swears that he did not kill him, his Akilas will have to pay compensation. Here we have distinct traces of the impression left by the Arab tribal system on the Muḥammadan law.

The scales both of blood-money and compensation are in many cases fixed according to the nature of the injury and the loss sustained and the culpability of the acts causing it.

As I have already indicated, the provisions of the Muḥammadan law relating to retaliation have mostly a theoretical interest, showing that the Muḥammadan Jurisprudence recognizes retaliation to be the original principle of remedial rights. Otherwise retaliation as a remedy has long been unknown in the Muḥammadan world and having regard to the strict conditions with which the law hedges round this form of remedy, it must be in rare cases that it could be available. Further, nowadays in Muḥammadan countries wrongs against human life and body are no longer treated merely as torts, but are punished as crimes, and apparently this would be justified on the ground that by wrongs of this category the interest of the community in the preservation of peace and order is seriously interfered with.

As regards remedies for other wrongs, restitution may be either by return (radḍ رد) of the thing, subject of the wrong or by delivery of a similar article (ii'tái miṣlihi اعطاء مثله). The first is the proper remedy in cases of usurpation or wrongful appropriation of all properties of the nature of dissimilaters, but if in such cases the property cannot be restored or if the article in respect of which a wrong has been committed was of the nature of similars, the defendant will be compelled to deliver a similar article to the plaintiff. The wrong-doer is further liable for all the produce or profits derived by him from the property not only in the opinion of the Sháfi'í and Málikí jurists, but also of the modern lawyers of the Ḥanafí School[1] in spite of the dictum of Abú Ḥanífa to the contrary already mentioned.

Then rules are laid down to meet cases in which an usurper has made improvements on the property; the principle on which such rules are based is, that

[1] 'Al-Majalláh', pp. 142-4.

both the owner of the property and the wrong-doer should, as far as possible, be restored to their former positions. Rules are also laid down for the assessment of damages in cases of destruction of, or loss caused to, property.

SECTION II—CRIMES

When certain primary public rights are violated the wrong is called máa'si'at (معصيّة), that is, crime or offence; and it gives rise to certain substitutory public rights in the form of uq'bát (عقوبات) or punishments. Criminal offences relate mostly to property, human body, reputation, religion, the state, public peace and tranquillity, decency or morals.

Punishments are divided into two classes: one of which is called ḥadd (حد) and the other táa'zír (تعزير). Ḥadd means measure, limit, and, in law, it means a punishment, the measure of which has been definitely fixed. In táa'zír, on the other hand, the Court is allowed discretion both as to the form in which such punishment is to be inflicted and its measure.

Ḥadd

Ḥadd used to be prevalent in Arabia at the time of the promulgation of Islám,[1] and the Muḥammadan law, while confirming it as the extreme punishment for certain crimes, has laid down conditions of a stringent nature under which such punishments may be inflicted. These rules are so strict and inflexible that it must be only in rare cases that the infliction of ḥadd as of retaliation would be possible, and, in fact, there are only a few instances known in which ḥadd has been inflicted. The department of the law relating to ḥadd has merely a historical interest and is typically illustrative of the principle of Islámic jurisprudence, namely, not to interfere with the customs and usages of the people in such matters except so far as it may be necessary to safeguard against abuses and oppression and to let the new principle take the place of the old rule slowly and along with the advance of public opinion.

[1] 'Hedáya', vol. v, p. 25.

Punishments by way of ḥadd are of the following forms:—Death by stoning, amputation of a limb or limbs, flogging by hundred or eighty strikes. They are prescribed respectively for the following offences:—Whoredom, theft, high-way robbery, drunkenness, and slander imputing unchastity.

I may here mention some of the more important limitations and conditions under which the Muḥammadan law allows the infliction of this form of punishment. The principle underlying them, is that any doubt would be sufficient to prevent the imposition of ḥadd. For instance, such doubt may arise from the nature of the authority applicable to the facts of a particular case or from the character of the evidence or from the state of mind of the accused person, that is, his knowledge of the law or facts, or the state of his will at the time of commission of the offence charged against him. If there be a show of authority, though not of a sound character against the accepted law which declares a particular act to be punishable with ḥadd, this is treated as a doubt sufficient to prevent the imposition of such a sentence, even if the accused himself did not entertain any doubt on the point. This is called error or doubt with respect to the subject of the application of law (shubhatu'l-maḥal شبهة المحل). Even when an offender misconceived the law in a case where there is no foundation for such misconception, but he actually believed that what he was doing was not an offence, the sentence of ḥadd will not be enforced against him. This is called doubt or error with respect to the act (shubhat-ul-fa'il شبهة الفعل).

In certain cases, such as an offence of whoredom, some jurists go so far as to recommend to a man who has seen it committed not to give information or evidence, though if he chooses to do so his testimony will be admitted, provided he possesses the qualifications of a witness. I may mention that the policy of law in connexion with this offence is to punish only those offenders who defy public decency and openly flaunt their vices. Hence it is, that four male eyewitnesses

are required for its proof. Even if they are forthcoming which is hardly to be expected, the Magistrate is asked to scrutinize their testimony closely in order to see if they are not mistaken, and to allow them to retract what they have deposed to. Furthermore, if there has been any delay in the witnesses coming forward and giving their evidence, that circumstance in itself is held sufficient to raise a doubt.

Táa'zír may be inflicted for offences against human life and body, property, public peace and tranquillity, decency, morals, religion and so on; in fact the entire criminal law of the Muḥammadans (as-siásat ush-shara'i السياسة الشرعية) as prevalent at the present day is based on the principle of táa'zír. Taa'zir

The nature of the sentence to be inflicted by way of táa'zír for particular kinds of offences may be regulated by the head of the State who has absolute discretion in the matter. The objects of táa'zír are the correction of the offender and the prevention of the recurrence of the crime, and it is left to the discretion of the Magistrate to determine, in view of the circumstances of each case, the sentence by which the objects of the law would best be achieved. He is to take into account in awarding punishment, the nature of the offence and the circumstances under which it was committed, the previous character and the position in life of the offender and so on. The range of this form of punishment extends from mere warning to fines, corporal chastisement, imprisonment and transportation.[1]

[1] 'Raddu'l-Muḥtár', vol. iii, p. 194.

CHAPTER X

PROCEDURE AND EVIDENCE

Preliminary observation

THAT department of the Muḥammadan legal system which regulates the procedure of the Courts, relating to the trial and proof of claims affords a peculiarly interesting study. Here, as in the other departments, the usages of the people of the age are not altogether ignored, but are to a certain extent still recognized as a sort of ground work on which to base the provisions of a scientific system of procedure. The Muḥammadan law requires that a properly appointed judicial officer called Qáḍí should decide upon the claims of the disputants but, if the requisite number of witnesses testify in support of a claim, the Court must, as a general rule, accept such testimony and decree the claim, a rule which reminds us of the age when witnesses were, in fact, judges of the cause. A new principle is, however, established, namely, that the object of testimony is to furnish information of a fact, and rules are introduced in order to give effect to that principle. Similarly, sanctity is still attached to an oath, but an oath is regarded as a guarantee of truth and not a conclusive test of the nature of an ordeal. The most noteworthy feature of this part of the system lies in the elaborate rules which have been laid down for the purpose of guiding the Court in determining the general credibility of a witness and the truth of his statements in order to guard against the possibility of the Court being misled by his testimony. Attempts are also made to preclude the possibility of the Court being called upon to decide between the claims of conflicting testimony. In cases where the parties make contradictory allegations and each desires to support his own allegation, rules are laid down as to whose evidence is to be preferred.

The cardinal principle underlying the Muḥammadan law relating to evidence is that a decree or order of the Court should be based as far as possible on certainty and not on conjectures. Those who are familiar with the modern system of procedure would be inclined to think that these rules, which leave little or no discretion to the Court in judging of the truth or credibility of testimony, however much they might eliminate uncertainty, are likely to have the effect in many cases of defeating their own object, namely, a right decision of the claim. On the other hand, it might be said that the Muḥammadan rules of procedure ought to lead to a speedy settlement of claims, an end which the rules of some of the modern systems of procedure are ill-calculated to achieve.

The right which the Court may be asked to enforce would be either a private or a public right. In the first case it is for the individual or individuals who complain of the wrong to seek the remedy and in the latter case the representative of the State or his agent would be the claimant. The rules are substantially the same in both classes of cases, with only such variations as are clearly called for by the difference in the character of particular claims.

Selection of the proper Court

The person who wants his claim to be heard must first of all select the proper Court, that is, the one which has jurisdiction to hear the suit. But this is a more or less simple affair under the Muḥammadan system. Except so far as the jurisdiction of a particular Qáḍí may have been limited by his order of appointment as regards the class of cases he is to try, a plaintiff is entitled to institute his action in the Court within whose local jurisdiction he and his witnesses reside. And it would make no difference in this respect if the subject-matter of litigation, for example, land be situated elsewhere or the person against whom the claim is made resides within the jurisdiction of another Qáḍí.

Definitions of claim, plaintiff, defendant

A claim (dawa دعوى) is defined as a demand by a person of his right from another in the presence of a judge. The man making the demand is called Muddai

(مدعي), that is, plaintiff or claimant and the person from whom the demand is made is called Muddaá' a'laihi (مدعي عليه) or defendant. These definitions of plaintiff and defendant are as given in 'Al-Majalláh'. According to 'Hedáya' the claimant is the party who is entitled to abandon the action, if he so chooses and the defendant is the party who cannot, at his mere pleasure, avoid the suit being pursued. According to other definitions the claimant is the party who cannot succeed without proving his allegation and the defendant is the party who may have a decision in his favour without adducing evidence, and according to Muḥammad the defendant is the party who denies.

Who may prefer a claim

A claim can only be preferred by a person possessed of understanding. Hence the claim of a minor or a lunatic will not be heard except through the intervention of a guardian, nor will a suit be heard against him without such representation.

A claim must conform to certain rules

A claim must conform to certain rules. For instance, the individual or individuals against whom it is preferred must be ascertained. The thing or right claimed must also be ascertained with sufficient distinctness; for instance, if it be landed property its boundaries ought to be specified though its value need not be mentioned; nor is it necessary for the plaintiff to state how he came to acquire the property which he claims, it being sufficient for him to state that it is his property. If the claim relates to a debt he ought to say how it arose, whether on account of money lent, purchase money or wages, and so on and the amount.

