

# FUNDAMENTAL CONCEPTS OF THE RULE OF LAW IN ISLAMIC PHILOSOPHICAL AND RELIGIOUS TENETS

by

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## I. SCOPE AND PURPOSE OF INQUIRY

1. Islam constitutes a close religious bond among more than two hundred million people in countries which are thousands of miles apart, in Asia, Africa and Europe. It transcends national boundaries as well as differences of race, colour and language. Wherever they may be, Muslims turn their faces to the Holy City of Mecca when they offer their five daily prayers. This is the one direction of 'kibla' which all Muslims follow.

This, however, is only one visible symbol of the unity of the Muslim world. The great intangible tie which binds Muslims and brings them close together from the distant corners of the earth, is their obedience to one Sacred Law, the **Shar**, or **Shari'a** of Islam. The Muslim Community, the Umma of Muhammed is composed of the nations who, under God, share in the privilege of a rule of law divinely inspired. In Islam, "Divine laws seek to prescribe the conduct of men in their affairs, their worship and their dealings, even in those relating to the state, which is natural to human society," says the Arab philosopher Ibn Khaldun. "The state, therefore, is patterned on religion, in order that the whole should come under the supervision of the Lawgiver."<sup>1</sup>

"It is characteristic of the practical bent of the Islamic community and of its thought," writes Professor Margoliouth,

<sup>1</sup> See an Arab Philosophy of History, selections from the Prolegomena of Ibn Khaldun, translated and arranged by Charles Issawi, John Murray, London, 1950, p. 135.

the great oriental scholar in his work, Mohammedanism, "that its earliest activity and most highly developed expression is in law rather than in theology."<sup>2</sup>

The purpose of the present paper is not merely to give a picture of the Islamic theory of the rule of law and its historical development over a period of thirteen centuries, we are concerned here rather with the living law; with the present status of the rule of law in Islam and with its future trends. Since the beginning of the twentieth century, some Muslim countries have adopted modern constitutions and "received" western positive legislation based on a new social and political philosophy. Does this mean, as some observers think, that the Shari'a or Muslim law is on the decline? Is its rigidity causing it to be abandoned under the impact of modern conditions and new needs? Is it becoming more and more a dead letter to which only lip service is paid in countries which profess Islam?

Such a view based on outward appearances and a rather superficial appraisal does not present a true picture of the present situation. Today, the Shari'a which represents the basic tenets of Islamic thought is not only alive more than ever; it is even undergoing a great revival which started at the beginning of this century. In the preface to his 'Introduction to the study of Muslim Law',<sup>3</sup> Professor Milliot of the University of Paris says :

"Je connais, moi, un droit relativement plastique, terriblement vivant et que pratiquent des justiciables ayant les pieds solidement plantés dans la réalité juridique, expérience humaine à côté de l'expérience religieuse."

<sup>2</sup> Muhammedanism, Oxford University Library, edited by Gibb, Oxford, 1952, Chap. 6, the Shari'a, p. 88.

<sup>3</sup> Introduction à l'Etude du Droit Musulman, par Louis Milliot, Paris, Sirey, 1953, Avertissement au lecteur, p. X.

(Translation : For my part, I know a law which is relatively flexible and vigorously living, with its roots solidly planted in legal reality; I know a law which is the expression of human experience as well as the expression of a religious belief.)

One of the most fascinating chapters on the present status of Muslim law, is to be found in Professor Gibb's work, 'Modern Trends in Islam.'

It is with this living Shari'a that the present study in comparative law is concerned. The question on which we should focus our attention is: "Does the legal order established by Islam as it is understood to-day present bases for comparison with the rule of law, under the Common Law, or with the 'regle de droit' under European law, and to what extent is the Muslim State a 'Rechtsstaat' governed by law in the sense in which this expression is understood in the West? Are there any common denominators between the rule of law in Islamic philosophy and the rule of law in Great Britain, or under the American Constitution or in the systems of law of West European States?"

We are not concerned here with the 'reception' of western law by Muslim Countries, fascinating as this study may be. It should be pointed out, however, that in no Muslim country has Muslim law been completely supplanted or superseded by a system of modern positive legislation. The remark of the French scholar Fustel de Coulange in the "Cité Antique" is true in this domain, as in many others: "for man, the past is never entirely dead."

2. At the threshold of a comparison between the legal order under Muslim law and the rule of law or the 'règle de droit' in modern law, two questions naturally suggest themselves:

a) Who are the people governed by Muslim law, and how are they geographically distributed among the continents of the Old World?

b) To what extent is Muslim law applicable to these people,

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\* Modern Trends in Islam by Sir H. A. R. Gibb formerly Laudian Professor of Arabic in the University of Oxford, now Professor at Harvard University, the University of Chicago Press, Illinois, 1946

and in what measure has it been replaced by other systems of law 'received' from abroad?

**a) Application of Muslim Law from the Point of View of Geography**

Massignon, the well known scholar and member of the French Institute, gives us the following answer to the first of these two questions in his *Annuaire du Monde Musulman*, éd. 1923, 1925, 1929. According to his estimate, with which Professor Milliot is in agreement,<sup>2</sup> there are roughly between 250 and 300 million Muslims today distributed among the following countries :

.... about 50 million in Africa, of whom 15 million live in North Africa and 16 million live in Egypt (now about 22 million according to more recent statistics);

.... about 40 million in the Middle East of whom 9 million live in Arabia, Iraq, Syria and Palestine; 9 million in Turkey, and 20 million in the USSR (Crimea, Turkestan, Caucasia and Azarbaijan)

.... about 140 million in the Far East, of whom about 70 million live in India (mostly in modern Pakistan) and about 55 million in Malaya and Indonesia.

In view of the growth of population over a period of about thirty years, these figures should be revised upwards.

