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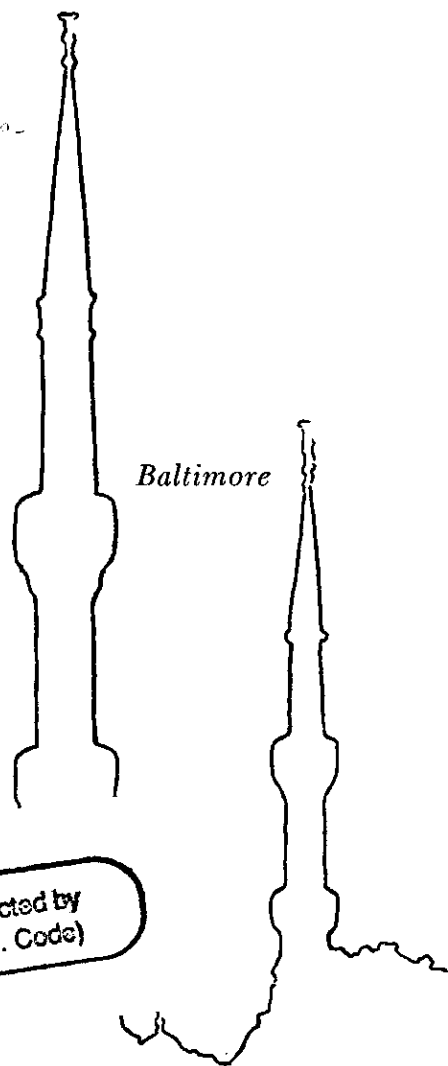
# WAR *and* PEACE

*in the Law of ISLAM*

MAJID KHADDURI, *1900-*

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"Verily, we have revealed to thee the Book with the Truth in order that thou mayest judge between men by means of what God hath shown thee. . . ." Qur'ān IV, 106.

## CHAPTER II

### NATURE AND SOURCES OF LAW

#### *Customary Law and Islamic Law*

Muslim jurists have maintained that since Islamic law was a divinely ordained system, they scarcely had anything to do with pre-Islamic law. Some went so far as to assert that Islam cancelled all the legal systems that preceded it since the Qur'ān provided a detailed account of "everything."<sup>1</sup> Others, especially the Mālikī and Ḥanafī jurists, recognized only those pre-Islamic rules and practices as valid which were not expressly abrogated by divine legislation. While the latter school of thought saw no harm in accepting certain pre-Islamic legal principles,<sup>2</sup> the

<sup>1</sup> See Q. XVI, 91: "We have revealed to you a Book explaining everything;" and Q. VI, 38: ". . . We have neglected nothing in the Book."

<sup>2</sup> See Sarakhsī, *al-Mabsūṭ* (Cairo, 1913), Vol. XV, pp. 171-172; Pazdawī, *Kashf al-Asrār* (Istanbūl, A.H. 1307), Vol. III, pp. 212-7; Cf. Ghazzālī, *al-Mustasfa* (Cairo, 1937), Vol. I, pp. 132-5.

other school repudiated the validity of all pre-Islamic doctrines, unless, for the purpose of showing that no inconsistency exists between the two schools, the term "cancellation" was construed, as Ibn Khaldūn stated, to mean "substitution," without giving any value judgment of the validity of pre-Islamic legal systems.<sup>3</sup> No school, however, gives an adequate explanation of the origin and development of Islamic law, much less of the relations of law to Arab society. There is ample evidence to show, however, that Islamic law evolved from Arab customary law and that, after the expansion of the Islamic state, Islam absorbed the local custom and practices of the conquered territories no less than other religious systems had done.

The pre-Islamic law of Arabia was embodied in a system of customary law, comprising legal and moral principles, known as the sunna. The sunna grew out of the custom of the forefathers and its enforcement by practice established its legal validity. Since the structure of pre-Islamic Arab society, even in the relatively large cities of Makka and Madīna, had not become completely urban, the character of customary law of the settled population did not essentially differ from that of the tribal population. Apart from the small Christian and Jewish colonies which had their own religious laws, the majority of the Arabs were idolaters; the sunna, accordingly, was pagan in character, based on what a nomadic or semi-nomadic society would need or honor.

The most distinctive feature of this society was the lack of political unity, a characteristic feature in all tribal organizations. The sayyid, or chief of the tribe, was usually selected on

<sup>3</sup> "The Shar'," said Ibn Khaldūn, "prohibited the consideration of other Heavenly Books than the Qur'ān. The Prophet said: 'do not accept nor refute the views of the People of the Book; say to them: We believe in what is revealed to us and to you; our Lord and yours is one'" (Ibn Khaldūn, *Al-Muqaddima*, ed. Quatremère (Paris, 1858), Vol. II, p. 387.

the basis of seniority, nobility, and reputation for wisdom. His authority rested more on the confidence and respect of his fellow-tribesmen than on the power of the loose machinery of his government. The chief's most important function was to make decisions on the basis of custom, enforced by tribal public opinion. But the chief had no authority to issue orders which exceeded the customary law, for he was the executive, not the legislative, head of the tribe. The chief also represented his tribe in its relations with other tribes, backed in his diplomatic actions by the full powers of his tribesmen.