What is claimed must be possible, so that if it be impossible according to our experience or judgement, for instance, if a person claims a man older than himself or one who is known to be the son of somebody else as his son, the claim will be rejected.

The statement of a claim, if self-inconsistent, is to be rejected. For instance, if a man takes steps to buy a certain property and, subsequently thereto and before making the purchase, puts forward a claim that the property belonged to him, his suit will be rejected because of inconsistency. So also if a person claims

certain property on behalf of somebody else, he cannot, at the same time, claim it for himself, but if the allegations of the plaintiff may be reconciled, his suit ought not to be dismissed for inconsistency.

A claim may be made verbally or in writing. If verbally, the Court ought to record it.

The claim must disclose a good cause of action against the person against whom it is made, the test of which is whether, if such person admitted the allegations in the claim, a decree would be passed against him. If it would, and he denies the allegation, the suit will proceed against the defendant as the opponent (Khasm خصم) of the claimant and the defendant will be called upon for an answer. Suppose, the plaintiff states that an agent of the defendant purchased certain goods from him, and he demands the price, but the defendant denies the claim, the defendant will be regarded as the opponent and the suit will proceed against him. On the other hand, if the plaintiff merely alleged that the defendant's agent purchased the article without at all alleging that he did not pay the price and the defendant denies the claim, the suit will fail and will not be heard as the plaintiff's allegations do not disclose a good cause of action against the defendant.

Joinder of parties

It may happen that two or more persons were concerned in violating, or interested in denying the right of the claimant, some more directly than the others or all in the same degree, or more than one person are interested in the establishment of the claim. Then the important question arises as to the selection of parties and the law lays down rules for the purpose of such selection. For instance, when a claim is made with respect to a specific article, the person who is in possession of it is alone to be made the defendant. Thus, if a person has taken wrongful possession of a horse belonging to another and sold it to a third person and the owner wants his horse back, he must sue the person who has possession of the animal. The person that has possession will be entitled to sue his vendor for recovery of the price

he has paid. A bailee for hire, a person having the use of an article, and a lessee, when the property in their possession has been wrongfully taken by another, may sue the wrong-doer for recovery of the article without making the owner a party.

In matters relating to the estate of a deceased person the general rule is, that one of the heirs may be a plaintiff or defendant with respect to a claim which could have been made by or against the deceased, except where the claim is for the recovery of a specific property from the estate of the deceased when the proper defendant is the person in whose possession it is and an heir who is not in possession cannot be made a defendant. The admission of an heir in possession will not, however, bind the other heirs. It is likewise competent for one of the heirs to sue on behalf of the deceased for something which was due to the latter from the defendant, in the form of a debt or similar obligation and if the claim is established, a decree will be made for the entirely of what was due for the benefit of all the heirs. The plaintiff himself will, however, be allowed to realize only his portion. Similarly, if a person has a claim for money against the estate of the deceased, he can establish his claim in the presence of only one of the heirs whether such heir is in possession of the estate or of any portion of it or not, though an admission by one of the heirs will not bind the other heirs. If the defendant heir does not admit the claim and the plaintiff proves his claim in his presence, the decree will be made against all the heirs and the other heirs will not be entitled to require the plaintiff to prove his claim against them with respect to their portions. It is, however, open to them to meet such a decree by a plea in the way of avoidance.

When there are several sharers in a specific property but not by right of inheritance, one of the cosharers cannot represent the others as defendant in a suit with respect to such property, but if he is sued alone a decree will be made against him to the extent of his share.

One member of the public may sue with respect to a property or matter the benefit from which is derived by the public generally such as a public road; and a decree in his favour will accrue to the benefit of all members of the public. In a suit with respect to a thing the benefit of which is participated in by the inhabitants of two villages, such as a stream or a common, it will be sufficient if some inhabitants of each village be made parties, unless the number of inhabitants be limited when all of them must come before the Court. If the number exceeds one hundred it is regarded as unlimited.[1]

Hearing of a claim

Rules are then laid down regulating the hearing of a claim. An important general rule in this connexion is that a claim must be heard in the presence of the parties or their representatives. The plaintiff, if he can, may bring the defendant with him to the Court at the time of presenting his claim. If he cannot bring the defendant, the Court is to issue summons to secure his attendance. If the defendant refuses to come or to appoint a representative, he is to be brought up under compulsion, and if his presence cannot be secured then a copy of the plaint is to be sent thrice to him at different times and if he still does not come it is to be notified to him that an agent will be appointed on his behalf by the Court and the claim and the evidence will be heard. If he does not still come or send his representative then the Court will itself appoint a person to watch his interests, and after hearing the claim and the evidence in the presence of such person and scrutinizing the same, pass its decision. But if the person against whom an *ex-parte* decree has been made appears afterwards and objects to the correctness of the decree, he will be allowed to meet the claim, and his defence will be heard. If his allegation is established the decree will be set aside. *Ex-parte* proceedings are not permitted in charges for offences punishable with ḥadd or retaliation because in such cases there must be no doubt as to the proof.

[1] 'Al-Majallâh', pp. 277-8.

When both the parties are present in Court, the claimant will be asked to state his case and if he has written out his claim to verify it. Then the Court will call upon the defendant for his answer, if necessary.

Reply by way of avoidance

The defendant may merely deny the claim or meet the claim by a plea in the nature of avoidance (daf'á دفع). A reply of the latter character consists of an allegation put forward by the defendant, which would be sufficient to meet the claim of the plaintiff, for instance, where a man claims from another a certain amount of money as a debt owing to him and the defendant states that he owed the money but has paid it or that the plaintiff has released him from the debt or that he and the plaintiff have settled the matter or that the amount was not a debt but the price of certain goods which he, the defendant, bought for the plaintiff. If the defendant establishes his allegation the plaintiff's suit will fail.

When the defendant disputes the claim the plaintiff will be called upon to prove his allegations. If the claimant is able to adduce admissible and sufficient evidence he will be entitled to a decree in his favour and if he is not, he can only call upon the opposite party to take the oath in support of his denial. If the opposite party thereupon takes the oath the claim against him will be dismissed, but if he refuses to take the oath, it will be decreed. The Qáḍí, according to the old rule, can base his order on his personal knowledge of the facts. But nowadays, says the author of 'Durru'l-Mukhtár', this would not be allowed because of the corruption of such officers.[1]

Procedure, where defendant resides beyond jurisdiction

According to the general rule of law, founded upon analogy the decree of a Qáḍí is only binding against a defendant who resides within his jurisdiction, but upon juristic preference which had the concurrence of the Companions and their successors and is based on necessity, if the defendant is within the jurisdiction of another Qáḍí, the plaintiff may file his suit in the Court of the Qáḍí in whose jurisdiction he resides

[1] 'Durru'l-Mukhtár', vol. iv, p. 391, also 'Raddu'l-Muḥtár'.

and his witnesses are available.[1] The Qáḍí in whose Court the suit is filed may record the evidence and also pass his order provided the absent defendant has either appointed an agent to represent him or the Court itself has appointed some one to watch his interests. But the validity of appointment by the Court of an agent for the defendant in such a case does not seem to be free from doubt. If the evidence adduced by the plaintiff proves his case the Court may record its finding and pass a decree and after properly sealing and securing the record in presence of two witnesses of unimpeachable character, remit the same with the plaintiff and those two witnesses to the Qáḍí within whose jurisdiction the defendant is to be found. If the absent defendant is not represented by an agent of his own the Court before whom the suit is filed may if it so chooses only record the evidence and forward it to the Qáḍí of the place where the defendant resides for the latter to pass order thereon in presence of the defendant.

These proceedings are allowed only in cases which involve the establishment of private rights, such as the recovery of a debt, the establishment of marriage or paternity, the recovery of immoveable property and the like and not in matters of ḥadd and retaliation.

Decrees

A decree (ḥukm, حكم) is defined as that which settles or terminates a dispute. The decree may be directory directing the judgement-debtor to give something to the judgement-creditor, or prohibitive, as when the case is decided against the plaintiff the judgement being that he is not entitled to the right which he claims. The decrees and orders of Court are to be preserved.

When a decree is made the question arises, whom does it bind. The general rule is that it binds the parties and also those whom the law allows them to represent, but not the others. As between them the matter is said to be finally settled so that it cannot be litigated afterwards except in some particular cases. Thus a decree with reference to property

[1] 'Hedáya', vol. vi, pp. 381–90.

against the man in possession of it binds him alone and those who derive title from him but not the others.[1] A decree against a person in possession declaring that the property is wáqf is, however, according to 'Ruknu'l-Islám', binding on all people, but not so in the opinion of Abú Laith and Ṣadru'sh-Shahíd.[2] And as already mentioned a decree against an heir will, generally speaking, bind the estate.

A decree of the Court may be void in certain circumstances. For instance, if it is contrary to a rule of certain law or if it is based on inadmissible evidence or if it is in favour of some person in whom the Judge is interested, such as his parents, wife or children.

Review of a decree

The law allows a review (رؤيّة) of a decree in cases where it is in violation of the principles of law; the case will then be heard over again.

Execution of decrees

When a decree is obtained by a party, the law also provides for its enforcement and realization through the agency of the Court, that is, by execution (tanfíḍ تنفيض). A decree is to be executed by compelling the judgement-debtor to comply with it and such compulsion is generally exercised by imprisoning the debtor until he obeys. If a decree can be satisfied by delivery of certain property or by the sale of the judgement-debtor's property, the Court will order such delivery or sale if the judgement-debtor does not otherwise satisfy the decree.[3] In execution of a money decree the debtor will be imprisoned if he makes delay in satisfying the decree; but if he is able to satisfy the Court that he has no property or means, there will be no order for imprisonment. If the Court finds that the judgement-debtor has concealed his property or refuses to pay the decretal amount in spite of his having sufficient means he may be imprisoned until he pays. But if the Judge thinks that the debtor has been for a sufficient length of time in imprisonment, he will be discharged.

[1] 'Fatáwá 'Álamgirí', vol. iii, p. 525.
[2] Ibid., vol. iii, p. 526.
[3] Ibid., vol. iii, pp. 501–2.