**b) Application of Muslim Law from the Point of View of Legal Relations it covers now**

As regards the second question, it would be wrong to make any generalization. The areas in Muslim countries covered by extraneous positive legislation 'received' from abroad and the areas still covered by indigenous Muslim law have to be studied individually in every Muslim country. Roughly speaking, however, these countries fall into three different groups.

<sup>2</sup> Milliot, *op. cit.*

1) Countries, such as the Republic of Turkey which have tried to secularize the law and to achieve a complete separation of church and state by the total reception of a foreign system of positive law.

2) Countries, mainly in the Arabian Peninsula, such as Saudi Arabia, and the Imamate of Yemen which have hardly 'received' any foreign positive legislation and which still follow the traditional rules of Muslim law, practically in every domain.

3) Countries, such as Egypt, Syria and Pakistan which lie between the foregoing two categories, and which have adopted modern constitutions based on a European pattern. These countries have also adopted civil, commercial and penal codes mainly based on French legislation. However, they still apply Muslim Law in matters of family relations (statut personnel) and religious endowments (waqf).

But even in modern Turkey, a colloquium on marriage held in Istanbul in 1955 under the auspices of the "Association Internationale des Sciences Juridiques" brought out the two following points :

1. The adoption of a western system of law did not succeed in changing the old Muslim beliefs and traditions concerning family law. In many instances, the courts had to interpret the texts of the positive legislation 'received' from Switzerland in a manner which was far removed from the interpretation given to it in its country of origin. This was done in an attempt to bring the new law more in harmony with the deeply rooted traditions and beliefs which would not die.

2. The basic philosophy of Muslim law still imbued the thinking of the Turkish jurists. The assimilation of the rules and principles of the new law was never complete.

Last year Egypt and Pakistan adopted new constitutions. These constitutions, however, provide that Islam is the religion of the State. In Egypt, a new modern civil code promulgated on July 16, 1948 is modelled on the French Civil Code. But, that code has adopted many rules of Muslim law, and its first article provides as follows :

"In the absence of a provision of a law that is applicable, the judge will decide according to custom, and in the absence of custom in accordance with the principles of Muslim Law. In the absence of such principles, the judge will apply the principles of natural justice and the rules of equity." \*

In the present study, reference will more frequently be made to Saudi Arabia, because it still applies Muslim law according to the teaching of the Imam Ahmed Ibn Hanbal in practically every domain. Apart from a committee of merchants (Majlis el-tujar) in Jedda who decide commercial disputes, the only judges in Saudi Arabia are the 'cadis' who are deeply steeped in Muslim tradition.

3. If we seek similarities as to the rule of law between Muslim political institutions and the Muslim conduct of the State on the one hand, and the constitutional structure and practice of the modern State, we are bound to be disappointed. The concept of the State in Islam over the last thirteen hundred years remained in the original simplicity with which it started. Muslim public law never developed a theory of separation of powers. It never made a differentiation between the executive and judicial branches of the Government. There was no written constitution in Islam based on a system of checks and balances. There was no supreme court that could review the constitutionality of enactments and executive decisions.

Basically, however, the Muslim philosophy of the rule of law and the Muslim conduct of the State are amazingly close to the modern concept of the rule of law and the 'Etat de droit' or the 'Rechtsstaat.' The ideals and the objectives are the same; the sanctions, guarantees and safeguards are different. The modern State is based on man-made laws and on a human social philosophy, the Muslim State is a theocracy governed

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\* Egyptian Civil Code, English Translation by Perrot, Fanner and Sims Marshall, edited by the Journal du Commerce et de la Marine Alexandria, 1952.

by a revealed law.<sup>7</sup> I cannot resist the temptation of quoting the following passages from Professor Milliot's work.<sup>8</sup>

"To try to analyse legal situation in Islam according to our Western methods of reasoning would be a mistake. Islamic legal thought is built of the same rational material as ours. It starts at the same peak and flows down the same slopes, but in so doing, it follows a different course. However, all the streams meet down the valley to form the mighty river of universal human experience... Basically, the foundations of all law are the same."

## II. CONTENT OF THE RULE OF LAW IN THE SHARI'A; ITS DECLARATION OF HUMAN RIGHTS

4. If we go deep enough, we find that all the substantive content of the rule of law is to be found in the Shari'a. In Islamic doctrine the believer is under the rule of law and not under the rule of a person or of a body of individuals. He is not subject to caprice or to arbitrary power. Islam proclaims the eminent dignity of **the human** being. It respects the liberty of the individual, and preaches the doctrine of equality and brotherhood among all Muslims. In the words of Professor Milliot :<sup>9</sup>

"The religious and political concept of Islam is profoundly democratic and individualistic at its origin (profondément démocratique et individualiste à l'origine). It would have led to the exercise of power by the mass of the believers who formed the small people of Muhammed."

The enumeration of the rights of man under the Shari'a compares very favorably with that contained in any modern constitution. Muslim law classifies rights under two main categories. The first group comprises the rights of God (hukuk Allah). The second is concerned with the rights of man or of

<sup>7</sup> The prime-minister of Saudi Arabia was once asked by a distinguished Western lawyer whether Saudi Arabia had a constitution. Yes, replied the prime-minister, but our constitution was not written by human hands; our constitution is the Book of God.

<sup>8</sup> Op. cit., Avertissement, p. VIII.

<sup>9</sup> Op. cit., p. 126.

private individuals. Life, liberty and the pursuit of happiness come under this category. Muslim jurists tell us that the rights of the individual under Muslim law are so numerous that it would be difficult to list them in a complete manner. Professor Milliot<sup>10</sup> mentions the following among the main human rights :

- "a) The right to the security of one's person (nafs);
- b) The right to one's reputation (horma);
- c) The right to one's property and other real rights;
- d) The rights derived from contracts, and the right to do any act which does not conflict with the law (tasarrufat);
- e) Family rights derived from marriage (zawdjiya), tutelage (wilaya);
- f) The right of poor relatives to alimentary provision and the rights of succession and heredity."