It follows that the sunna, the common law of a primitive social order, developed in a loose political organization to supplement the benign authority of the chief—it also often ran counter to his authority in such cases as the dakhāla (asylum)—as well as to temper the austere desert life which provides but meager resources for living. Thus, such customary practices as hospitality, dakhāla and najda developed to provide food, asylum, and assistance to helpless desert travelers. The loose—in certain places even the absence of—authority of the chief was augmented by such severe practices as the vendetta (*tha'r*) and the cutting off of the hand of the thief, in order in the former case to prevent crimes against the person by retaliation and in the latter to protect private property in a society whose little respect for property right was too tempting to theft. In spite of some strict customs regulating sex relations, the male enjoyed almost free and licentious rights in marriage, such as unrestricted polygamy, mut'a (temporary marriage) and divorce. The male was permitted to marry the female of the next of kin, such as his stepmother and the wife's sisters.<sup>4</sup> Above all, idolatry had become such an integral part of the customary law that so-

<sup>4</sup> For a discussion of sex relations in pre-Islamic Arabia and in early Islam, see W. Robertson Smith, *Kinship and Marriage in Early Arabia*, ed. S. A. Cook (London, 1907); and Gertrude Stern, *Marriage in Early Islam* (London, 1939).

cial and economic functions were regulated in terms of religious duties, such as the ḥajj and other religious ceremonies. Even the kāhin, like the Greek oracle, performed a social-economic function prescribed by religion.

The rise of Islam, though it did not aim at displacing the prevailing sunna, had far-reaching effects on it. That Muḥammad's aim was at the outset not to alter or violate the established sunna is demonstrated not only by his own personal conduct in conforming to it (a conduct which probably earned him the title of amīn, or trustworthy), but also by his insistence, especially in the Makkan period, that his mission was merely to warn people against idolatry and to preach the oneness of God. Muḥammad's opponents argued, however—not without good reason—that he had violated the sunna; for, despite his reiteration that he merely intended to replace false idols by Allah, the repudiation of idolatry itself implied the violation of the sunna, since idolatry was part of the customary law of the land. Law and religion were so closely interwoven in primitive societies that an attack on religion would constitute a violation of law. Thus Muḥammad's call to abandon idolatry in favor of the Deity inevitably resulted in the establishment of the supremacy of God's law over "idolatrous" law even though customary law was not abolished in toto. The sunna persisted, however, in substance if not in form, as a basic source of legislation.<sup>5</sup>

#### *Nature of Islamic Law*

Islam, probably more than any other religion, has the character of a jural order which regulates the life and thoughts of the believer according to an ideal set of revelations communicated to Muḥammad, the last of the Prophets. Thus Islam

<sup>5</sup> Cf. Aḥmad Fahīm Abū Sana, *Al-'Urf wa'l-'Āda fī Ra'y al-Fuqahā'* (Cairo, 1949), pp. 29-32.

established its own order of right and wrong, embodying its own justice, as the correct and valid one. In order to give a rational justification for this jural order Islam, like other religions, asserted that its ideal system proceeded from a divine source embodying God's will and justice. The need for a rational justification of this assumption is so great that man often seeks to satisfy it with mere self-conviction.<sup>6</sup>

In the Islamic legal theory only God, as the source of ultimate authority, has knowledge of the perfect law. This law which is represented in the Jewish and Christian religions as the expression of the will of God, or as God's direct creation, was raised a step higher by the Muslim jurist-theologians—at least after Orthodoxy had triumphed over the rationalist Mu'tazilites—to be on the same level as God: the divine law, originally embodied in the Qur'ān, co-existed with God Himself in a heavenly book which, from the Orthodox Muslim viewpoint, may be called the law of nature.<sup>7</sup> In the same way as natural law was regarded in the West as the ideal legal order consisting of the general maxims of right and justice, so Islamic law was in the eyes of the Muslims the ideal legal system. As a divine law it was regarded as the perfect, eternal and just law, designed for all time and characterized by universal application to all men. The ideal life was the life in strict conformity with this law.

In the Muslim legal theory, the divine law preceded both society and state; the latter existed for the very purpose of enforcing the law. But if the state failed to enforce the law—

<sup>6</sup> Cf. Hans Kelsen, *General Theory of Law and State* (Cambridge, Mass., 1946), p. 8.

<sup>7</sup> The original version of the Qur'ān is thought of as a book preserved in heaven (Q. LXXXV, 22). See Richard Bell, *Introduction to the Qur'ān* (Edinburgh, 1953), p. 37. See also 'Abd al-Qāhir al-Baghdādī, *Kitāb Uṣūl al-Dīn* (Istanbul, 1928), Vol. I, pp. 106, 108; and al-Asha'ri, *Kitāb al-Ibāna 'an Uṣūl al-Diyāna* (Hyderabad, 2nd ed., A.H. 1367) pp. 19-35.

in such a case the state obviously forfeits its *raison d'être*—the believer still remained under the obligation to observe the law even in the absence of any one to enforce it. The sanction of the law, which is distinct from the validity of the law, need not exist. For the object of the law is to provide for the believer the right path (Shari'a), or the standard life, regardless of the existence of the proper authority charged with its enforcement. The Muslim jurists, however, agreed—except the Khārijī sect—that in theory the Muslim community must at all times recognize at its head an imām (or caliph), charged with the enforcement of the law, and that the community falls in error if it fails to enthrone one. “He who dies without an imām,” Muḥammad is reported to have said, “dies the death of a pagan.” But if the imām himself fails to enforce the law, the Muslims are still bound to observe the law regardless of whether the imām, by the very fact that he failed to fulfill his duties, ceased to be the head of the Muslim community or not.

The law comprises devotional obligations to God as well as rules regulating the relations among fellow-believers. If the believer consummates his obedience to the law he realizes his ultimate objective in life, namely, the achievement of salvation. This fulfillment of the law would constitute his happy life—hard as it may seem—by giving him an inner satisfaction that his next life would be assured in Heaven.