The Court is empowered to make certain ancillary orders with a view to preserve the subject-matter of litigation. For instance, it may sometimes happen that all the parties who may be interested in certain property may not be before the Court or their whereabouts may not be known. In such cases the Court secures the protection of the interests of others by appointing a receiver or by taking security from the party in possession. For instance, if a property be in the possession of a certain person and another person adduces proof that it belonged to his father who died leaving himself and a brother who had disappeared, the Qáḍí while making a decree for a moiety of the house in favour of the claimant should according to Abú Ḥanífa leave the other share in the hands of the person in whose possession it is without taking from him any security.[1] But according to his two disciples, if the person in possession of the property disputed the fact that it belonged to the deceased, it should be removed from his possession and made over to a trustworthy person to hold it on behalf of the absent heir. Ancillary orders

Similarly, when the Court makes over a runaway slave or a trove to the owner or orders maintenance for a woman who alleges to be wife of a person, who has disappeared from the latter's property, it ought to take security.

The Muḥammadan law allows the parties disputing about claims in respect of property and other similar private rights to refer their dispute to an arbitrator. Such reference is called taḥkím (تحكيم). The arbitrator must possess the qualifications which are required of a Qáḍí, for in fact he exercises the same function, but the dhimmis may appoint a person of their own pursuasion as an arbitrator. In certain matters, such as offences entailing ḥadd and retaliation, no arbitration is allowed. The arbitrator is empowered to hear the evidence and to administer oaths just like a Court, and on the award of the Arbitration

[1] 'Hedáya', vol. vi, p. 480.

arbitrator being filed in Court a decree will be passed in accordance with its terms if it does not contravene the law.

Limitation

In Turkey periods of limitation for the hearing of suits have been laid down by the order of the Sulṭán, so that if a plaintiff comes to Court after the lapse of the prescribed period his suit will not be heard.

The order is justified on the ground that as the head of the State has power under the law to make the appointment of Qáḍís limited to particular matters, an order to the effect that a Qáḍí is not to hear suits instituted after a certain time is within his competence. The learned of the present day apparently agree that such an order is in accordance with the principles of Muḥammadan jurisprudence.[1] The old theory of the law undoubtedly was that a person's right would not be lost because of lapse of time and that it was incumbent on the Qáḍí to hear his claim.[2] However that may be, the introduction of the law of limitations is a forcible illustration of the fact that law in the long run tries to find out some means of adapting itself to the circumstances of the time and Muḥammadan law is no exception to this rule.

Evidence

Juristic theory relating to testimony

Let us now consider the general features of the Muḥammadan law of evidence and the theory on which it is founded. Testimony of a witness (sha'dat شهادة) is a juristic act of the category of informations (akhabárát). When a right is originated or translated either by an event of nature or act of man, it is the State as representing the community that gives effect to such a fact when it occurs. When a fact has given rise to a right of an individual the State takes notice of it when moved by him and when to a right of its own it takes notice of it of its own motion. But in either case the official of the State in this connexion, that is, the Judge, if he himself has no personal knowledge of the occurrence which he mostly has not, has to depend upon information or evidence. This information may be supplied either by the state-

[1] 'Raddu'l-Muḥtár', vol. iv, pp. 377-9.

[2] Ibid., p. 378.

ments of some one who perceived the fact or by perceptible signs or traces accompanying or immediately following the event or by both. If the fact is of an imperceptible nature or all traces of it have been removed or disappeared, it is necessarily beyond the ken of a human tribunal. For this reason there can, generally speaking, be no evidence of a bare negation or denial.[1]

When a perceptible fact originating or translating a certain right has occurred, it is a right as well as a duty of every member of the society who perceived it to give information of it to the State. But as the witness may choose not to give a correct account of what happened and such account alone can be said to be information, the duty or obligation to give evidence is regarded as of an imperfect character so far as its enforcement by the human tribunals is concerned. False testimony is not regarded as evidence by the Muḥammadan jurists, as the very object of information is to disclose what occurred. In fact according to them false testimony or false evidence or false information would be a contradiction in terms.[2]

The necessity for evidence mostly arises when the fact in question has originated a right in some one against another and the latter denies it. And as it is in the very conception of evidence that it gives information of that fact its practical effect is to originate liability against the person of incidence taking the place of the fact itself so far as a human tribunal is concerned. The Muḥammadan jurists, therefore, say that to give evidence is the right of a person who has seen an occurrence to fasten liability upon the person against whom a right is claimed. So far as the Court is concerned its only function is to enforce such liability on a demand to that effect being made by the claimant and on being furnished with the information or proof. The right of the witness, however, is to give true evidence (shahádat شهادة), but as men do not always give correct information either from error of perception or some moral aberration, it is

[1] 'Al-Majalláh', p. 289.

[2] 'Fatḥu'l-Qadír', vol. vi, p. 446.

incumbent on the law to take precautions with a view to prevent the Court as far as possible from being misled by falsehoods.

True information alone being regarded as evidence, there can be no conflict of evidence though there may be a conflict of statements, one of which alone can be called evidence, the other being either a falsehood or an error. As regards falsehoods or errors it cannot be the right or duty of any one to place them before the Court nor can the Court admit them. Hence on principle, evidence relating to a fact must necessarily according to Muḥammadan jurists be one-sided. Having regard to these principles the law makes provisions for excluding as far as possible mistakes and falsehoods. Some of these are mere matters of procedure, but the others indicate the nature and extent of testimony as a juristic act.

Different kinds of testimony

The highest kind of oral testimony having regard to its value as a proof is known as tawátur (تواتر) or universal testimony. Such proof consists of information given by such a large body of men that our reason cannot conceive that they would combine in a falsehood or agree in an error. When testimony is not of this notorious and universal character it is called isolated or single testimony (احاد). When a man testifies against himself in support of a claim made against him, it is called admission (iqrár اقرار).

Conditions relating to capacity of a witness

Regard being had to the various reasons which induce men to tell falsehoods or the circumstances which prevent them from giving correct and reliable information, the law insists upon certain conditions as necessary for a juristic act of this class: (1) Freedom from bias and prejudice; hence, testimony is not admitted of the father in favour of the son and vice versâ, of a slave in favour of his master, of parties in support of their own case, of a person who bears a grudge against the opposite party, of a non-Muslim against a Muslim and so on. (2) General reliability of character; hence, persons carrying on certain professions of a degrading nature, such as professional dancers, persons known to be habitual liars, drunkards

or gamblers, persons who are not of virtuous character being in the habit of committing such breaches of religious injunctions as would entail ḥadd, that is, men who are fásiq (فاسق), as opposed to á'dil (عادل) or as the compilers of 'Al-Majalláh' say, those whose bad actions outweigh their good ones and unscrupulous officers employed for purposes of oppression are not admitted as witnesses. Abú Yúsuf is, however, of opinion that though a man be not of virtuous character, yet if he is of such a position in life that he is unlikely to depose to a falsehood, he ought to be admitted as a witness. (3) Maturity of the understanding and power of perception; thus, a small child, a lunatic, or a blindman in matters which have to be proved by ocular testimony, are declared unfit for giving testimony.

As a further precaution against the chances of mistake or false testimony and also because otherwise there would be the word of one man against another, testimony of a single witness is generally regarded as insufficient to prove a claim. Hence claims belonging to the category of rights of men are not established except by the testimony of two male or one male and two female witnesses. But certain matters which women alone are likely to know such as whether a particular child was born to a particular woman, can be proved even by the testimony of a single woman. Matters which are of the category of public right and require absolute certainty of proof, such as offences entailing the punishment of ḥadd can only be proved by the testimony of two male witnesses and in one case, namely, that of whoredom by four male witnesses. A woman is regarded as of inferior competence in respect of giving evidence because of her weak character.

Inquiry into the competency of a witness

It is one of the important duties of a Judge, if the witness who is put forward by the party going into evidence as eligible, has given relevant evidence against the opposite party and the latter challenges the evidence by alleging that his evidence is false or due to his having forgotten the occurrence, to make inquiries into the witnesses' competence and particularly as to the fact of his being a man of rectitude.

The inquiry is to be made by him either privately or in Court with the help of persons whom he knows to be reliable and who are acquainted with the life and character of the witness cited. The other party is also at liberty to take exception or objection (jarh, ṭa'n جرح طعن) to such evidence by showing that the witness is disqualified such as by reason of bias or interest or otherwise. Public investigation into a witness's character which prevailed in the early days of Islám has, it is said, been discontinued because of the strifes and disturbances which it led to.[1] If a witness is a stranger to the place the Qáḍí of the locality where he resides should be asked to make the inquiry. The Qáḍís are also required to keep a register of persons who are proved to be á'dil (عادل) or men of rectitude and to revise the register from time to time.

Direct and hearsay testimony

Again direct testimony alone, generally speaking, has any probative value. Hence a fact must be proved by an eyewitness if it be one which could be seen, or if it consisted of spoken words, by the person who heard them. But sometimes indirect testimony is also admitted. For instance, the facts of paternity, death, marriage, appointment of a Qáḍí, can be proved by a person who received information with regard to them from men of reliable character.[2] Even in those matters a mere statement by a witness that he heard so and so will not be accepted but he must be able to depose to the fact itself, for instance, that on a particular date so and so was the Qáḍí of such a place or so and so died on such a date and that he knew it although his knowledge might be based on heresay. In other words his information must have produced such belief in his mind as to be accepted by himself as knowledge. Similarly, if he says 'I did not see this but know it' and it is a notorious fact the statement will be accepted. Such evidence is also admissible to prove the fact of a property being wáqf but not to prove the conditions of the grant.[3] If a person sees another

[1] 'Fatḥu'l-Qadír', vol. vi, pp. 458-9; 'Hedáya', vol. vi, pp. 458-9.
[2] 'Hedáya', vol. vi, pp. 466-7; 'Al-Majalláh', pp. 287-8.
[3] 'Hedáya', vol. vi, p. 469.

in possession of a property other than a slave, he would be justified in deposing that it belongs to the man in possession because possession indicates ownership.[1]

It may sometimes happen that the persons who witnessed a transaction may not be available owing to their being dead or being at such a great distance that it is not practicable to produce them; then evidence may be received of a person who heard them state that they witnessed the transaction. This is called 'evidence of testimony' (Shahádut alá Shahádut), and is allowed by juristic equity because of necessity.[2]

Testimony must agree with claim

Legal testimony must also agree with the claim; otherwise it has no effect. For instance, when the claim is that a certain property has belonged to the plaintiff for two years and his witnesses say that it has been his for above two years, it will not be accepted; though, if they had said that the property had been owned by the plaintiff for less than two years, the testimony would not be discarded, because their knowledge might have fallen short. Similarly, if a plaintiff claims a thousand rupees and the witnesses speak to five hundred, the evidence will be accepted for five hundred, but not if they speak to more than a thousand. Suppose a man's claim is for a thousand rupees for property sold and the witnesses depose that the defendant owes a thousand rupees to the plaintiff on account of a loan, it will not be accepted.[3] Similarly, if there is conflict of testimony among the witnesses of the claimant such evidence will be rejected.