In Muslim law, freedom is the general rule, and restraint is the exception.

#### a) Personal Rights

5. The following examples chosen at random from old texts and traditions, as well as from modern practice in Muslim countries would illustrate the basic philosophy of the Shari'a :

a) On his last pilgrimage, the Prophet Muhammad addressed his followers from the top of Mount Arafat near Mecca in what is known in Tradition as 'the Farewell Speech.' Sayed Amir Ali, former member of the Judicial Committee of His Majesty's Privy Council in the days of the Indian Raj, calls this important speech 'the Sermon on the Mount.'<sup>11</sup> It contains a virtual Muslim declaration of human rights. In words which "should ever live in the hearts of all Muslims," as Sayed Amir Ali puts it, the Prophet of God said :

<sup>10</sup> Op. cit., p. 208

<sup>11</sup> The Spirit of Islam by the Rt. Hon. Sayed Amir Ali, London, Christophers, fifth impression, 1949, pp. 113.



"Your lives and property are sacred and inviolable amongst one another until ye appear before the Lord, as this day and this month is sacred for all; and (remember) ye shall have to appear before the Lord, who shall demand from you an account of all your actions.

Keep always faithful to the trust reposed in you and avoid sins.

Usury is forbidden. The debtor shall return only the principal : and the beginning will be made with (the loans of) my uncle Abbās, son of Abd ul-Muttalib... Henceforth vengeance of blood practiced in the days of paganism (Jahilijāt) is prohibited; and all blood-feuds abolished, commencing with the murder of Ibn Rabi ā.<sup>12</sup>

Ye people! listen to my words and understand the same. Know that all Muslims are brothers unto one another. Ye are one brotherhood. Nothing which belongs to another is lawful to his brother, unless freely given out of goodwill. Guard yourselves from committing injustice.

.... O Lord! I have delivered my message and accomplished my work." The assembled host below with one voice cried, "Yea, verily thou hast." "O Lord, I beseech Thee witness unto it", the Prophet concluded.

b) The second Caliph, Omar Ibn el-Khattab nominated a wali to govern a province. Later on, he was informed that his wali oppressed the people. In a letter revoking his power, Omar rebuked him in the following words :

"How dare you enslave people who were born by their mothers as free men?"

c) The doctrine of equality is proclaimed in many Traditions of the Prophet. Professor Milliot<sup>13</sup> quotes the famous two hadiths :

"Among themselves, men are like the teeth of a comb";

"One man is not superior to another man, except by his righteousness (quoted by the Imam Ahmad Ibn Hanbal in his Musnad)."

<sup>12</sup> Ibn Rabi ā, a cousin of the Prophet. He was confined in his infancy, to the care of the family of Bani Faith. This child was cruelly murdered by members of the tribe of Huzail, but the murder was not yet avenged.

<sup>13</sup> Op. cit. p. 36.

Knowledge of Muslim law gives the "ulamâ" or savants a preeminence in rank. This qualifies them to play an important rôle as the guardians of the Sacred Law and the Tradition of the Prophet. The savants (ulamâ) are described as the "heirs of the prophets" (Al Bukhari, the Koran XXXV, 25; XXXIX, 42; XXXIX, 12. The merits of Knowledge (of the Shari'a) are extolled in the Koran in Suras XX, 113 and specially LVIII, 12) " We shall come back to this point when we discuss the safeguards and guarantees of human rights against infringement by a despot.

Apart from this, the principle of equality is strongly emphasized. The Prophet himself used to say: "I am but a man." " The imam, or head of the Muslim community is only **primus inter pares**. He only acts as the vicar or **locum tenens** of the Prophet (khalifah). He was not a sovereign (Malik), but a prince, in the original sense of the word. "

The doctrine of charity and human brotherhood is illustrated in the institution of Zakat which is a religious tax collected to assist the needy members of the community. "

d) Respect for the human being under Muslim law starts even before he is born. It is a duty imposed on all Muslims including the Imam himself, who is only the agent of the community, to protect the rights with which the Shari'a clothes the individual since he is conceived. An incident which occurred under the Caliphate of Omar, the second Imam is significant in this respect :

"Omar sent his attendant, the equivalent of the modern 'hajeb,' bailiff or 'huissier' to call a woman to his presence in

<sup>11</sup> See Milliot, *op. cit.*

<sup>12</sup> See Milliot, *op. cit.* 41

<sup>13</sup> See D. de Sintillana, *Law and Society in the Legacy of Islam*, Oxford University Press, p. 298.

<sup>14</sup> See the *Encyclopaedia Islamica* under Zakât, Part 2, Vol. IV, p. 1202, Leyden and London, 1928.

order to question her in some judicial affair. The woman, who was pregnant was so frightened by the summons that she suffered a miscarriage. According to Muslim law, the 'diya,' or price of blood was due for the loss of the unborn child. Omar was uncertain whether he owed the 'diya' personally for having caused the miscarriage, or whether that 'diya' was to be paid by 'Beit el Mal,' the ancestor of the Department of the Treasury in modern Muslim states. So, he consulted Ali, the nephew of the Prophet, and after deliberation, the verdict was that Omar was not personally responsible because he had acted as the agent of the Muslim Community, and therefore the 'diya' was due from Beit el Mal. <sup>18</sup>

e) The dictatorship of an individual or of a party is repugnant to the teaching of Islam. God said in the Koran addressing his Prophet: "Thou art not a tyrant over them" (*lasta alaihim bi musa'iter*). God also enjoined on his Prophet to tell the believers that the government of the affairs of the Community is a matter of consultation among them (*Anna l-amra shoura beinahum*). Again I am tempted to quote the words of a Western jurist who specializes in Islamic law, Professor Milliot: <sup>19</sup>

"Islam never knew the concept of *supremitas*. When one speaks of Muslim sovereignty, one must be aware of the fact that that expression means something quite different in Islam. The caliphate is prestige and personal influence; it is not authority backed by the prerogatives of power."