The law existed independently of man's own existence. Just as the norms of natural law exist in nature, to be discovered by reason, so the norms of Islamic law were discovered by (or revealed to, in the Islamic conception), Allah's Apostle. The substance of this law, which existed in its perfect and most complete form only in the Mother Book (i.e. nature) was communicated to the Prophet Muḥammad piecemeal, each verse at its proper occasion, and pieced together two decades after Muḥammad's death in a book known as the Qur'an. Thus the

Qur'ān represents the earthly record of the Mother Book, the embodiment of a universal law or the law of nature.<sup>8</sup>

The divine law represents an effort to rationalize a world in which the Prophet Muḥammad found chaos and conflict while his aspiration was order. The law provided guidance not only in establishing an ordered society, but also in distinguishing what is called ḥusn (beauty)—hence to be followed—and qubḥ (ugly)—which should be avoided—or, in Western terminology, distinguishing between the “good” and “evil.” The divine law is a system of obligations (farā'id) which help to show the right “path” (sharī'a) to be traveled by the believer during his life-sojourn in order to achieve salvation. This “path,” however, narrow as it may seem, has given the believer several choices between the strictly enjoined (farḍ) and the strictly forbidden (ḥarām). For between these two extremes the believer has the liberty of fulfilling certain recommended actions (mandūb) and of refraining (makrūh, objectionable) from others, but neither is the latter forbidden nor the former obligatory. Further, between the recommended and objectionable, there is the category of jā'iz to which the law is indifferent and the believer has full freedom of action. For instance, the daily prayers or the fasting of the month of Ramaḍān are farḍ; pork, wine, and adultery are ḥarām; any additional prayer or the emancipation of a slave are mandūb; but the flesh of the hyena or divorcing the wife during the period of menstruation are makrūh. All

<sup>8</sup> It is contended that in the same way as the Old and the New Testaments are the Hebraic and Syriac records of God's commands, the Qur'ān represents the Arabic version of them. (Q. IV, 162; XII, 1; XX, 112; XLII, 2). See 'Adb al-Qāhir al-Baghdādī, *Uṣūl al-Dīn* (Istanbūl, 1928), Vol. I, p. 108; and Arthur Jeffery, *The Qur'ān as Scripture* (New York, 1952). For the possibility of the Qur'ān might have been revealed in another language, see Qur'ān, XLI, 42-43. Cf. Abū Ishāq al-Shāṭibī, *al-Muwāfaqāt fi Uṣūl al-Fiqh* (Cairo, n.d.), Vol. II, pp. 64-6.

other activities which do not fall within these categories are jā'iz. Sale, for instance, or any other contractual arrangements which are not prohibited, are jā'iz. As is provided in a Qur'ānic injunction: "God hath allowed selling and forbidden usury" (Q. II, 276).<sup>9</sup>

The Muslim jurist-theologians assert that the basic principle of law is liberty; but this principle is qualified by another, that human nature is essentially weak and can easily be led astray unless guided by divine wisdom. Hence the divine law, revealed to the Prophet Muḥammad as a set of all-embracing commands, is both authoritarian and totalitarian in nature. For it includes dogma as well as social and political principles; these are combined to constitute an indivisible unity. Law thus has the character of a religious obligation; at the same time it provides a political sanction of religion.

Three fundamental characteristics of the law may be stated, on which the classical Muslim jurist-theologians seem to have agreed. The first is its permanent validity, regardless of place and time. Believers, even if they resided outside the territory of Islam, were bound by the law. For the law was revealed to bind the believers as individuals, not as territorial groups. Secondly, the law takes into consideration primarily the common interests of the community and its ethical standard, the personal interests of the individual believers are protected only insofar as they conform to the common interests of Islam.<sup>10</sup> Not infrequently the interests of the individual were sacrificed for the sake of protecting the common interests of the community. For the law laid emphasis on mediation among individuals rather than on the regulation of their conflicts of interests.

<sup>9</sup> See Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām* (Cairo, A.H. 1347), Vol. I, pp. 50-65; Pazdawī, Vol. I, pp. 100ff; Ghazzālī, Vol. I, pp. 42-53.

<sup>10</sup> Cf. Sir Henry Maine, *Ancient Law* (World's Classics edition), pp. 101, 138-41.

Thirdly, the law must be observed with sincerity and good faith. In Islam, as in ancient Rome, the law regards the principle of *bona fides* to be the underlying basis of the believer's private and public conduct. Faithlessness, duplicity, and dissimulation have been repudiated as inconsistent with the objectives of the law in normal circumstances; the law permits relaxation of certain strict rules only under extenuating and exceptional circumstances such as when the believer's own life should be subjected to extreme peril or he is threatened with death. This relaxation of the law is permitted under the general principle of moderation, by virtue of which the believer may keep a balance between his obligations under the law and the circumstances permitting their fulfillment. Fasting during the month of Ramaḍan, for instance, is compulsory upon all believers; but this rule, qualified by the principle of moderation, permits the postponement of fasting while the believer is traveling (if his journey exceeds three days) and exempts the sick from fasting so long as he is unable to fulfill the obligation; but the nonfulfillment of an obligation, or even failure to observe the law, does not necessarily imply the supremacy of the believer's interests over the law. For the law, as the ideal divine system, sets the standards to which the believer has to conform; he may not alter or adapt the law to fit his own interests or convenience.<sup>11</sup>

### *Sources of Law*

The Muslim community, after Muḥammad's death, inherited a legal order comprising the Islamic *jus naturale* and the Arabian *jus gentium*. Since the prophetic function was not bequeathed by Muḥammad to his successors, divine legislation came to an end at a time when the Islamic state was about to

<sup>11</sup> See Abū Ishāq al-Shātibī, *Al-Mūwāfaqāt fī Uṣūl al-Fiqh* (Cairo, n.d.), Vol. II, p. 8; and Suyūṭī, *al-Ashbāh wa'l-Nazā'ir* (Cairo, 1938), pp. 7-50.

embark on expansion outside Arabia. Thus the Muslim community was bound to fall back on customary law, which had supplied substance for some divine legislation, in conformity with the Arabian way of life.