If evidence be opposed to a visible or notorious fact it will have no operation.

Preference of proof

Suppose both the parties make contradictory allegations of a positive nature in relation to the same matter and both are prepared to adduce proof, the question then arises whose proof is to be preferred or heard (tarjiḥu'l-bayyínat ترجيح البينة). The general rule

[1] 'Hedáya', vol. vi, p. 469.
[2] Ibid., vol. vi, pp. 522-33.
[3] 'Al-Majalláh', p. 291.

is that the evidence of the party whose allegation is supported by certain general presumptions (istiṣhab-ul-hal استصحاب الحال) will be preferred. The Court, as we have seen, cannot hear evidence in support of the allegations of both, because the allegation of one must be false and the testimony in support of it cannot be information or evidence. Thus, if one person wishes to produce evidence that a person was in good health at a particular time and the opposite party wants to prove that he was then seized with death-illness, there being nothing else, the evidence of the former will be accepted in preference to that of the latter. The reason is that in the absence of proof to the contrary a man will be supposed to continue in good health. Similarly, evidence of the party who wants to prove that a man was possessed of understanding will he heard in preference to that of the party who alleges that he was insane or idiotic at a particular time. The evidence that a certain property was purchased will be preferred to the evidence that it was a gift or a pledge or hired, and the evidence that it was hired would be preferred to the evidence that it was a pledge.

If both the parties are in possession of a certain property and one of them claims that it belongs exclusively to him and the other alleges that it belongs to them jointly, the evidence of the former will be heard, the reason being that his right is partially admitted by the latter. If, on the other hand, both claimed exclusive rights, they will be declared to be joint owners as there is no reason for preferring the proof of one to that of the other.

When the word of one party is to be accepted

In certain cases where both the parties are unable to adduce proof, but there is a presumption in favour of the allegation of one of them arising from circumstances (taḥkím-ul-hál تحكيم الحال), the statement of that party is to be accepted.

In such cases the law will sometimes require the party in whose favour the presumption is raised to take the oath and sometimes not. For instance, when there is a dispute between the husband and the wife

regarding certain goods in the house, if they are articles like swords and lances and the like, they will be presumed to belong to the husband and his word will be accepted and a decree will be made in his favour if the wife is unable to adduce any proof and the husband is prepared to take the oath. A similar presumption will be made in favour of the wife in respect of things like household utensils, carpets, and so on. If a donor applies for revocation of his gift and the donee says that the thing has perished, his word is to be accepted without his being asked to take the oath. If a bailee says that he has returned the goods entrusted to him, his word is to be accepted if he takes the oath. If a Christian dies and his wife alleges that she became Muḥammadan after his death, but his heirs say that she became a convert to Islám before his death, the statement of the heirs is to be accepted. The reason is that, at the time the woman comes to Court, she being a Muḥammadan, this fact confirms the allegation of the heirs.[1] Sometimes when the parties to a transaction cannot agree and neither of them is able to adduce evidence, but both are prepared to take the oath in support of their respective allegations, the Court will set aside the transaction itself. For instance, when the vendor and the buyer of an article cannot agree as to the amount of consideration or as to the thing sold or both, and none of them can adduce evidence, but both are prepared to take the oath in support of their allegations, the Court will set aside the sale. The reason is that there is no ground for preferring the bare statement of the one to that of the other.

Circumstantial evidence

Besides human testimony facts and circumstances (Qarinat قرينة) may also be relied upon as a proof. But circumstantial evidence will only be acted upon if it is of a conclusive nature (Qáṭia'tun قاطعة). For instance, if a person is seen coming out from an unoccupied house in fear and anxiety with a knife covered with blood in his hand and in the house a

[1] 'Hedáya', vol. vi, p. 425.

dead body is found with its throat cut, these facts will be regarded as a proof that the person who was seen coming out murdered him.[1]

Documentary evidence

Sometimes documents are accepted as a substitute for oral testimony. But the Court is not to act on a sealed deed or any other document unless it is free from the suspicion of being forged and is such as is customary for people to enter their transactions therein. For instance, official documents and the records of a Court of Justice can be accepted. Books of account kept in course of business and documents executed in presence of two witnesses are also admitted in evidence.[2]

Admission

The Court generally accepts an admission without requiring any further proof from the claimant. An admission must, however, be unconditional, and it must be voluntary, so that if obtained by coercion it is not binding nor if made in jest. Similarly, if the fact admitted is contradicted by apparent and obvious circumstances of the person making the admission, it will not be accepted.

Retraction of testimony

The juristic effect of testimony may be revoked by the witness himself by retraction of what he testified to. Such retraction must be made in Court, otherwise it will not be taken into account at all. If the witnesses retract their testimony before the order is passed such testimony will be rejected, but if afterwards, it will not affect the order. If in the last case their evidence has caused any loss, the witnesses will be held liable.

Estoppel

The law sometimes does not allow evidence being given of a certain fact having regard to the conduct of the party desiring to adduce such evidence. This, as I have stated elsewhere, is called bayánu'ḍ ḍarúrat (بيان الضرورة), which corresponds to estoppel of the English law. For instance, if the owner of a certain property sees another person selling it and keeps quiet, he will not be allowed to prove that the man who purported to sell was not authorized by him to do so.

[1] 'Al-Majalláh', p. 297.

[2] 'Fatáwá 'Álamgírí', vol. iii, p. 534; 'Al-Majalláh', p. 297.

CHAPTER XI

CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

Constitutional law

Conception of a State

The office of Imam or head of the State

THE conception of a State in the Muḥammadan system is, as already mentioned, that of a commonwealth of all the Muslims living as one community under the guidance and direction of a supreme executive head called the Imám or the Caliph. The responsibility of administration rests with the Imám, but for the convenience of administration, he may delegate his powers to different persons. He may, for instance, appoint ministers to whom he may delegate practically all his powers and faculties or only particular powers, or he may appoint them merely for the purposes of consultation and for executing orders. Similarly, he may appoint a person as Governor of a particular country with such powers as may be necessary. He may also delegate the exercise of his authority in the various departments of administration to different officers, such as the command of the army, administration of justice, revenue, Police and the like. But the Imám has no legislative powers at all though he may interpret the law if he happens to be a jurist, but his interpretation will have no special authority by reason of his position as Imám. He is bound by the law, and by the decrees and orders of the Court like any other citizen. In fact, there are many recorded instances in which Qáḍís passed orders against the chief of the State of the day and the latter submitted to them. One of the best known of these is the case in which Shuraiḥ the famous Qáḍí decided against 'Alí the third Caliph a suit which the latter had instituted against a Jew. But this is possible only if the Imám chooses to submit to the order. Hence it is laid down that neither retaliation nor ḥadd can be ordered

against the Sulṭán because of want of power in the Court to enforce them. It is, however, the duty of the Qáḍí when a suit or complaint is instituted before him against the Imám to notify the fact to the Imám with his views and to request him to redress the wrong.

He is merely the representative of the people

To be elected

The Imám is merely the representative or delegate of the people, from whom he derives his rights and privileges. The office is elective being based on Ijmá', as I had occasion to mention in another place, and the first precedent for it was the election of Abú Bakr as the Caliph after the death of the Prophet. But, as it is not possible for all the Muslims to take part in such election, it is deemed sufficient if the power is exercised by their chief men (A'yán اعيان), that is, the nobility, the gentry and the learned. Once duly elected the Imám acquires supreme control over the executive administration of the State. If the Imám happens to be oppressive and to violate the injunctions of the law and religion the Muslims may, if they can, replace him by another Imám, but until then he is entitled to homage and obedience and his orders are absolutely binding. This is the meaning of what the author of Baḥru'r-Ru'iq on the authority of Qáḍí Khán lays down, namely, that the Sultánate is based on two facts (1) fealty of the aristocracy and the gentry and (2) power to enforce orders. If he has the homage of the aristocracy and the gentry, but has not the power to enforce orders, he does not become Sulṭán. If a person becomes a Sulṭán by acceptance of the leaders of the people and turns out to be a tyrant, he does not cease to be a Sulṭán by reason of this fact alone because if the law ordered that he should no longer be the Sulṭán, it would be useless considering that he has the power to enforce his authority as the Sulṭán. But if the Sulṭán becomes oppressive, and he has not the power to retain his position, he then ceases to be the Sulṭán (Yana'zil).[1] In these passages one cannot help detecting a reluctant effort of the law to adjust the true Islámic idea of an Imám as the

[1] 'Raddu'l-Muḥtár', vol. iv, p. 336.

representative of the people pure and simple with the actual facts of later days when Kings and potentates assumed by force powers which the law did not concede to them.

The Imám ought to belong to the tribe of Quraísh, but it is not necessary that he should be of the Háshimi family. If no person competent to hold the office of Imám can be found in the tribe of Quraísh, then a person may be chosen as Sulṭán who is virtuous ('Ádil) and trustworthy and has knowledge of the conditions regarding appointments to the office of Qáḍí and the like.[1] A duly appointed Imám may nominate his successor as Abú Bakr nominated 'Umar, but such nomination must apparently be confirmed by the people.

It is a fact of history that for a long time a number of Muḥammadan States have existed without a common Imám or executive chief and in fact the Islámic conception of a vast Muslim republic must be regarded in the nature of a constitutional ideal towards which some progress was made during the time of the first four 'rightly guided' Caliphs, but which has ever since been supplanted by despotic kingly governments.