In strict Muslim legal theory, sovereignty over the Muslim Community belongs to God alone. In a real as well as in a true legal sense, that Community is "a nation under God."

### **b) Property and Contractual Rights**

6. Turning now from the rights of the individual on his person to ownership and contractual rights, we find that both property and contract are sacred under Muslim law. Property

<sup>18</sup> See for an account of the incident Milliot, *op. cit.*, p. 52.

<sup>19</sup> Milliot, *op. cit.*, pp. 79, 80.

is God-given, and all human relations, whether between man and God, or between man and the Community, or between man and man, are based on the idea of a covenant or pact to which God is witness. Interference with private property and failure to live up to contractual obligations are sinful infringements of the divine law as well as legal trespasses which call for reparation. Nowhere has the sanctity of property and contract been more emphasized than in the teaching of Muslim law.

As illustrations taken at random from the sacred sources of the divine law, we quote the following :

Verse 125 of Surah VII of the Koran reads as follows, according to Bell's translation :

"Verily the land belongs to Allah, He makes whomsoever He willeth of His servants inherit it, and the final issue is to those who show piety."

The measure of the respect in which private property is held in Islam is given in the following passage of a statement made by Eboul Hulla Bey, professor of law at the University of Istanbul, to Maurice Pernod and published in the "Revue des Deux Mondes", March 1, 1922, p. 181 :

"It is difficult for us to conceive that a right of ownership can lapse (by extinctive prescription), and it is impossible for us to conceive that it can be acquired by (acquisitive) prescription. For us, ownership according to the Canon Law (the Shari'a) is eternal and can never be abolished. Even if the right of ownership is not exercised, it continues to exist nevertheless. Our law does not authorize expropriation except in exceptional cases."<sup>20</sup>

A more recent demonstration which points out to what extent property is held sacred under Muslim law was given a short time ago in Saudi Arabia. A housing shortage in Jiddah sent rents sky-rocketing. Legislation was proposed to compel owners to charge reasonable rates. It was defeated because the Ulamas thought that it constituted undue interference with the sanctity of private property.

<sup>20</sup> Quoted by Milliot, *op. cit.*, p. 578

As for the sanctity of contract, His Eminence Sheikh Muhammad Ahmad Farag El Sanhoury, former Justice of the Shari'a Court of Appeal and former Minister of Religious Endowments of the Government of Egypt, wrote a few weeks ago in an article published in a monthly review :

"God Almighty ordains in the most emphatic terms that treaties and contracts are to be fulfilled. His commandments make no distinction between one pact and another. God Almighty makes known to his servants that faithfulness to pledges is one of His qualities. He calls the pledges of mortals His pacts. Fulfilment of the covenant between man and God consists in obedience to God's commandments and compliance with His Law which calls for respect for all undertakings. God praises fulfilment of contractual obligations and considers such conduct as part of the Faith and as one of the pillars of the Religion of Islam."

Judge Sanhoury then goes on to quote from the Suras of the Koran and from the Hadith of the Prophet no less than fourteen admonitions to the faithful to be true to their contracts. For lack of space, one verse from the Koran and one Hadith will suffice as illustrations :

God says in the Koran :

"O ye who believe fulfill your contracts."

The Prophet says :

"A banner will be raised on the day of judgment on each man who was not faithful to his pact indicating the extent of his treachery."

Finally, one of the important factors in the concept of the rule of law is stability. This is assured in the Shari'a by its divine origin, its immutability and finality. The Sacred Law partakes of the unchanging nature of the Lawgiver. God has revealed His Law for all time. Systems of law of Semitic origin pride themselves on being like the "laws of the Persians and the Mades which may not be altered." <sup>21</sup>

<sup>21</sup> Book of Esther, Chap. 1, verse 19.

This fixed character of the Shari'a would have resulted in a fossilized system of law which would have been incapable of meeting the changing conditions of social and economic life. However, the two other sources of law beside the Koran and the Sunna, namely concensus (idjm'a) and analogy (Kiyas) infuse into the system a flexibility which has enabled it to survive and still keep its basic characteristics. In the words of the late Justice Jackson of the Supreme Court of the United States :<sup>22</sup>

"It is not possible to separate political or juristic theories from the teachings of the Prophet, which establish rules of conduct concerning religious, domestic, social and political life. This results in a law of duties rather than of rights, of moral obligation binding on the individual, from which no earthly authority can relieve him, and which he disobeys at the peril of his future life. Since Americans do not accept the religious or philosophical foundations of Islamic law, they are apt to think nothing of the superstructure can interest us.

But the fact is that the system which seems so unworkable to us has an amazing record of accomplishment."

### III. SANCTIONS AND GUARANTEES OF THE RULE OF LAW IN THE SHARI'A

7. The foregoing remarks about the absence of a constitutional system of checks and balances in the Muslim State, and the concentration of powers in the hands of the Imam, or head of the Muslim community, naturally lead to the following question : In the experience of the modern State, the separation of powers has proved to be an essential safeguard of the rule of law and a necessary guarantee of individual rights. Since Islam has failed to develop a distribution of functions among different organs of the State, does it not follow that the rights of the individual consecrated by the Shari'a would be of mere academic interest? Would it not be natural to expect the authority of the Imam to degenerate into despotic oppression

<sup>22</sup> Law in the Middle East edited by Majid Khadduri and Herbert J. Liebesny, Vol. 1, Foreword by Robert Houghwout Jackson, Associate Justice, Supreme Court of the United States. The Middle East Institute, 1955.

before which the rule of law and human rights would exist only on paper? Are there safeguards of the rule of law, and guarantees of the liberties of the individual Muslim which the Shari'a provides, other than the checks and balances with which Western lawyers are familiar? How effective are these safeguards and guarantees?