The development of Islamic law would have been less complex and the difference among the jurists probably less considerable and confusing if the Muslim community had remained confined to Arabia. The newly conquered territories of Syria, Iraq, Persia, and Egypt presented legal problems which were not easy to solve by the norms of a law that had developed in Arabia. The early caliphs and their jurisconsults inevitably had to resort to personal opinion (*ra'y*) to supplement divine legislation and customary law. Traditions ascribed to Muḥammad permitting the use of *ra'y* as a source of law were cited;<sup>12</sup> but a more authentic evidence of the use of reason in early Islam is to be found in Caliph 'Umar's instructions to Abū Mūsa al-Ash'arī (qāḍī of Baṣra) in which the Caliph stated three sources to be used in legal decisions, namely, the Qur'ān, the prevailing sunna (*al-sunna al-muttaba'a*) and reason.<sup>13</sup> This

<sup>12</sup> The so-called Mu'adh ibn Jabal's tradition runs as follows: The Prophet Muḥammad sent Mu'adh as a judge to take charge of legal affairs in al-Yaman, and asked him on what he would base his legal decisions. "On the Qur'ān," Mu'adh replied. "But if that contains nothing for the purpose?" asked Muḥammad. "Then upon your tradition," answered Mu'adh. "But if that also fails you?" asked Muḥammad. "Then I will follow my own opinion," said Mu'adh. And the Prophet Muḥammad approved his purpose. See Ibn Sa'd, *Kitāb al-Ṭabaqāt al-Kabīr*, ed. Sachau (Leiden, 1917), Part II, Vol. II, pp. 107-8, 120.

<sup>13</sup> Doubt has been raised as to the authenticity of 'Umar's letter to Abū Mūsa owing to variations in the text as reported by various authorities. Abū Yūsuf, one of the earliest authorities, refers to the contents of the letter in brief, which indicates that such instructions were likely to have been given (Abū Yūsuf, *Kitāb al-Kharāj*, p. 117). For a critical study of the text and translation of this document, see D. S. Margoliouth, "Omar's Instructions to the Kadi," *Journal of the Royal Asiatic Society* (April, 1910),

document possesses an additional significance in the use of the term sunna, which bears witness that in the early Islamic period the term still meant the Arabian customary law (*jus gentium*) and that it had not yet acquired the technical sense of Muḥammadan traditions (sunna of the Prophet.)

In the conquered territories of Syria and Iraq the term sunna was indiscriminately used to mean not only the sunna of the Prophet, but also (āthār) or traditions from the Prophet's companions and successors (tābi'ūn) as well as local custom. If there were no Qur'ānic rule or sunna, resort was made to ra'y. But ra'y proved to be so controversial a source of law that it was soon abandoned.<sup>14</sup> It was attacked on the grounds that it permitted legislation by man. The jurists, accordingly, had to find other means in which reason was used to supplement the Qur'ān and sunna.<sup>15</sup>

In Iraq, Abū Ḥanīfa (A.D. 699-768) distinguished himself as the chief advocate of analogy (qiyās) as a source of law, whenever specific Qur'ānic verse or tradition was lacking. His use of traditions was so consciously selective—especially those coming from companions and successors—that his knowledge of traditions seemed palpably lacking to his contemporary critics.<sup>16</sup> Abū Ḥanīfa's reply to those critics was that he always

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pp. 307-326. Cf. E. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam* (Paris, 1938), Vol. I, pp. 106-113.

<sup>14</sup> According to Ibn al-Muqaffa', writing during the caliphate of Al-Manṣūr (A.H. 136-158), no one but the caliph has the right to use ra'y in matters of military and civil administration and generally on all matters on which there were no traditions (āthār). See Ibn al-Muqaffa', *Risāla fī al-Ṣahāba* in *Rasā'il al-Bulaghā'*, ed. Kurd 'Alī (3rd ed., Cairo, 1946), pp. 121-2.

<sup>15</sup> See Edwin E. Calverley, "The Fundamental Structure of Islam," *The Moslem World*, Vol. XXIX 9L939, pp. 373-4.

<sup>16</sup> Khaṭīb al-Baghḍādī, *Ta'rikh Baghdād* (Cairo, 1931), Vol. 13, pp. 415-6, 420-1.

depended on traditions (āthār) in his analogical method, making no use of ra'y (personal opinion),<sup>17</sup> but in fact his analogical reasoning and preferential choice of traditions necessarily carried with it personal opinion. In case there were two traditions bearing on the same subject, Abū Ḥanīfa's choice is known as istiḥsān—a procedure in which Abū Ḥanīfa chose the traditions which he thought would be least harmful.<sup>18</sup> Most damaging of the criticisms levelled at Abū Ḥanīfa's method was his use of casuistry (al-ḥiyal al-shar'īyya).<sup>19</sup> While the ḥiyal were intended to temper the strictness of, or offset the evil consequences created by, certain rules and practices, they were, however, often abused—especially by later Ḥanafī jurists—consults—for the purpose of evading the law.