Administrative law

The head of the State among the Muḥammadan is the trustee of public property and in no sense its owner. Such public property consists first of all of revenues which when collected are to be deposited in the public treasury (baiṭul mál بيت المال literally the house for property). The revenues are derived from the following principal sources: taxes levied on land belonging to Muslims, in the shape of 'Ushr or tithe (عشر), khira'j (خراج) or land-tax, originally assessed on land belonging to non-Muslim owners, poll-tax or jiziya (جزية) leviable from non-Muslims subjects in lieu of protection afforded to them, zakáṭ (زكواة) or poor-rate levied from the Muslims alone, and khums (خمس) consisting of one-fifth of the property acquired from the non-Muslims by conquest and one-fifth of the contents of mines, escheats and forfeitures. Of the above,

Revenues

[1] 'Fatáwá 'Álamgírí', vol. iii, p. 390.

the proceeds of the poor-rate and one-fifth of the booty and of the contents of mines are ear-marked for the use of the poor and the indigent. But in cases of emergency the Imám may utilize them for the protection of the Muḥammadan community such as for religious wars. The rest of the revenues is to be spent for the purposes of administration generally.

It was at first doubted whether the Imám could take anything from the public treasury for his own maintenance and of that of his family, but when the public affairs of the community increased in complexity and dimensions so that the Imám could have no time to earn his own livelihood, the law permitted him to draw upon the public funds for the purpose.

The Imam is the custodian of public property

The Imám is also the custodian of such public property as rivers, public roads, waste lands and the like. He is the ultimate guardian of trusts and institutions intended for the benefit of the community or of a section of the community such as mosques, madrassas, inns and the like, and of the person and property of helpless persons such as minors, lunatics and idiots. The care and supervision of trusts and public institutions and of the person and property of minors, lunatics and idiots are generally delegated to the Qáḍí in addition to his ordinary duties in connexion with the administration of justice. He has besides a general disciplinary power over the Muslims so that he can enforce chastisement with a view to compel the observance of religious injunctions and public decorum. These disciplinary powers are also sometimes entrusted to the Qáḍí. It is also a high privilege of the Imám to lead the Friday congregational prayers, but this also he may delegate to other persons.

His disciplinary power

Of the principal sources of revenue open to a Muḥammadan State, zakáṭ or the poor-rate, jiziya or poll-tax, 'ushr or tithe, and khiráj call for a somewhat specific notice. Zakáṭ is a tax imposed on the Muḥammadans alone and the payment of it is an obligatory act of worship.[1] It may be realized by

Zakat or poor-rate

[1] 'Hedáya', vol. ii, p. 112.

the State by enforcement of disciplinary measures as it was done in the time of Abú Bakr. But nowadays it is left to the religious sense of each Muslim even in self-governing Muḥammadan countries whether to pay zakáṭ or not. It is levied on a man's possessions exclusive of landed property, such as on gold and silver, cattle, goods of merchandise and the like, provided they reach a certain value at the end of the year. Generally speaking it is two and a half per cent of the aggregate. Jiziya which is also a personal tax may be imposed on the non-Muslims either under a treaty in which case its amount is to be determined by agreement of the parties, or it may be imposed after conquest in lieu of the Imám confirming them in possession of their country. In the latter case, it is to be paid according to certain rates, which are fixed having regard to the means and income of each individual. This is according to the Ḥanafís but the Sháfi'ís have one uniform rate for all, rich or poor. Since this tax is in the nature of ransom for a hostile non-Muslim's life and it is not lawful to kill females, children, the blind and the diseased, such persons are exempted from its incidence. The idolaters of Arabia and apostates from Islám are given the option between death and the acceptance of Muḥammadan religion and hence jiziya cannot be accepted from them. This tax is not levied on monks who have forsaken society because as they do not live in their community, it is not lawful to fight them.[1] When a non-Muslim who is assessed with this tax embraces Islám he becomes exempt from such payment.

Jiziya or poll-tax

All lands of a country, the inhabitants of which have accepted Islám, are liable to pay 'ushr or tithe. The reason is that the payment of tithe is an act of worship and also least burdensome and, therefore, most fit and proper to be levied on Muslims.[2] All land, which has been conquered after resistance or which is surrendered to the Muslims and allowed to remain in the hands of its inhabitants, is liable to the

'Ushr or tithe

[1] 'Hedáya', vol. v, pp. 288-99.
[2] Ibid., pp. 277-88.

Khiraj or land-tax

payment of khiráj, subject to certain conditions. Mecca is, however, exempted from this rule for only tithe was levied upon it when the Prophet accepted the treaty of its non-Muslim inhabitants. All the land of Arabia proper is liable only to the payment of tithe because the only option allowed to the Arabs was either to accept Islám or to fight But Syria is subject to khiráj by consensus of opinion among the Companions. Whether land is to be assessed with Khiráj or 'Ushr, depends mainly on the means of irrigation. If a country which has been conquered by force is irrigated by a stream or river, it is regarded as tributary and whatever land is not reached by such river, but is irrigated by water derived from an underground spring by digging, it is liable to the payment of tithe. If waste land is brought into cultivation then the question whether it is to be assessed with khiráj or 'ushr is determined, according to Abú Yúsuf, by the character of the land in the vicinity. According to Muḥammad, if land is brought into cultivation by digging wells in it or by springs of water coming out of it or by the water of the Tigris or the Euphrates or of large rivers which are not the property of anyone or by rain water then it is liable to payment of tithe. The rates of khiráj vary with the kind of crops grown on the land and its productive powers. It is not, however, to exceed half the value of its average produce. If the produce of the khirájí land is destroyed by floods or drought or blight, the revenue ceases to be payable for that year, but not if it is destroyed by the negligence of the owner. The character of khiráj paying land would not change, merely because it has passed into the hands of a Muslim.

Administration of justice

The powers of the Imám, not only in fiscal matters but also with regard to the appointment of Qáḍís and otherwise providing for the administration of justice, are defined by the law. Not only may the Imám appoint Qáḍís but so also may the minister and the Governor if they have been vested with such powers. A non-Muslim Ruler or Governor may also legally appoint a Qáḍí to administer Muḥammadan law.

Appointment of Qadis or Judges

No one can be appointed a Qáḍí unless he possesses the qualifications of a witness, that is to say, unless he is a Muslim, free and major. According to the Sháfi'ís he must also be of virtuous character, but the Ḥanafís while holding that the Qáḍí should be a man of virtuous character do not consider it a necessary condition of the validity of such an appointment, so that the decree of a Qáḍí who is not of virtuous character will not, according to them, be treated as invalid. Nor, according to the Ḥanafís, differing from the other Sunní Schools, is it necessary that a Qáḍí should be a mujtahid or jurist. The Ḥanafís hold that the function of a Qáḍí is to redress wrongs and to enforce rights which it is possible for a Qáḍí who does not hold the rank of a mujtahid to do acting upon opinions of others who possesses the necessary qualifications of a mujtahid.[1] When, therefore, a Qáḍí is appointed who is not a mujtahid, a Mufti should be appointed to advise him on questions of law. The Mufti must necessarily be learned in the law and he must also in addition to his possessing the qualifications of a Qáḍí mentioned above be an 'Ádil or man of virtuous character.

A woman may be a Qáḍí according to the Ḥanafís as she possesses the qualification of a witness, but she is not competent to pass orders of ḥadd or retaliation as in these matters her evidence is not admissible. She is altogether disqualified for the office according to Sháfi'ís.

A woman may be a Qadi

Powers and jurisdiction of a Qadi

A Qáḍí may be appointed for a limited time or with jurisdiction over a particular area. Similarly a particular class of cases may be excluded from his jurisdiction or he may be empowered to try only particular classes of cases. For instance, a Qáḍí may be prohibited from hearing cases instituted after the lapse of a certain time or he may be appointed only to hear cases arising in the army or in any particular division of it. Sometimes two Qáḍís may be appointed to hear a particular case.

The Qáḍí may appoint a deputy Qáḍí if he is empowered to do so by the Sulṭán, and he can also

[1] 'Hedáya', vol. vi, pp. 357–61.

dismiss him. When a deputy has been properly appointed, he can pass orders on evidence heard by the principal Qáḍí or vice versa.

The Qáḍí holds his office at the discretion of the Sulṭán who may dismiss him on suspicion or even without suspicion. Abú Ḥanífa says that a Qáḍí should not be allowed to hold office for more than a year.[1] On the death of a Sulṭán, however, the Qáḍí does not, according to accepted opinion, vacate his office.[2]

Quasi judicial duties of a Qadi

Among the quasi judicial duties ordinarily attached to the office of a Qáḍí is the protection and supervision of trust property like wáqf, of the properties and interests of minors, lunatics, idiots and missing persons. The Qáḍí is empowered and required to supervise the management and administration of wáqfs so far as it may be necessary for the preservation of the trust property and their application to the objects of the grant. The authority is quite independent of the wishes of the grantor, being exercisible for the benefit of the present and the future beneficiaries whether they be the general public or a class of individuals. His powers in this respect are more comprehensive than those of a trustee or mutawallí appointed by the grantor. For instance, a mutawallí has very limited powers of leasing, mortgaging or selling wáqf property in cases of necessity, but the Qáḍí's powers in this respect are plenary. In fact, the trustee's general powers under the Muḥammadan law are so limited that it is difficult for a wáqf property to be properly managed or even preserved without the constant supervision of the Court. The Qáḍí is to take periodical accounts from a trustee regarding the trust property and its income, and if he finds anything wrong in the way the trustee has been dealing with the property he should dismiss him and appoint another trustee in his place. The Qáḍí has similar power of supervision and control over the properties of minors, lunatics and the acts of their guardians. If a

[1] 'Fatáwá 'Álamgírí', vol. iii, p. 390.
[2] Ibid.

minor has no guardian he may appoint one for the safe custody both of his person and property and if necessary may give him or her in marriage.

Similarly the Qáḍí should appoint an administrator to administer the estate of a deceased person whose heirs are absent in a foreign country or whose whereabouts are not known or if some of the heirs are minors, and he should also take the necessary measures for the protection of the properties of a missing person.[1] Shamsu'l-Aimma Halwái says that an administrator of the estate of a deceased person is to be appointed in three cases: (1) if the deceased has left debts, (2) if the heirs are minors, and (3) if he has left a will (without appointing an executor).[2]

[1] 'Fatáwá 'Álamgírí', vol. iii, pp. 418-20.
[2] Ibid., p. 513.