To answer these questions, one must bear in mind the essential difference between the Shari'a, which is a law of divine origin, and modern systems of law which are man-made. Sanctions and safeguards of the rule of law do exist under the Shari'a. Some of them, and not the least important, are ultra-mundane in character, but they have proved to be effective nonetheless. The guarantees of the rule of law in Islam can be summarized under the following headings :

- a) The sacred origin of the law;
- b) The contractual basis of the Imamate and the counterbalancing influence of the Community exercised through the Ulama.
- c) The jurisdiction of the cadis (judges) and their personal prestige.

Before giving an appraisal of the relative value of these factors and their effectiveness in keeping the conduct of the Muslim State within the rule of law, an important remark should be made. In Islam's long history, acts of injustice occur from time to time; but such also is the case under modern constitutional government. The most liberal and up-to-date constitutions have often been violated, and the best safeguards have sometimes proved inadequate. For example, the Second Republic in France became the Second Empire and its Prince President became Emperor Napoleon III through a coup d'état, not to mention more recent forms of dictatorships.<sup>21</sup> Human nature is imperfect, and human ambitions may be dangerous. However, it is the duty of jurists all over the world to continue

<sup>21</sup> See Jacques Bainville's study of the history of dictatorships in his book: "Les Dictateurs".

their endeavours toward a more perfect and a more secure rule of law. But, it would be unfair to judge a system only by the occasional breaches. History is not only the record of the crimes and follies of mankind. It is also the record of man's achievements. D. de Sintillana has summed up the contribution of the Shari'a to our modern system of law in the following words :<sup>24</sup>

"Among our positive acquisitions from Arab law, there are legal institutions such as limited partnership (quirad), and certain technicalities of commercial law. But even omitting these, there is no doubt that the high ethical standard of certain parts of Arab law acted favourably on the development of our modern concepts."

Bearing this in mind, we can now proceed to examine the safeguards of the rule of law enumerated above and to give an idea of their merits and effectiveness.

#### a) **The Sacred Origin of the Shari'a**

8. One can apply to the Shari'a with more truth what the Roman lawyers said of their own pursuit : *Rerum humanarum atque divinarum scientia*.<sup>25</sup> It is significant to note in this respect that the School of the Imam Abou Hanifa defines 'Fikh' or the Muslim science of law, as "the knowledge of the rights and duties whereby man is enabled to observe right conduct in this life, and to prepare himself for the world to come."<sup>26</sup>

The Shari'a is a religion, a social ethic, a law and an all-embracing way of life. As Sir Hamilton Gibb puts it :<sup>27</sup>

"Unlike the law which Christendom inherited from Rome, therefore Islamic law takes into its purview relationships of all kinds, both toward God and toward men."

<sup>24</sup> D. de Sintillana, *Law and Society in the Legacy of Islam*, op. cit., p. 310.

<sup>25</sup> D. de Sintillana, op. cit., p. 294.

<sup>26</sup> Gibb, *Modern Trends in Islam*, op. cit., p. 87 and D. de Sintillana, op. cit., p. 294.

<sup>27</sup> Gibb, *Modern Trends*, p. 87.



The first source of the Shari'a is the Koran which is inscribed on a tablet in Heaven and which was revealed by God to the Prophet Muhammad through the Angel Gabriel who descended with its verses from Heaven.<sup>28</sup> According to the Hanbali jurist, Taki-D-Din Ahmad Ibn Taimiya, the Koran has provided for all situations (*Wama ahmalna fil-Kitab min Shai'*). As Henri Laoust says in his *Contribution à l'étude de la Méthodologie Canonique d'Ibn Taimiya* (Imprimerie de l'Institut Français d'Archéologie orientale, le Caire, MCMXXXIX, p. 12)

"The Koran contains the sum-total of religious knowledge, in its letter as well as in its spirit. It is synonymous with philosophy and wisdom (*hikma*)."

Next to the Koran as a source of law comes the "Sunna" or Tradition of the Prophet. The excellent example given by the Messenger of God, his acts and his words (*Hadith*) were inspired by God, who says referring to the Prophet in the Koran (*Sûra LIII, 3*) "Nor does he speak of (his own) inclination."<sup>29</sup> On the basis of this text, what the Prophet did and what the Prophet said, his Sunna and his *Hadith*, are an infallible source of the Divine Law because they are covered by the "isma" (infallibility).

The Koran and the Sunna have laid the foundation of the Shari'a for all time. Their immutability would have apparently resulted in an inflexible system of religious dogma which has been handed down from generation to generation, for thirteen hundred years. Such a picture, however, would be far removed from the facts of the situation. To the Muslim world, the Koran and the Sunna are a "living conviction which ever renews and confirms itself in the heart and mind of the Muslim, and more specially the Arab, as he studies the sacred text."<sup>30</sup>

The two inspired sources of the law, the Koran and the Sunna, provide for flexibility to meet the changing needs of

<sup>28</sup> See in *Encyclopaedia Islamica*, vo. Lawh, Part I, Vol III, p. 16 "Al-lawh thus means the tablet kept in heaven which in *Sûra LXXXV, 22* is called 'lawh mahfuz' ... according to this passage, it is described as the 'safely preserved' tablet..."

<sup>29</sup> Bell's Translation, vol. 2, p. 540.

<sup>30</sup> Gibb, *Modern Trends in Islam*, p. 3.

the Muslim Community and to make the Shari'a adaptable as to time and place. Two human sources of law are recognized by the Shari'a side by side with the two divine sources. The first is *idjma'* or concensus of the Muslim Community and the second is *kıyas* or analogy.