Abū Ḥanīfa's liberal use of analogical reasoning reflected the need of a new social environment for the development of a system of law which had originated in Arabia before its area of validity was widened by the rapid expansion of the Islamic state. Although Abū Ḥanīfa and his disciples were more outspoken in the use of independent opinion, their critics in Iraq and Syria, such as Ibn Abū Layla and al-Awzā'ī, were not less influenced by their social environment than Abū Ḥanīfa. Zufar went, perhaps, beyond the limits of analogy set by his master, but Abū Yūsuf (died, A.D. 799) and in particular Muḥammad ibn al-Ḥasan al-Shaybānī (died A.D. 805) were more conservative in the use of analogical reasoning.

In Madīna Mālik ibn Anas (A.D. 718–96) had the reputation

<sup>17</sup> Muwaffaq al-Makkī, *Manāqib . . . Abū Ḥanīfa* (Hyderabad, A.H. 1321), Vol. I, pp. 77-8; cf. Al-Khaṭīb al-Baghdādī, *Ta'rikh Baghdād*, Vol. 13, p. 390.

<sup>18</sup> Abū Muzzafar 'Īsa, *Kitāb al-Radd 'Ala al-Khaṭīb al-Baghdādī* (Cairo, 1932), pp. 79, 102.

<sup>19</sup> Khaṭīb al-Baghdādī, *Ta'rikh Baghdād*, Vol. 13, pp. 403-4, 408-9. For an exposition of the Ḥanafī system of al-ḥiyal, see Shaybānī, *Kitāb al-Makhārij fī al-Ḥiyal*, ed. Joseph Schacht (Leipzig, 1930).

of making use of traditions of the Prophet and his Companions to a larger extent than his Iraqi contemporaries, but in fact those traditions were no less mixed with local traditions than elsewhere. Mālik and the jurist-theologian of Madīna claimed that their city was the home of true Muḥammadan traditions and therefore their school was designated as the School of ḥadīth (traditions). It is reported that Mālik compiled his law-book, *al-Muwatṭa'*, from several thousand ḥadīths which he submitted for approval to seventy jurist-theologians.<sup>20</sup> In this digest the ḥadīths comprised not only the Muḥammadan traditions but also the local sunna and the practice of the Madīnan jurists, which was regarded as constituting the true Muḥammadan tradition.

Mālik's procedure in selecting the body of ḥadīths acceptable to recognized jurists of Madīna introduced a new procedure, which was probably invented by him, namely, the *ijmā'* (consensus). This was in contrast to the Iraqi jurists who often disagreed with each other. To Mālik the agreement of the Madīna jurists on a rule of law based on ḥadīth (which may have been a local custom embodied in ḥadīth, or by a ḥadīth, lacking in genuineness, circulated to sanction it) constituted law. The *ijmā'* was a weapon with which the Ḥijāzī attacked the Iraqi jurists (especially the Ḥanafīs) on the ground that they had departed from the sunna of the Prophet. Further, Mālik developed the principle of *istiṣlāḥ*, on the basis of which he gave legal opinion designed to serve the common interests and welfare of the community. This procedure was derived from the idea of the consent of the community and may be regarded as a form of consensus.

The *ijmā'* was not accepted without opposition, for it was feared that it might constitute legislation by man. The jurists, however, modifying Mālik's conception of *ijmā'* to include all

<sup>20</sup> See Suyūṭī, *Kitāb Tazyyīn al-Mamālik* (Cairo, A.H. 1325), pp. 42-3.

the leading scholars (mujtahids), saw the value of agreement and approved of the procedure. This was justified by a ḥadīth ascribed to the Prophet Muḥammad to the effect that "my people shall never be unanimous in error," and a vague Qur'ānic verse: "follow . . . the way of the believers."<sup>21</sup> Moreover, the Prophet said "the learned are the heirs of the prophets"—they are therefore the ones who can interpret the Book.

The jurists of Iraq objected to the narrow Mālikī conception of *ijmā'* and contended that other provinces of the Islamic world were as capable of arriving at an *ijmā'* as the Madīnan jurists, though in practice they betrayed similar local prejudices to those of the Madīnans. More constructive criticism of local *ijmā'* was reserved for Shāfi'ī (A.D. 768-820), the first and probably the greatest Muslim systematic legal theorist, who widened the conception of *ijmā'* and, although he did not completely repudiate the doctrine of the *ijmā'* of the scholars, advocated in the final revision of his doctrine the consensus of the community at large. He saw in the doctrine of *ijmā'* the safest legislative authority.

In trying to achieve a consistent legal theory, Shāfi'ī accepted the unquestionable authority of the Qur'ān, but he rejected the sunna as a source of law unless the sunna was an authentic Muḥammadan tradition. In this he tried to narrow the use of sunna merely to utterances reported on the authority of the Prophet Muḥammad.<sup>22</sup> He attached more significance to the unanimous consensus of the community in arriving at a rule of law than to a sunna ascribed to a questionable source (often invented by certain vested interests) or based on local practice. He also tried to limit the use of analogy to questions

<sup>21</sup> Q. IV, 115.

<sup>22</sup> See J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford, 1950). Shāfi'ī's legal system is to be found in his collected writings entitled *Kitāb al-Umm* (Cairo, A.H. 1321-5), 7 volumes.

of detail when there was no relevant text in the Qur'ān, no sunna, or no consensus. Analogy, he maintained, cannot supersede the other three sources of law, but rather it must be superseded by them. Neither should it be based on a special or exceptional case; analogy must conform to the general spirit of the law. In taking this attitude Shāfi'ī established a balance between those who used analogy extensively and those who rejected it as a source of law.