CHAPTER XII

THE LAW REGULATING RELATIONS BETWEEN MUSLIMS AND NON-MUSLIMS

Relations between Muslims and non-Muslims

THE relation between Muslims and non-Muslims has several aspects, that between (1) the Muslim State and an alien non-Muslim State, (2) the Muslim State and the alien non-Muslims living temporarily within its jurisdiction, (3) individual Muslims residing or sojourning within the jurisdiction of an alien non-Muslim State and such State, (4) individual Muslims living within the Muslim State and alien non-Muslims, (5) the Muslim State and its non-Muslim subjects, and (6) individual Muslims of a Muslim State and non-Muslim subjects of that State. Questions relating to (5) and (6) have already been dealt with under other heads. I propose here to notice briefly the main principles governing the law under the remaining heads. The subject, as I had occasion to mention elsewhere, is dealt with in the writings of Arab jurists under the heading of As-Siyar or Jehad (جہاد) which is usually translated as religious war.

Declaration of war

According to Muḥammadan law the Imám of the Muḥammadan State, supposing there is such an Executive Chief recognized by the Muḥammadans, would be justified in declaring such a war against the non-Muslims of Dáru'l-Ḥarb or an alien State for the protection of religion. From what the Prophet experienced at the hands of the infidels of Mecca it is presumed that Islám is liable to be exposed to trouble and danger from the enmity and prejudices of non-Muslims. Therefore, in order to ensure the safety of Islám, the Muslim State, provided it is powerful enough to do so, may wage war against an alien or hostile non-Muslim State. That Jehad is permitted

really for the protection of Islám and is limited by such necessity is in the first place apparent from the fact that the Imám is allowed to enter into a treaty of peace with the hostile State if such a treaty would secure the prevention of the evil to be avoided.[1] Then, no such war can be waged unless the non-Muslim subjects of the hostile State have first of all been invited to embrace Islám; and if they accept such invitation, hostilities are to cease at once. That is why, as already explained, Jehad is said to be good not in itself (Husnun li a'ynihi, حسن لعينه) but for the sake of something else (Husnun li ghairihi حسن لغيره), namely, religion. If they refuse to accept the Muḥammadan religion but accept the suzerainty of Islám by agreeing to pay a poll-tax (jiziya) to the Muslim State, in that case also hostilities must cease, as there would be no more likelihood of danger to Islám. Non-Muslims so submitting are entitled to the enjoyment of all rights in respect of their lives and property like the Muslims. The underlying idea of Jehad is to maintain the predominance of power or the balance of power as it is euphemistically called in modern European diplomacy.

Life and property of the citizens and soldiers of the beligerent States

In the event of a religious war, the women, the children, the aged and the diseased among the enemies are not to be killed or maltreated, but such of them as have taken part in the fight cannot claim such consideration. The goods of the enemy that are captured during hostilities are treated as a prize in the hands of the Muslims. The head of the conquering Muslim State is entitled to divide the country which has been wrested from the non-Muslims after fight, among the soldiers or if he chooses may impose a poll-tax on its inhabitants. As regards the prisoners taken in war they may be killed or enslaved or left free to live under the protection of the Muslim State as dhimmees. The Imám has the discretion to determine what is to be done with them and he should do what is most politic under the circumstances. If the non-Muslim enemies triumph over the Muslims,

[1] 'Hedáya', vol. v, pp. 204–5.

whatever property the former may have taken in the fight become theirs according to the Muḥammadan law; so that it will not be lawful for the previous Muslim owners to take the same from the captors except by recognized means of acquisition. But Muslims captured by their non-Muslim enemy cannot be enslaved, as freedom is the inalienable and inviolable condition of a Muḥammadan.

Duty of Muslim subjects of the Muslim State in case of war

When there is a religious war between a Muslim State and a non-Muslim State, it is the duty of the Muslim subjects of the former as a body to serve in such war, but not of every individual. What is meant is that if a sufficient number of men join, the rest will be absolved, but if none join, every one would be a transgressor in the eye of law. There is no obligation on the children, the women, the aged and the infirm to join in the fight except when the non-Muslims are the aggressors, and it has become necessary for them to fight in self-defence, because otherwise if the infidels triumphed, Islám would not be safe.

Treaties

The head of a Muslim State may, if he considers it beneficial to the Muḥammadans, conclude a treaty with a non-Muslim State which it will be his duty to observe faithfully. Such a treaty is regarded as carrying out the real aim of Jihád which is to ward off injuries likely to be inflicted by non-Muslims. It is assumed that the Imám is to enter into a treaty only for the good of the Muḥammadans. The treaty may be for a short or a long period of time as the Imám may think best, and according to the accepted doctrine there is no fixed limit of time for it. If, during the term of the treaty, the Imám finds that it would be good for the Muḥammadans that he should withdraw from it, he can do so, but only after giving sufficient notice of his intention to the other party, because otherwise it would be an act of treachery which the law forbids. If the other party begins hostilities in violation of the treaty, it will not be incumbent on the Imám of the Muslim State to give a formal notice before taking action.

Not only may the Imám enter into a treaty of peace with a non-Muslim State, but individual Muslims may

afford protection to individual non-Muslim subjects of a non-Muslim State, in which case it will not be lawful for a Muslim to fight them. But should the Imám be of opinion that it is not expedient that those non-Muslims should continue to be under such protection, the protection will be withdrawn after notice has been given to them.[1]

Daru'l-Islam and Daru'l-Harb

The relations of the Muslims towards the non-Muslims are mainly determined on the basis whether the country or State of the latter is to be regarded as Dáru'l-Islám (دار الاسلام) literally, territory of safety, or Dáru'l-Ḥarb (دار الحرب) literally, territory of war. There can be no question but that a country governed by a Muslim ruler according to the laws of the Islámic religion is Dáru'l-Islám. Nor can there be any doubt that a country under a non-Muslim Government in which a Muḥammadan cannot live with personal security and freedom to perform his religious duties is Dáru'l-Ḥarb. But it does not follow that a self-governing Muslim country passing into the hands of non-Muslim conquerors or of the dhimmees rising against the Muslim Government becomes by that fact alone Dáru'l-Ḥarb. It turns into Dáru'l-Ḥarb if it fulfils three conditions, namely, that the laws and regulations of the non-Muslims be enforced there, that it should be surrounded by other countries answering the description of Dáru'l-Ḥarb without any country of the description of Dáru'l-Islám being contiguous to it and if no Muslim or Dhimmí, that is, a non-Muslim subject of a Muslim State, can live there, in the same security as under the previous Muslim Government. This is apparently the opinion of Abú Ḥanífa and adopted by the author of 'Durru'l-Mukhtár' as representing the law on the subject. The two disciples, however, hold that such a country would be called Dáru'l-Ḥarb if the laws of the non-Muslims are promulgated there so that neither ḥadd nor retaliation is enforced. If the laws of both are enforced, that is, non-Muslim laws for the non-Muslims

[1] 'Hedáya', vol. v, pp. 210-3.

and the Muḥammadan laws for the Muḥammadans, the country will retain its character of Dáru'l-Islám. On a Muslims' country being conquered by the non-Muslims and turning into Dáru'l-Ḥarb it is lawful for the Muslim prisoners to oppose, and fight with them in every possible way. A Dáru'l-Ḥarb, on the other hand, becomes Dáru'l-Islám if the ordinances of Islám may validly be promulgated there.

One of the tests, as to whether a country should be treated as a Dáru'l-Ḥarb or Dáru'l-Islám, is whether congregational prayers during Fridays and 'Íds should be held in the country.[1] Under what circumstances then the holding of Friday prayers is allowed by the Muḥammadan law? One of the conditions mentioned in the books is that such prayers can be said only in a town where there is a Governor and a Qáḍí to administer the laws and to enforce the punishment of ḥadd and retaliation. The author of 'Hedáya' says that this is the accepted law. According to Abú Ḥanífa, Friday prayers are to be held in a town where there are roads and markets, a Governor who administers laws and redresses wrongs, and learned men to whom Muḥammadans can resort for the solution of the difficulties of Sharâ or the Muḥammadan Code. Another condition of Friday prayers is that they must be held under the order of the Sulṭán or of some person authorized by him in that behalf.[2] If the non-Muslims who have conquered a Muslim territory have appointed a Muḥammadan Governor, he may give such sanction. If the Governor himself be a non-Muslim, it may be the interests of Muḥammadans to obey him. In a self-governing Muḥammadan country when the Sulṭán has appointed a non-Muslim Governor, the Muslims of the place may hold Friday prayers and the Qáḍí of that place will be regarded, although appointed by the non-Muslim Governor, as if he had been appointed by the consent of the Muslims. But under such circumstances it is the

[1] 'Raddu'l-Muḥtár', vol. iii, p. 275.
[2] 'Hedáya' and 'Fatḥu'l-Qadír', vol. ii, pp. 22-6.

duty of the Muslims to demand the appointment of a Muḥammadan Governor.[1]

Ibn 'Ábidín then quotes a passage from a commentary of Shaikh Ismá'íl of Delhi to the effect that when it is said that Friday prayers can only be held in a place where the Muḥammadan laws are enforced, it does not mean that all the laws should actually be enforced, but that the Governor or the Qáḍí should have the power to enforce them. It is also stated in the gloss of Abú Sa'wood on a treatise by A'llamah Núr Effendi that if actual enforcement of all the laws or, it may be added, enforcement of ḥadd and retaliation were a necessary condition, then Friday prayers could not be held even in any Muḥammadan country at the present day, and therefore it is regarded as sufficient if the Governor or the Qáḍí should as already stated have the power to enforce them. But it is necessary that most of the Muḥammadan laws should be enforced.[2] The substantial idea running through the discussion of the jurists on this point seems to be that Friday or 'Íd prayers may be held in a place where the congregation will not be liable to molestation.

India is Daru'l-Islam

It may be observed here that the Friday and 'Íd prayers are regularly held all over India and recognized to be validly held according to the Muḥammadan Canonical Law. Further, the Muḥammadans of India enjoy absolute protection of person and property and religious freedom and their laws relating to religious institutions and usages and those governing family relations and succession and certain forms of transfer of property are enforced by the Anglo-Indian Courts. Another convincing test that India under the present form of Government must be regarded as Dáru'l-Islám, is that those Muḥammadans who strictly follow the rules of juristic law regarding Ribá do not feel themselves justified in taking interest on money advanced to non-Muslims.

Duty of non-Muslims residing in an alien country

As I have had occasion to point out, the Muḥammadan law, generally speaking, has two sides. In its

[1] 'Raddu'l-Muḥtár', vol. iii, p. 275.