The authority as a source of law of the concensus of the learned members of the Muslim Community is based on texts of the Koran, and more specially, on the following two Hadiths of the Prophet :

"My people will never be unanimous in error"

(*La tajtamiu Ummati ala al-Dalala*).

"What Muslims agree to consider as good is also good in the sight of God." (*Ma Ra ahu-l-Muslimum hassanan fa-howa 'ind Allahi hassan*).<sup>21</sup>

In theory the proper province of *kıyas* or analogy, (logical deduction) and *ıjtihad* or learned opinion of Muslim jurists, is the interpretation of the Shari'a. Cases occurred however, where no solution could be based on the revealed texts of the law. In their attempts to find a solution in these cases the ulamas and the cadis, like the Roman jurists before them, consciously or unconsciously contributed to the development of the law. This practice of *ıjtihad* was endorsed early in Islam. When Ma'az Ibn Jabal was sent to govern a province, he was asked how he would judge. Ma'az replied : "According to the book of God." "Supposing you did not find a text in the Book," he was asked again, "How would you judge?" "Then-I would judge according to the Tradition of the Prophet of God" was his reply. "Suppose you do not find a Sunna (Tradition) of the Prophet how would you judge?" "Then," answered Ma'az, "I shall try to judge to the best of my opinion (*Ajtahid Ra'yi*)." This last reply was tacitly approved.

The role of the learned jurists in the development of Is-

<sup>21</sup> See *Muslim Conduct of the State* by Muhammad Hamidullah of the Faculty of Law, Osmania University, Hyderabad-Deccan (Asbraf, Kashmiri Bazar-Lahore), pp. 21, 22.

lamic religious philosophy is described by Gibb in the following words : "

"The Ulama, to the extent in which they have succeeded in imposing Islamic law, succeeded in unifying Islamic society, since the law as I have suggested, was the instrument by which the social ethic of Islam was consolidated."

Another significant testimony on the predominant influence of the Shari'a in molding Islamic society and in establishing its rule of law, comes from Professor Margoliouth who wrote in his work, *Mohammedanism* : "

... "The Shari'a always remained in force as an ideal and a final court of appeal, and by its unity and comprehensiveness it formed the main unifying force in Islamic culture. Its very lack of flexibility contributed to this result by preventing divergences and disintegration into purely local systems. It permeated almost every side of social life, and every branch of Islamic literature, and it is no exaggeration to see in it, in the words of one of the most penetrating of modern students of the subject, 'the epitome of the true Islamic spirit, the most decisive expression of Islamic thought, the essential kernel of Islam.' (G. Bergsträesser's *Grundzüge des Islamischen Rechts*, edited by Joseph Schact, p. 1.)"

9. The contribution of the Ulama to the teaching of the Shari'a did not affect the belief in its divine origin. This fact is of immense significance as a guarantee of the rule of law in Islamic society.

We must shed our modern ideas of the human origin of the State, sovereignty and law, in order to understand the profound respect of the rule of law in Islam. The Muslim State is a theocracy. Sovereignty over the Muslim Community belongs to God, who is the only lawgiver, as well as the supreme Judge. Transgression of the Law, whether committed by the governor or by the governed, is not only an anti-social act; it is also a sin, an offense against God for which man is accountable in

<sup>22</sup> *Modern Trends in Islam*, op. cit., p. 89.

<sup>23</sup> *Op. cit.*, pp. 105, 106.

the day of judgment. The responsibility of the unjust Imam is even more serious than that of the ordinary Muslim. According to an accepted Hadith of the Prophet, "Over each unjust man, a standard will be raised on the day of resurrection proportionate in size to his injustice. No injustice is more grave than that of a ruler of a community."

I cannot agree with anything more than with Professor Milliot's following statement. "

"L'autorité de la loi, selon la théorie musulmane, repose donc, avant tout, sur la conscience des hommes, non sur la force publique."

10. To the Muslim, God's presence is very real. "God is nearer to man than his jugular vein" says the Koran. To understand the impact of the fear of ultra-mundane punishment as a guarantee of the rule of law in Islamic religious philosophy, one must go back to ancient law, and more specially to the law of Semitic peoples to whom the Arabs belong. "Ancient law," says Fustel de Coulanges in the "Cité Antique," is a religion, ancient legislation is a sacred text and the administration of justice is a series of ritual performances." On the north and south walls of the U. S. Supreme Court Chamber are carved two marble panels depicting processions of historical law-givers, beginning with Menes, the first Pharaoh of Egypt. But, in Ancient Egypt the Pharaoh was a God. The inscription on the obelisk at Matarich describes him as "Horus, the youthful Sun God." On the walls of the Temple of Seti I at Abydos (Araba al-Madfuna near Balyana in Upper Egypt), there is a beautiful relief picture of Thoth, the Egyptian God of letters, invention and wisdom, the mouthpiece and recorder of the Gods and arbiter of their disputes. He is depicted while descending from heaven with the books of the law. The text of the code of Hammurabi, another Semitic king, was found at Suza in Mesopotamia inscribed on a diorite stela beneath a bas relief of the king who stands in an attitude of prayer before the seated Sun God (Shamash) who delivers to him the laws of the king-

<sup>21</sup> Op. cit., p. 189.

dom. The law of another Semitic people was given by God on Mount Sinai to Moses on two tables of stone, "written with the finger of God." <sup>22</sup> This is very close to the verse already quoted from the Koran about the tablet <sup>23</sup> preserved in heaven (Lauh mahfuz) which is the original copy of the Book.