Shāfi'ī's doctrine of the *ijmā'* as the consensus of the community was short-lived, for not only was it opposed by other schools, but was even qualified by his own followers. Al-Ghazālī, who supported Shāfi'ī's insistence on unanimous agreement, confined unanimity to fundamentals, and left matters of detail to "agreement of the scholars."<sup>23</sup> Ibn al-Humām (died A.H. 861), in trying to reconcile the Ḥanafī with the Shāfi'ī doctrines, offered a formula which reduced *ijmā'* to agreement of the scholars in one generation, but saw no need for the expiry of the generation (as others contended) before an *ijmā'* could be reached.<sup>24</sup>

The fundamental weakness in Shāfi'ī's doctrine of universal agreement was procedural, namely, the lack of an adequate method which would provide means for the community to arrive at an *ijmā'*. Indeed, the whole doctrine of *ijmā'*, whether based on the consent of the community or the scholars' agreement, suffered from this procedural defect. Its critics, especially Al-Nazzām, a Mu'tazilite, attacked it mainly because of the difficulty of securing agreement among scholars who were scattered far and wide throughout the Islamic empire. Some of the jurists offered a corrective by arguing that if a few scholars reached an agreement and no objection was raised by others (*ijmā' al-sukūt*), or if the majority agreed and only a few raised

<sup>23</sup> Ghazālī, *al-Mustaṣfa fī Uṣūl al-Fiqh* (Cairo, 1937), Vol. I, pp. 115-21.

<sup>24</sup> Ibn al-Humām, *al-Taḥrīr* (Cairo, A.H. 1351), pp. 399, 401.

an objection, agreement becomes binding upon the community.<sup>25</sup> While this narrowed the possibilities of disagreement, the process itself remained undefined. No precise definition of the *ijmā'* were ever given nor the qualification of a scholar ever agreed upon by the jurist-theologians.

### *Schools of Law*

The controversy over the "sources" of law arose from the termination of revelation—Muḥammad's chief Prophetic function—without providing a rule for further legislation. A more serious issue that had arisen revolved on the question of succession, because Muḥammad's sudden death left the matter undecided. These two lacunae in Muḥammad's jural heritage profoundly affected the political and legal development of the Islamic state—the one created the greatest schism in Islam, and the other, confusion and diversity in the legal system.

All the jurist-theologians agreed that the Qur'ān, embodying the infallible revelations, was an unquestionable source of law. But here agreement ended, since the Qur'ān provided no clear guidance for further legislation. As a result, the controversy that followed was essentially one concerning the sources, rather than the substance, of legislation. The character of this controversy was not, strictly speaking, legal; at bottom it was theological, since an inquiry into what would constitute an authoritative supplement to the Qur'ānic revelations is a doctrinal, not a legal matter.

The confusion and diversity in the initial stages of the development of Islamic law were opposed by the early jurists, arguing that the Qur'ānic injunctions repudiated disagreement in the matters of religion.<sup>26</sup> Probably the first Muslim publicist

<sup>25</sup> Ghazzālī, *op. cit.*, Vol. I, pp. 121 ff; 'Alī 'Abd al-Rāziq, *al-Ijmā' fī al-Sharī'a al-Islāmiyya* (Cairo, 1947), pp. 73-90.

<sup>26</sup> Q. III, 101; XCVIII, 4. For details on the early jurists' criticism of

who saw the futility of disagreement in the development of law was Ibn al-Muqaffa', who, while in the service of the Caliph al-Manşūr (A.D. 754-75), addressed to the Caliph a treatise in which he suggested putting an end to the then existing anarchy of the law by its formal codification into a coherent system.<sup>27</sup>

The later jurists, however, favored disagreement rather than uniformity, a tendency reflecting the force of local particularism and precedents. Traditions ascribed to Muḥammad in support of disagreement were cited, the most important of which runs as follows: "the disagreement of my people is a mercy from Allah."<sup>28</sup>

This freedom in legal speculation set on foot the movement to develop a variety of schools, each led by a distinguished mujtahid, around whom a number of disciples gathered and discussed questions of law. Although these leading jurists often attacked each other, as in the case of Abū Ḥanīfa and his critics, there was on the whole a tolerant attitude on the part of the Muslim community towards their leading jurists, believing that in spite of their differences on matters of detail (*furū'*) they all sought the truth, each according to his light. Al-Sha'rānī has compared the four orthodox schools of law to several roads, all leading to the truth.<sup>29</sup> But lack of direction in the *ijtihād* and disagreement tended to multiply the schools and to accentuate the rivalry among their followers. During the second

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disagreement, see J. Schacht, *op. cit.*, p. 95; and I. Goldziher, *Die Zahiriten*, (Leipzig, 1884), p. 98.

<sup>27</sup> Ibn al-Muqaffa', *op. cit.*, pp. 117-134.

<sup>28</sup> A traditional story is related by several reporters that Mālik ibn Anas was requested by Caliph al-Manşūr (some say by Caliph al-Mahdi) to permit the adoption of *al-Muwatta'* as the official law-book for the state. Mālik is reported to have politely refused favoring the enforcement of a variety of law-books rather than the enforcement of a single standard text. See Ibn 'Abd al-Barr, *al-Intiqā'* (Cairo, A.H. 1350), pp. 40-1.