[2] Ibid., vol. i, p. 589.

worldly aspect, it is enforcible by the Court and in its spiritual aspect, it affects the conscience of every individual Muslim. The head of the Muslim State can obviously enforce Muḥammadan laws only within his own jurisdiction. A Muḥammadan living within the territory of non-Muslims is required to conform, as far as is practicable for him to do so, to the rules and injunctions of the Muḥammadan law and religion. If he violates them, he incurs religious guilt and when he finds that he cannot stay in a particular non-Muslim country with safety of person and property nor discharge his religious duties there, he is expected to retire to his own State. If such a person finds that the non-Muslim Government actually interferes with his property and reduces his children to slavery or suffers it to be done or is guilty of other similar acts of oppression, he would be justified in interfering with the lives and properties of the non-Muslim inhabitants of the place. The reason is that the Government itself of the country of his adoption must in such circumstance be held to have been guilty of treachery towards him for he could not have resided in an alien country without its express or implied permission and it is always lawful for a Muslim according to his law to repel oppression. But otherwise, he must forbear from interfering with the non-Muslim Government and inhabitants of the country of his adoption as that would be an act of perfidy on his part which the law absolutely forbids.

Glossary of Arabic Words and Phrases

Adá = specific discharge (of obligations).
Ádábu'l-Qáḍí = procedure.
'Adadiyát = things sold by tale.
'Adálat = rectitude of character.
'Ádat = custom.
'Adháb = spiritual punishment.
'Ádil = man of rectitude; virtuous; just.
Af'ál = acts; practice.
Af'álu'l-jawáríḥ = physical acts.
Af'álu'l-qalb = mental acts.
Aḥáḍ = isolated tradition, information.
Aḥláf = sworn allies.
Ahliyat = legal capacity.
Ahliatu'l-wajúb = capacity for the inherence of rights and obligations.
Ahliatu'l-adá' = capacity for the exercise of rights and discharge of obligations.
Ahlu's-Sunnat wa'l-Jamá'at = orthodox sects or the Sunnís.
Ahlu'l-hawá = literally men of passions and desires, heretics.
Aiyyun = whoever.
Akhbár = information or narration.
Akhbarana = informed us.
Akhbárát = informations, proofs and admissions.
Akilas = tribe; regiment.
A'lal = causes.
'Alam = proper noun.
'Alámat = sign.
Al'am'ru bil yadí = the business is in thy hands; delegation to wife of the husband's power of divorce.
Al-ashyá'u'l-mubáḥatu'l'umúmíah = property which is for the common use of all.
Al-fá = then.
Al'ikhtiar = choose thyself; delegation of power of divorce to wife.

'Álim = learned in the law.
Al-itláf mubásharatun = damage caused directly by an act of another without the intervention of any other extraneous cause.
Al-itláf tasabbuban = injury which is the combined result of two or more causes.
Al'-mashí'at = if thou wishest, divorce thyself; delegation to wife of the power of repudiation.
'Ám = words of general import.
'Ámí = layman.
Amánat = trust.
Amín = trustee.
Anbiyá = prophets.
Aqár = landed property.
'Aqd = contract.
'Aríyat = commodate loan.
Arkán = essential elements (of a juristic act.)
'Aṣba = residuaries.
Aṣḥáb = Companions of the Prophet.
Asháb'u'l-farâ'id = sharers.
Aṣḥábu't-takhríj = doctors who occupied themselves in making inferences from higher authorities and explaining doubts in them.
Aṣḥábu't-tarjíḥ = doctors competent to decide in cases of conflict among higher authorities.
Aṣḥábu't-taṣḥíḥ = doctors competent to declare whether a particular version of law is strong or weak.
Aṣl = roots; authorities of law.
= original (rights).
Asnád = statement of authorities in a tradition.
As-siásat ush shara'i = criminal law.
As-Siyar = Jehad; Constitutional and Administrative Law.
At-Tauwaliya = sale at cost price.
'Aul = doctrine of increase.
'Awáriḍ = circumstances.
Áyát = verses.
= signs.
'Ayb = defect.
'Ayn = specific or determinate property.
'Azímat = strict law.
Baḍá't = capital.
Badíhi = intutional knowledge.

Badl = (application of a word) by way of substitution.
Bai' = a sale of property for money; sale.
Baitu'l-mal = public treasury.
Bai'u'l-wafá = a mortgage by conditional sale.
Báṭil = void.
Báṭin = internal.
Báyan = irrevocable repudiation.
Bayánu'dh-dharúrat = interpretation by necessity; Estoppel.
Bayyanát = evidence; proof.
Bidát = innovation, heresy.
Ḍabṭ = power of retention.
Dahríatun = atheists.
Dakhíl = one who has joined a new tribe.
Dalálatan = by implication of language.
Ḍararun fáḥishun = manifest and serious injury.
Dáru'l ḥarb = territory of war, a hostile state, an alien state.
Dáru'l Islám = territory of safety, a friendly state.
Darúrí = necessary.
Dawa' = claim.
Dayn = indeterminate property.
Dhahní = mental.
Dhawi'l-arḥám = distant kindred.
Dhimma = legal capacity.
Dhimmí = non-Muslim subject of a Muslim state.
Diyat = compensation.
Dhu'l-yad = man in possession.
Fáa'lia = that which appertains to the person making a contract.
Falásifata = philosophers.
Faqíh = lawyer.
Farḍ = obligatory (act).
Fásid = vitiated; invalid.
Fásiq = transgressor of religious injunctions.
Faskh = revocation, annulment.
Fiqh = science of material law.
Fiqhu'l-Akbar = the Great science of Fiqh.
Furḍun kifayatun = duties of the community.
Furqat = separation.
Fusúkhát = acts cancelling or annulling contracts.
Ghairu maljíin = non-constraining (coercion).
Ghairu mustabínin = writings other than those in a perceptible and lasting form.

Ghasab = usurpation.
Ghásib = usurper; trespasser.
Ghávia = that which relates to the result aimed at (in a contract).
Ghurúr = fraud.
Ḥadd = a form of punishment.
Ḥadíth = precept of the Prophet; a tradition.
Ḥaddathaná = so and so related to us.
Ḥaiwánát = animals.
Ḥajj = pilgrimage.
Ḥákim = Lawgiver; Magistrate; Judge.
Ḥalál = proper.
Ḥaq = right.
Ḥaqíqi = words of primary meaning.
Ḥaqqu'l-marúr = right of way.
Ḥaqqu'l-majrá = right to flow of water.
Ḥaqqu'l-masíl = right to discharge water over another's land.
Ḥaqqun qá'imun bi nafsihi = rights existing by themselves; rights in *rem*.
Ḥarábí = hostile (to the law); alien.
Ḥarám = forbidden (act).
Ḥaṭím = a place where oaths used to be administered.
Ḥawálat = novation.
Hazl = jest.
Híbá = gift.
Ḥibábi Sharṭi'l-'iwaḍ = gift on condition of an exchange.
Hiba bi'l-'iwaḍ = gift on receiving something in change.
Ḥikmat, maṣlaḥat = policy of law.
Hissi = natural acts.
Hizánat = custody.
Hujub = doctrine of exclusion.
Ḥukm = law; command; decree; order.
Ḥukmí = symbolical (possession).
Ḥurmat = right to reputation.
Ḥasanun = good (acts).
'Ibádat = acts of devotion.
Ibáḥat = permissibility.
'Ibáratun = (the conveyance of meaning directly) by the language of the text.
'Iddat = period of probation.
Iḥráz = securing, original acquisition.
Iḥṣán = legally married.

Ii'tai mislihi = giving a similar article.
Íjáb = proposal.
Ijára = letting and hiring.
Ijmá' = consensus of opinion.
Ijtíhád = exposition of the laws.
Ikhtíár = volition.
Ikráh = duress.
Ílá' = a form of divorce.
Ilhám = inspiration.
'Íllat = effective cause.
'Ilmu'l-Farú' = practical science of law.
'Ilmu'l-Uṣúl = science of jurisprudence.
'Ilmu'ṭ-ṭamániyata = knowledge satisfactory to one's mind.
'Ilmu'l-yaqín = certain knowledge.
Ímán = faith.
Inshá' = originating acts.
Iqála = cancellation by consent.
Iqrár = acknowledgement; declaration of faith; acknowledgement of legitimacy.
Irádat = intention.
Irsh = compensation.
I'sawíatun = followers of Christ.
Ishárát = gestures or signs.
Isháratun = connotation.
Islám = Muḥammadan religion.
Isqátát = acts extinguishing rights.
Istidlál = one of the sources of law according to Sháfi'ís and Málikís; a mode of interpretation.
Istiḥsán = juristic equity.
Istishab-ul-hal = presumption arising from accompanying circumstances.
Istisná = a kind of sale.
Istiṣḥábu'l-ḥál = presumption of continuance.
I'tiqádát = acts of faith.
Íthbátát = creative acts.
Jahl = ignorance.
Jama' munakkar = indeterminate plural.
Jamí' = all of them.
Jamá't = community.
Janáyat = Torts.
Jarh = exception or objection, cross-examination.
Jihád = religious war.

Jiziya = poll-tax.
Juz = a part.
Kaffárat = atonements for the non-discharge of certain obligations.
Káfir = ungrateful; a non-Muslim.
Khafí = obscure.
Kámilatun = perfect (punishments).
Khula' = lit. stripping; conferment of the power to dissolve marriage on the wife.
Khalf = substitutory.
Khiláfat = succession.
Khamr = an intoxicating drink prepared by fermenting the juice of grapes.
Kháṣ = specific word.
Khasm = opponent.
Khaṭá = mistake or accident.
Kháriji = outward.
Khayáru'l-bulúgh = option of puberty.
Khayáru'l-'aib = option of defect.
Khayárur-rúyat = option of sight.
Khayárush-shart = option stipulated for (in a sale).
Khayáru't-taghrír = option to repudiate a transaction on the ground of fraud.
Kafálat = suretyship.
Khiraj = a form of land tax.
Khiṭab = speech; a communication from God.
Khula' = power given to wife for consideration to dissolve marriage.
Kináya = allusive (words).
Kitábat = writings.
Kull = all.
Lián charging the wife with adultery.
Lá muthbatun = that which does not prove or establish.
Lázim = binding (transaction).
Lázimuhu'l-mutákhkhar = that which is necessarily implied as a consequence of the application of a word in the text.
Má = that which.
Máa' sil'at = crime.
Mabía' = the thing sold.
Mád'día = appertaining to the essence.
Madhrú'át = things estimated by linear measurement.
Mafhúm = sense of a word.