11. Respect for divinely revealed Books constitutes an important incentive for the observance of the rule of law so miraculously given to man. The two following illustrations of the effectiveness of this guarantee of the rule of law among Muslim communities are typical examples of the profound respect in which Muslims held the holy texts :

a) In the civil war between the followers of Ali, the nephew of the Prophet and Mu'awiyah, the founder of the Umayyad Dynasty, the Syrian followers of Mu'awiyah were hard pressed by Ali's army. Acting on the advice of his lieutenant Amur Ibn el-As, Mu'awiyah resorted to the stratagem of ordering his followers to raise the Koran high on the points of their lances and to cry that they wanted to arbitrate the dispute between the two camps according to the Book of God. Ali knew that it was a ruse, but so profound was the Muslim's veneration for the Koran that he could not prevail on his followers not to lay down their arms. He had to accept the arbitration against his better judgment.

b) The second illustration points out the deep respect for the Tradition of the Prophet, his Sunna and Hadith, which constitute the second revealed source of the Shari'a. It is taken from the recent article already referred to by Justice Sanhoury, formerly of the Supreme Shari'a Court of Egypt.

According to Muslim international law governing treaties, in case of fear by the Muslim Community of breach by the other nation, without effective transgression of the treaty by

<sup>22</sup> Exodus, Chap. 31, verse 18.

<sup>23</sup> See for the influence of religion as a guarantee of respect for the rule of law, Frazer's "Psyche's Task" (2nd ed.), Chap. II and Sir Henry Maine, "Early History of Institutions" and "Ancient Law."

that other nation, liberation from the obligations imposed by the treaty on the Muslim State can only be effected after serving formal notice on the other nation that the treaty has been terminated. A pact had existed between Mu'awiyah and the Greeks. Mu'awiyah mobilized his army and moved to the border to invade their land once the treaty expired. A man stood up and called: "God is great, God is great! Loyalty and not treachery!" The man proved to be Amr Ibn Anbah. Mo'awiyah sent for him and questioned him on the basis of his opposition to the movement of the troops. The man replied:

"I have heard the Prophet, praise and prayer be on him, say: "Whoever has a treaty with a nation should neither tighten nor loosen its bond until its duration ends or notice is duly given of its repudiation."

Upon this Mo'awiyah and his army retraced their steps.

Whether such stories are to be taken as history or legend, the mere fact that they were handed down from generation to generation gives the measure of the restraint which the authority of the rule of law exercised on the conduct of the Muslim Community because of its divine origin.

**b) The Contractual Basis of the Imamate and the Counterbalancing Influence of the Community.**

11. One of the basic concepts of Islamic religious and legal philosophy is that human relations are based on a covenant, a pact or a contract. This idea has played a predominant role in the development of the Shari'a, and has constituted an important guarantee of the rule of law in Islam. The relationship between God and the Muslim Community is based on a mutual pact. God says in the Koran "Fulfill your covenant to Me, and I shall fulfill My covenant to you and fear Me." A similar concept is to be found in Hebrew religious philosophy which is also of Semitic origin. Thus, God made a covenant with Abraham,<sup>27</sup> and with the people of Israel. The relationship between the Imam and the Muslim Community is likewise based on the contract of bai'a or muba ya'a. The imamate

<sup>27</sup> Book of Genesis, Chapter 15, verse 18.

or caliphate is not sovereignty or **supremitas**; it is a mandate given by the Community through its ulamas, or through those who are given the power "both to bind and to loose" (Ahl-ul-akd wal-Hall). The Imam is merely the person they choose as mandatary of the Community to direct the affairs of the Muslim State. Neither does the Imam have the power to legislate, since God alone is the Lawgiver. In the words of Sir Hamilton Gibb : "

"At the root of all Islamic political concepts lies the doctrine of the umma, the Community of Muslims..."

The Head of the umma is Allah, and Allah alone. His rule is immediate, and His commands, as revealed to Muhammad embody the Law and Constitution of the umma. Since God is Himself the Legislator, there can be no room in Islamic political theory for legislation or legislative power, whether enjoyed by a temporal ruler or by any kind of assembly. There can be no "sovereign state," in the sense that the state has the right of enacting its own law, though it may have some freedom in determining its constitutional structure. The Law precedes the State, both logically and in terms of time; and the State exists for the sole purpose of maintaining and enforcing the Law."

Thus the Imam is not above the Law. He is only the first servant of the Law. This is of much more than academic interest. Important practical consequences for the rule of law result from the submission of the Imam to the Shari'a. If I may quote the words of the great Italian jurist D. de Santilana." "

"By accepting the investiture, the caliph binds himself to exercise his power within the limits laid down by the divine law."

The best example of the bay'ah or contract of investiture of the Imam symbolized by the traditional handclasp, is to be found in the election by the Muslim Community of the first

<sup>28</sup> Law in the Middle East, op. cit., Chapter I Constitutional Organization by H. A. R. Gibb, the Muslim Community and the State, p. 8

<sup>29</sup> Law and Society in the Legacy of Islam, op. cit., p. 297.

Caliph, Abu Bakr, immediately after the death of the Prophet. The short address he gave after his investiture is an important page in the rule of law for all time. It is the most authoritative precedent in the constitutional law of Islam.

Professor Milliot in his 'Introduction à l'Etude du Droit Musulman' gives a French Translation of Abu Bakr's speech. The following are its leading passages :<sup>49</sup>

"I have been invested with the supreme authority, but I am not the best among you. If I do justice, help me. If I deviate from the truth, correct me. Obey me so long as I obey God; if I disobey Him, you will no longer owe obedience to me."

This is a far cry from absolute or despotic rule. The contents of the covenant or the contract of bay'a were limited to an undertaking by the members of the Muslim Community "to obey the Imam in what is acceptable to God."