<sup>29</sup> Sha'rānī, *Kitāb al-Mizān* (Cairo, 1932), Vol. I, pp. 2, 6-7.

and third centuries of the Islamic era (the eighth and ninth of the Christian era) the Islamic world was abounding with a great number of schools of law, major and minor. But at this stage no sharp distinction was yet recognized between them. These schools varied from the relatively liberal Ḥanafite and Mu'tazilite jurists—permitting large measures of independent reasoning (*ijtihād*)—to the conservative Zahirite and Ḥanbalite jurists, who not only restricted *ijtihād*, but also insisted on a literal interpretation of the Qur'ān and ḥadīth. Each school consisted at the outset of a group of disciples who followed their master in giving certain answers to specific questions, practical or speculative; it was not until the third century of the Islamic era, probably as a result of Shāfi'ī's systematizing effort in the study of the law, that the technical term *madhhab* (school of law) was applied to the followers of the founders of the recognized schools of law. Before that it was fashionable to call the followers of each jurist his *aṣḥāb* (singular, *ṣāhib*). Probably both Mālik and Abū Ḥanīfa died without realizing that they were the future founders of schools called after their names. Their followers were usually referred to respectively as the "people of tradition" (*ahl al-ḥadīth*) and the "people of opinion" (*ahl al-ra'y*). In the case of the latter school the reference was made to a number of Iraqi jurists, not to the Ḥanafīs only, and in this frame of reference the followers of Ibn abī Layla (great rival of Abū Ḥanīfa), Sufyān al-Thawrī and Ibn Shubruma were included.

In the fourth century of the Islamic era only four schools were recognized as orthodox, namely, the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī schools. Their law-books became the standard text-books and any attempt to depart from them was denounced as innovation (*bid'a*). As a result *ijtihād* was gradually abandoned in favor of *taqlīd* (literally, "imitation") or submission to the canons of the four schools, and the door of *ijtihād*

was shut. At first taqlīd reflected a tendency to reduce the differences among jurists and limit the number of schools, but the growing intolerance of the Muslims to legal reasoning rendered taqlīd an obstacle to legal development. The triumph of the followers of Ibn Ḥanbal coincided with this growing spirit of intolerance and was best expressed in their repudiation of ijtihād and their rejection of all forms of qiyās, seeking to find all the answers to their problems in the ḥadīth. Even the ijmā', which had been established as an infallible principle, ranked in their eyes inferior to a weak ḥadīth.<sup>30</sup>

The rigidity of the Ḥanbalī school and the austere life it required were opposed by many persons in authority who supported the Ḥanafī and Shāfi'ī schools. The Ḥanbalis would accept neither positions in the State nor gifts from supporters—two important factors which were fully exploited by their opponents and which weakened the Ḥanbalī followers.<sup>31</sup> Thus the Ḥanbalī teachings were abandoned in favor of other schools, in spite of occasional revivals of Ḥanbalism by a number of influential jurist-theologians, as in the eighteenth century of the Christian era when the teachings of Ibn Taymiyya (A.D. 1260-1327), a great Ḥanbalī jurist who revived interest in Ḥanbalism,<sup>32</sup> were adopted by the Wahhabi movement of Arabia as the official creed of the movement.

Outside Arabia the Ḥanafī and Shāfi'ī canons became dominant in Iraq, Syria, Egypt, and Turkey; and the Mālikī school, shrinking in the Ḥijāz, spread all over North Africa and Spain before the latter was restored to Christian rule. But there was,

<sup>30</sup> For a detailed study of Ḥanbalī law, see Ibn Qudāma, *al-Mughnī*, ed. M. Rashid Riḍa (Cairo, A.H. 1367), 9 vols; and Henri Laoust, *Le précis de droit d'ibn Qudama* (Beyrouth, 1950).

<sup>31</sup> See Ibn Rajab al-Baghdādī, *Histoire des Hanbalites*, Arabic text (Damas, 1951), Vol. I, pp. 10-1, 189.

<sup>32</sup> For a translation of Ibn Taymiyya's treatise on public law, see Henri Laoust, *Le traite de droit public d'Ibn Taimiya* (Beyrouth, 1948).

and still is, no restriction of the Muslim from changing his allegiance and religious practice from one school to another during his lifetime. A number of distinguished jurists as well as men in authority have, with facility and without incurring social criticism or prejudice, changed their allegiance from one school to another. It was possible to find in the same family one member belonging to one school and the other to another school; and in a certain family of four children, each purposely belonged to a different school.<sup>33</sup>

### *The Shī'ī Doctrine*

The Sunnī sectarian division in Islam includes the four schools of law previously considered. The Shī'a comprises a heterodox group the historical importance of which requires separate treatment. The underlying difference between the Shī'ī and Sunnī legal theory is the doctrine of the imāmate (the Shī'ī term for the caliphate) which narrows the qualifications of the candidate for this position not merely to the tribe of Quraysh but still further to ahl al-bayt, the descendants of 'Alī and Fāṭima.<sup>34</sup> The Shī'a accepts the legitimist right of 'Alī to the imāmate as an article of faith; for, it is held, 'Alī was designated by Muḥammad and after him his descendants in direct line. This designation, made on a special occasion, entrusted 'Alī with divine authority; at the same time it confided to him a secret knowledge (ta'wīl), empowering him to interpret the Qur'ān as well as to make—some say even to abrogate—the law. This esoteric knowledge 'Alī passed on to his male descendants from generation to generation.<sup>35</sup>

<sup>33</sup> Sha'rānī, *op. cit.*, Vol. I, pp. 36-40; and Goldziher, *Les Dogme et le lois de l'Islam*, trans. Felix Arin (Paris, 1920), pp. 42-3.

<sup>34</sup> 'Alī was the cousin and son-in-law of Muḥammad; Fāṭima, the daughter of Muḥammad and wife of 'Alī.

<sup>35</sup> Ḥilli, *Al-Bābu'l-Ḥādī 'Ashar*, trans. W. M. Miller (London, 1928), pp. 62-81.