Maḥal = the object to which an act relates.
Maḥkúm 'alaihí = those to whom the law applies; persons.
Maḥkúm bihi = objectives of law; acts.
Mahr = dower.
Mahru'l-míthl = proper dower.
Ma'húd = particular noun.
Majáz = tropical or secondary word.
Majhul unnusah = a man where paternity is unknown.
Majnún = lunatic.
Makílát = things sold by measurement of capacity.
Makrúh = condemned acts.
Makrúhun kirahata taḥrímin = condemned acts approximating to unlawfulness.
Makrúhun kirahata tanzíhín = condemned acts approximating to lawfulness.
Mál = property.
Maljíun = constraining (coercion).
Málik = owner.
Ma'na = meaning of a word.
Mandúb, mustaḥab, nafi = a supererogatory but commended act.
Manfaat = usufruct.
Manqúl = moveable property.
Ma'rúf = well known.
Maṣáliḥu'l-mursala wa'l-istiṣláḥ = general considerations of public good.
Mashhúr = well known (traditions).
Mátúh = idiot.
Mauḍú' lahu = a word conveying its meaning by denoting the thing to which it is originally applied.
Mauzúnát = things sold by weight.
Mawát = waste land.
Mawla-mawalat = successor by contract.
Milku'l-yad = rights of possession.
Milku'r-raqba = proprietary rights.
Milku't-taṣarruf = rights of disposition.
Mithaq-i-azali = primordial covenant.
Mithli = similars.
Mithlun má'aqúlun = intelligibly similar.
Moḍariba = a partnership where one contributes capital and the other skill and labour.
Mua'jjal = exigible dower.
Muajjal = deferred dower.

[u'allal = based on an extendible cause.
[u'ámilát = a juristic act of the nature of a secular transaction.
= dealings among men.
= a mortgage by conditional sale.
[u'arraf = a determinate plural.
[u'aththir = authoritative.
[ubáh permissible acts; *res nullius.*
[ubárát = mutual release; khula'.
[uddad' a' laihi = defendant.
[uflis = insolvent.
[udda'i = claimant.
[ufassar = unequivocal word.
[uḥáqala = sale of wheat in the ears or of a feotus in the womb.
[uḥárím = persons permanently prohibited from intermarriage.
[uḥkam = a word, the meaning of which is unalterably fixed.
[ujlis = meeting.
[ujmal = vague.
[ujtahid = jurist.
[ujtahidun fi'l-Madhhab = jurists having authority to expound law according to a particular School.
[ujtahidun fi'l-Masá'l = jurists competent to expound the law on unsettled questions.
[ujtahidun fi'sh-Shari' = jurists who founded schools of law.
[ujtahidunu'l-Futiyá' = jurists competent to give fatwas.
[ujtahidu'l-Madhhab = jurists following a particular school of law.
[ujtahidunu'l-Muqayyid = jurists with a limited power of exposition.
[ujtahidunu'l-Mutlaq = jurists with absolute powers of exposition.
[ukátab = slaves entitled to freedom on certain contingencies.
Mukhábara = a certain form of lease.
Mulá'im = appropriate (reason).
Munábadha = a form of sale.
Munákaḥát = laws relating to domestic relations.
Muna'qad = constituted (juristic act).
Muqá'iḍa = exchange.
Muqallids = followers.
Murábaha = sale for the cost price and stated profits
Mursal = disconnected (tradition).
Múṣalahú = devisee.

Musáqát = partnership with respect to trees.
Musáwama = sale by bargaining.
Mushá' = pre-emption.
Mushtarak = homonym.
Múṣi = testator.
Muṣlaḥat = principle of public welfare.
Mustabínun ghairu marsúmin = legible writings but not in customary form.
Mustabínun mursúmun = legible writings in the customary form.
Muta't = right to conjugal society; a present to the wife; temporary marriage.
Mutawátir = proved by universal testimony.
Muṭlaq = absolute.
Mutwalli = the trustee of a wáqf.
Náfiḍ = operative.
Nafs = person; life.
Nafsu'l-wajúb = obligation *per se*.
Nahí = prohibitive law.
Najisun bi a'inihi = unclean.
Nakara = indeterminate.
Naql = transfer.
Naskhu'l-qirá'at = repeal of the words of Qur'án.
Naskhu'l-hukm = repeal of the law of Qur'án.
Naṣṣ = texts.
Naẓm = words (of the Qur'án).
Nikáḥ = marriage.
Niyat = motive.
Nuqúd = money.
Qabḍa = possession.
Qabúl = acceptance.
Qaḍá' = non-specific discharge of an obligation.
Qáḍí = a judge; a magistrate.
Qaran = period.
Qarḍ = loan.
Qaṣd, = intention.
Qáṣiratun = imperfect (punishments).
Qaṭa'í = absolute (text).
Qaul = act of utterance.
Qawd = retaliation.
Qímí = dissimilars.
Qisá's, = retaliation.

Qismat = partition.
Qíyás = analogical deduction.
Qubḥun = bad (act).
Qur'án = the book revealed to Muḥammad.
Qurbat = nearness to the Perfect Being.
Raḍḍ = return; restitution.
Rafu'u'l-yadain = raising of the hands to the ears at prayer.
Rahn = pledge.
Raja'i = a revocable repudiation.
Raqaba = corpus; a slave.
Rasúl = messenger; Prophet.
Libá' = usury.
Riḍá = consent.
Rubbu'l-mál = owner of capital.
Rukhṣat = modified.
Rukn = constituent.
Ruqba = donatio mortis causa.
Sabab = preparatory cause.
Safíh = a person of weak mind.
Ṣaghír = minor.
Ṣáḥibu'l-bid'at = men of innovation; heretics.
Ṣaḥíḥ = correct; valid.
Salam = a form of sale where the price is paid in advance.
Ṣalát = prayers.
Samáwí = providential circumstances.
Ṣarf = a sale of gold or silver for gold or silver; money-changing.
Ṣaríḥ = plain (word).
Sáriq = thief.
Ṣaum = fasting.
Ṣayd = game.
Shahádat = oral testimony.
Shahádut alá shahádut = evidence of testimony.
Shara' = lit. pathway, the legal code.
Shari'at = legal code.
Shara'í = juristic (acts).
Shauq = desire for (a thing).
Shayyun = thing.
Shirkatu'l-milk = ownership of property by two or more persons in undivided shares.
Shirkatu'l-'aqd = partnership in contract.
Shirkatu'l-muáfaḍat = partnership on a basis of equality.
Shirkatu'l-'anán = unequal partnership.

Shirkatu'l-amwál = partnership in capital.
Shirkatu'l-'amal = partnership labour.
Shirkatu'l-wajúh = partnership credit.
Shubhat'-ul-fa'il = doubt or error with respect to an act.
Shubhatu'l-mahal = doubt or error with respect to the subject of application of law.
Sibr = elimination.
Ṣifat = derivative noun.
Ṣígha = grammatical form.
Shighár = a form of marriage with the object of getting rid of dower.
Ṣilat = obligation of a benevolent nature.
Súaría = that which appertains to the external (manifestation of a contract).
Sunnat = traditions; practice of the Prophet).
Súras = chapters of Qur'án.
Ta'ámul = custom, practice.
Taba'tába'ín = successors of successors (of Companions).
Tábi'ún = successors of Companions.
Tafsír = science of interpretation of the Qur'án.
Tafwíd = delegation.
Taghrir = fraud; deception.
Tahayyu = arrangement.
Tahkím = arbitration.
Tahlíl = consummation of marriage required for reunion with the previous husband.
Taḥsín = what is proper.
Tayammuum = substitutory ablution.
Takhṣíṣ = limitation or specification (of a general proposition).
Taklífi = controlling; defining law.
Ṭalabu'l-muwáthíbat = first assertion of the claim by a pre-emptor.
Talabu't-taqrírwa'l-ishhád = assertion of a pre-emptor's claim in the presence of two witnesses before vendor or vendee or on the spot.
Ṭalabu'l-khuṣúmat = enforcing a right of pre-emption in Court.
Talafinuqṣán = damage; depreciation.
Ṭaláq = dissolution of marriage by the husband; repudiation; divorce.
Ta'líl = reasoning (based on an effective cause).
Ṭa'n = imputation.
Tanbíhu'l-qalb = promptings of the heart or conscience.

Tanfiḍ = execution.
Taqlíd = following opinion of another person without knowledge of the authority for it.
Taqrír = fixing (meaning).
Tarjihu'l-bayy'inat = preference of proof.
Tark = omission.
Taṣarrufát = expenditure of one's energy or will; voluntary acts.
Taṣarrufát'ush-shari' = lawful acts.
Taṣdiq = acknowledgement of God's authority over our actions.
Tawátur = universal testimony.
Ta'zir = a doctrine of punishment.
Tazwíj = marriage.
Thaman = consideration; price.
Thanawiyatun = those who believe in two gods; magians.
Thayyiba = a girl who has had sexual intercourse.
Thawáb = spiritual merit.
Tuhr = period of purity.
Turku't-tarwá = negligence.
Uf' = an exclamation of anger or contempt.
Ummatu'd-Da'wat = men of innovation; heretics.
'Uqúbát = punishments.
'Urbún = a kind of sale on approval.
'Urf = usage; custom.
'U'rúḍ = goods.
'Ushr = tithe; a kind of land tax originally leviable from non-Muslims alone.
Uṣúlu'l-Fiqh = science of law.
Vakálat = agency.
Waḍí' = sale at less than cost price.
Waḍ'aí = declaratory laws.
Wadíyat = deposit.
Waḥi = revelation.
Wajubu'l-adá' = obligation to do certain acts.
Waṣí = executor.
Waṣiyat = bequest.
Wáqi'át = cases.
Wathníyatun = idol-worshippers.
Wiláyat = rights of guardianship; authority.
Wiráthat = right of inheritance.
Wajúb = obligations.
Yad = possession.

Yaḥi = reviving (waste land).
Yaqíni = certain proof.
Ẓáhír = manifest (of meaning).
Ẓáhiru'l-ḥál = outward circumstances.
Ẓahirun = in appearance.
Zaujíat = marital rights.
Ẓanni = presumptive.
Zakát = poor-rate.
Ẓihár = comparing a man's wife with the back of a female within prohibited degrees of relationship.

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PRINTED AT THE
S. P. C. K. PRESS, VEPERY, MADRAS
1911