It is here that counter-balancing and moderating influence of the Ulamas appears as a check on the conduct of the affairs of the Muslim State by the Imam. If the Imam's commands are clearly contrary to the divine law, for instance, if he commands any one to commit murder or adultery, to drink wine, or to omit a ritual prayer, the contract of bay'a which binds the Community to him is cancelled. We thus find that Muslim religious and legal philosophy is very close to modern constitutional law. Man was endowed, said Jefferson, with certain "inalienable rights." These were derived, he held, from "the laws of nature and Nature's God." It is the function of Government to make those rights secure. To do this, governments must have powers, and in this concept of the state and society, the "just" powers that may be exercised arise from the consent of the governed. "No obedience is due to any of God's creatures in disobedience to God's law," say the Muslim jurists. However, in order to avoid instability and chaos in Government, the Ulamas are directed to use restraint, moderation and wisdom in their efforts to redress the unjust acts of the Imam.

<sup>49</sup> Op. cit., p. 50.



12. A modern example of these principles at work is to be found in the articles of the Fundamental Law of the Hijaz of 21 Safar, 1345 of the Hijra (1926). The administration of the Kingdom of the Hijaz, as Section II provides, is in the hand of (biyad) the King. However, the text hastens to add, the King is bound (muquayyad) by the rules of the exalted Shari'a article VI provides that "the laws of the Kingdom of the Hijaz must always conform to the Book of God, the Tradition of His Prophet and the practice of our pious predecessors."

The Imam cannot deny a request to submit to the arbitration of the Ulamas any question where a departure is claimed from the rule of law as revealed in the Koran or as provided for in the Tradition of the Prophet. The late King Abdul Aziz had to defend his actions before the Wahhabi Ulama at Al Artawiya when he was charged by some of his puritan followers with unorthodox practice in government, such as the introduction to Saudi Arabia of a telephone system which was alleged to be a contraption of the devil.

Sunni or orthodox Muslim jurists teach that the relationship between the Imam and the Muslim Community was at its best under the first four Caliphs: Abu Bakr, Omar, Othman and Ali. These four Imams are called 'Al Rashidun,' the well guided. With the advent of the Umayyads and the Abbassides, the leadership of the Muslim State degenerated into a temporal monarchy. The concept of the universality of the Imamate became merely an ideal after the disintegration of the Muslim Empire. But as Professor Sanhoury, former Dean of the Law School of Cairo University and former President of the Egyptian Council of State points out, it is an ideal enshrined in the veneration of every Muslim. It is the perfect pattern of the rule of law which the Muslim Community should always strive to attain. The continued existence of this ideal is an important asset in the struggle for better government and more secure human rights. The Muslim concept of the "virtuous city" (Al Madina al Fadila) offers a surprising parallel to Saint Augustine's concept of the City of God.

### c) Jurisdiction of the Cadis and their Personal Prestige

The third guarantee of the rule of law in Islam to be considered, is the jurisdiction of the cadis, or judges who are charged with the duty of applying the Shari'a. The high esteem in which the Sacred Law is held exalts the function and the personal prestige of the cadis. When they sit to adjudicate disputes, the cadis have no orders to receive from any one. They are independent, and they should only follow the dictates of their conscience in applying the rules of the Shari'a.

A grave point of weakness in the Muslim organization of the judicature however, is the theory that all authority in the Muslim State, including the dispensation of justice, is in the hands of the Imam. The cadis derive their mandate from him, and their tenure of office is dependent on his will. They only exercise a delegated jurisdiction. This principle of the "justice retenue," in virtue of which the Imam is looked upon as the final resort and the source of all judiciary power, is a serious limitation on the independence of the cadis. For this reason, many eminent jurists refused to serve as cadis. The great Imam Abou Hanifa, the founder of the Hanifite School whose teaching is followed by 60 % of all Muslims around the world, preferred to go to prison, rather than serve as judge under the Abasside caliph. When he was brought before the Caliph, who tried to convince him to accept the appointment, Abou Hanifa made a plea to justify his refusal on the ground that his knowledge of the Law was inadequate. "You are telling a lie," said the Caliph. Abou Hanifa retorted: "You have given judgment in my favour against yourself; how can you appoint a liar as your judge?" Abou Hanifa held that only the four first Imams were righteous and therefore legitimate Caliphs of the Prophet. This was the real reason why he refused to accept a mandate from the Abasside caliph whom he looked upon only as a secular sovereign and not as a spiritual leader of the Muslim Community.

Another point of weakness which seriously diminished the effectiveness of the cadis as guardians of the rule of law in Islam, was the fact that they depended on the rulers for gi-

ving effect to their judgments. Where the rulers themselves were the defendants, the impartial application of the law was in danger.

In order to remedy this defect, the Caliphs appointed a special judge whose functions were to hear complaints against rulers and persons in authority, and to grant redress where an injustice was committed. In the view of Professor Abou Zahra of the Faculty of Law of the University of Clairo, this *cadi* who came to be known as *cadi-l-mazalim*, performed a function similar to that of the Council of State in some modern countries.

### Conclusion

Islam did not organize a priesthood. The *cadis* did not constitute an independent judicial body. But, the prestige which was reflected on the *Ulamas* and *Cadis* by the *Shari'a* was such, that their advice and exhortation carried weight with the rulers. Under modern conditions, people "go to town" or write to their senator or representative in congress or parliament when they feel that they have been victims of some injustice. In Muslim countries, people complained to the *Ulamas* and the *Cadis* who "rode to town" and laid the complaint before the sultan or ruler. "More often than not, they could obtain redress.

A short time ago Ambassador James Wadsworth, deputy United States representative to the United Nations addressed two thousand members and guests of the American Bar Association about the role of the United Nations in strengthening the rule of law as a way to preserve peace. "While the United Nations has no power to compel," he said, "it has enormous power to persuade."

Time and again the persuasive power of the *Shari'a* and its guardians the *Ulamas* and *Cadis* acted as an effective deterrent from injustice and a reliable guarantee of the rule of law.

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" The *Ulemas* and the *Cadis* used to ride caparisoned mules, a sign of rank and distinction.