This doctrine, regarding 'Alī and his descendants as the repository of the Islamic truth, was further elaborated by 'Alī's devoted followers so as to ascribe superhuman qualities to him, raising him and his descendants to a level higher than fallible human beings. To many a Shi'a, Muḥammad is slightly eclipsed by 'Alī, and to certain extremists God's revelations, miscarried by the Angel Gabriel to Muḥammad, were originally intended for 'Alī.<sup>36</sup> To the majority of the Shī'a, however, 'Alī was to rule by divine right, armed with such authoritative knowledge bequeathed to him by Muḥammad—a knowledge which placed him beyond the reproach of human beings. He and his descendants formed, in contrast to the Sunnī caliphs, a caste of not only infallible, but also impeccable imāms.

Differences of opinions on the nature of the imāmate, itself the cause of division in Islam, gave rise to sub-divisions within the Shī'ī sect. Apart from the Zaydīs, who permit the election of the imām from among 'Alī's descendants, the principal sub-divisions are two, the so-called Twelvers and Seveners. This dissension took place after the death of the sixth imām, Ja'far al-Šādiq (died A.D. 765); the Twelvers acknowledged his younger son Mūsa al-Kāzim and the Seveners supported the claim of the elder brother Ismā'il. The minority, however, followed Ismā'il, whose descendants established the Fātimid Caliphate in Egypt (A.D. 969-1171), and who are now to be found only in India, Central Asia, Syria, Persian Gulf, and East Africa. These are often called the Ismā'ilīs.<sup>37</sup>

The majority of the Shī'a were, and still are, the supporters of the imāmate of Mūsa al-Kāzim and his descendants until

<sup>36</sup> Ras'ani, *Mukhtaṣar al-Farq Bayn al-Firaq*, by 'Abd al-Qāhir al-Bagh-dādī, ed. P. K. Hitti (Cairo, 1924), p. 157.

<sup>37</sup> For an exposition of Ismā'ilī legal doctrine, see Qādī al-Nu'mān ibn Muḥammad, *Da'ā'im al-Islām*, ed. Āṣif ibn 'Alī Aṣghar Fayḍī (Fyzee) (Cairo 1951).

the disappearance of the twelfth Imām Muḥammad ibn al-Ḥasan al-'Askarī (A.H. 260, or A.D. 874).<sup>38</sup> These are called the Twelvers. No other imām had been selected since the disappearance of Muḥammad, because his absence (ghayba) did not mean that he had perished; his spirit, it is held, is still with his fold. The doctrine of the ghayba (absence of the imām) and his final return as the mahdī (messiah), to dispense justice and righteousness in a world now full of sin, forms the basis of the Twelvers' creed. During the imām's absence, the creed and the law have been interpreted by the mujtahids (scholars) who have acted as agents of the imām. Owing to continual persecution under succeeding Sunnī caliphs and sultans (mainly because the Shī'a were opposed to the Sunnī caliphate), the Shī'a developed the doctrine of kitmān or taqiyya (dissimulation) which permitted the members of this sect to hide their belief in order to secure protection. This principle is based on a vague Qur'ānic injunction,<sup>39</sup> but the mujtahids have regarded it as an integral part of their creed.

The Shī'ī conception of law, it will be noted, is more authoritarian and far more detached from social reality than the Sunnī conception, not only because the final authoritative interpretation of the law had been placed in the imām, but also because of his infallibility and his possession of an esoteric knowledge of the true meaning of the law. Not even the absence of the imām had transformed this character of the law, for the mujtahids acted only as agents of the imām, not as free representatives who followed their independent judgments. Thus ijtihād in Shī'ī law has a different meaning from that of

<sup>38</sup> Muḥammad is said to have disappeared in mysterious circumstances when he entered a cavern in search of his father who died at Sāmarrā', then capital of the caliph. From that cavern the child never returned, but the Shī'a believe that he is still alive and will return as the Mahdī-Imām.

<sup>39</sup> Q. III, 27.

the Sunnī conception, at least before the closure of the door of *itjihād*.<sup>40</sup>

In the Shī'ī, as in the Sunnī, legal theory the Qur'ān is accepted as an unquestionable source of law;<sup>41</sup> but the ḥadīth is not accepted unless related by an imām recognized by the Shī'a. The *ijmā'* is rejected unless the imām takes part in it because neither the community nor the scholars have the final legal authority to interpret the law. Analogical reasoning play a less significant part in legislation, at least in contrast to the liberal Sunnī schools, because the mujtahid's opinion must be supported by a tradition or the precedent of an imām.

The differences between the Shī'ī and Sunnī law in matters of detail (*furū'*) are hardly more marked than those between one orthodox school of law and another. Apart from the doctrine of the imāmate, and the consequent emphasis on the authoritarian character of the law, the Shī'ī system, as it has been proposed, might have constituted a fifth madhhab, or school of law. However, the revolutionary character of Shī'ī opposition tended to accentuate the Sunnī-Shī'ī schism and rendered the recognition of their doctrine as Orthodox exceedingly difficult.<sup>42</sup>

<sup>40</sup> Cf. A. A. A. Fyzee, *Outline of Muhammadan Law* (Oxford, 1949), p. 35.

<sup>41</sup> Some Shī'ī extremists accused the Caliph 'Uthmān of deliberate suppression of certain Qur'ānic verses favorable to Shī'ism, but the majority accepted the same Qur'ān as the Sunnī, although they admit that it does not represent the original version.

<sup>42</sup> H. Lammens, *Islam: Beliefs and Institutions*, trans. Sir Denison Ross (London, 1929), p. 151-152; and H. A. R. Gibb, *Modern Trends in Islam*. (Chicago, 1947), p. 12.