

DIŞ BASINDAN YANKILAR :

İmâm Muhammed

The Great Muslim Jurist [Dr. M. HAMİDULLAH]

[We have pleasure in publishing an article, specially written for the "Muslim World" by the well-known scholar Dr. M. Hamidullah, on İmam Md. Shaibani, the greatest jurist of his time, whose 1200th death anniversary falls on 16th May].

INTRODUCTION.

Born in 132 A. H. (sometime between 749 and 750), and died relatively young, at the age of 57 years, in 189 A. H./805, the Imam Muhammed Shaibani has rendered a service to legal science—to Muslim law in particular—which is scarcely equalled and never surpassed in later history. He is one of the "Sahibain" (the Two Companions of the Imam Abu Hanifah), two wings with which this latter soared "upto the Pleiades to cull the science", as the Holy Prophet is reported to have predicted.

He is dear to everybody: To the Hanafites of course, since he is the literary founder of the Hanafite school of Muslim law. To the Malikites also, for he was a most diligent pupil not only of Abu Hanifah bu also of the Imam Malik, at Medinah; and later it was he who trained Asad ibn Furat, the literary founder of the Malikite school of law and it is Asad's book, Asadiyah, which was later amplified into the enormous al-Mudauwanah of Sahnun, the sum total of the Malikite law. The Imam ash-Shafi'i was also a pupil of our author, Shaibani and hence the Shafi'ites have a very tender corner for him. And it is from ash-Shafi'i that the Imam Ibn Hanbal acquired his learning. Shaibani was the qadi al-qudat of the Caliph Harun ar-Rashid; and when this latter chose Rayy (Tehran) as his Darul Khilafah, Shaibani had to accompany him there, and he died there in harness, to be buried with great honours in the graveyard of Ranbuyeh on Mount Tabarak, at Rayy (Our Persian readers may shed some light on this aspect of topography). Iran must be as proud to own him.

BACKGROUND.

In world antiquity, Justinian is considered to be the greatest law-giver. But his work resembles the Fatawi Alamgiriya: Just like the emperor Aurangzib Alamgir, Justinian too had nominated a committee to prepare a digest or synthesis of law, gleaning best rules from the existing and conflicting works of Roman Law. There is nothing original. Shaibani on the contrary had nothing before him; the Quran and the Haidth were there, but no manual of Muslim law worth the name. The Muwatta, work of his teacher, Malik, is more a book of Hadith than of law. Of course there have been collection of Fatwas of 'Umar, 'Ali, Zaid ibn Thabit and of later jurists, yet they were not systematic, much less exhaustive. The small compendium al-Majmu' of Zaid ibn Ali (d. 120 A. H.) was certainly there, yet it is doubtful if it was available to Shaibani, since for political reasons, the family of Zaid was, after this latter's unsuccessful revolt, under strict supervision, both under later Umayyads and early Abbasids. Abu Hanifah had certainly taught him the method of deducting rule of law, yet had not produced himself a code of law which

Shaibani could copy and ameliorate. So what Shaibani has produced is all his own. He is a contemporary of Charlemagne, the "great" emperor in Europe. The law of his realm pales away in face of the glare of the enormous and brilliant work of Shaibani. In fact Europe of that epoch has nothing to offer in the field of law.

[Note: With the destruction of the Roman Empire, Roman law had also vanished from Europe, and the conquering Barbarians were bound by nothing that went against their discretion or desire. Justinians' codes were not recognized in Western and Central Europe. Charlemagne may be a great emperor to his countrymen. In a Latin work, Capitularia, there is a chapter on the edicts of Charlemagne also, in a few pages, and concerns more the public law and state property than the civil law. For marriage for instance, kidnapping and purchase were the more usual "legal" forms. Polygamy was so much in use that even Christian bishops of the emperor Charlemagne practised it, the emperor himself having not only several queens simultaneously but also a number of concubines. We possess the budget of Harun ar-Rashid; one does not even know approximately the revenues of Charlemagne. Europe of this time has nothing to compare with the Islamic law of Baghdad or Cordova].

HIS LIFE.

His parents were originally of Damascus region, villagers as it appears, of military profession. Shaibani himself was however born at Wasit, in Iraq. Biographers report that he was not a member of the Arab tribe Shaiban, but only a client, affiliated to it. So it is not at all sure if he was an Arab. He must have been young when his father died, since he says, all the thirty thousand dirhams which he inherited from his father, he spent on his education of Arabic literature-grammar, Hadith and Fiqh. He began his career as a teacher of law in a Mosque-school. Later, the Caliph Harun ar-Rashid appointed him qadi al-qudat, in place of Abu Yusuf who had died; and he had to work in Raqqah (Syria) which the Caliph had selected as his metropolis. Dismissed from the post, he was reappointed qadi al-qudat of Khurasan (Iran), with his post in Rayy where Harun-ar Rashid had decided to move. There he died on 14th Jumadal-Akhira 189 A. H. (Monday 16th May 805) according to an old A'ras Namah (MS Sa'idiyah Library, Hyderabad, Deccan),

HIS WORK.

Of the 990 works attributed to him, only a very few have come down to us. Of the extant treatises, the al-Asl, is sufficient to establish his reputation as a great jurist. The book surpasses the Code of Justinian in many respects: Its MS in Murad Mulla Library of Istanbul is in 8 thick volumes. The Dairatul-Maa'rif of Hyderabad, Deccan, has so far published two parts, and the whole may swell to five thousand pages and more. Some aspects are intriguing. For instance, I have consulted about a dozen MSS of this work in Turkey as well as elsewhere, and none seems to be complete, since the chapters on Haj and Adab al qadi are lacking although later writers have always referred to these chapters of the Kitab al-Asl. If any of my readers happens to know a MS of it containing these chapters, he should kindly bring it to the notice of the Dairatul-Ma'arif which is actively pursuing its edition. It is said that the chapter on Waqf never formed part of it, may be because Shaibani had produced an independent monograph on the subject, which we possess in the revised and commented form of the work of al-Khassar etc. Leaving aside these marginal points, it is to recall that the subjects treated by Shaibani are far more numerous than in the Code of Justinian, and he gives also sources and reasons of the rules. Justinian promulgates his code as his will, and of course those

of his countrymen who did not like him for political reasons had no respect for his order—not to speak of people of other countries—whereas Shabani propounds God's law, deducting it from the Quran and the Hadith and hence even those who nourished jealousy against Shaibani had yet to respect his description of the divine ordinance.

KITAB AL-ASL

Before analysing the Kitab al-Asl, it is worth recalling that this huge work was later condensed in the al-Mukhtasar al-Kafi of Hakim al-Marwazi, and this abridged version was still later commented by as-Sarakhsi in his al-Mabsut, whose bulk has required thirty big volumes to print. Sarakhsi has protested against new and ever increasing tyrannical taxes, and the Qarakhanid ruler of Turkistan had imprisoned him in a pit where he remained for about twelve years. The jailor seems to have been human and intelligent, for he allowed students to sit on the brink of the pit, read a book aloud and Sarakhsi, from inside the pit, to dictate commentary and explanation. His Mabsut, Ziyadat, Sharh Siyar Kabir, Usul al-Fiqh etc, are all products of his prison life. (I cannot help thinking «if» Abul Kalam Azad and Mohammed Ali—of Ali brothers— would not have been more useful to humanity and to science in prolonged prison than as politicians with no time to learn avocations).

The method followed by Shaibani is the following: He takes man as a single whole, and does not isolate his spiritual life from the material one, private life from the public and collective one. So, if he takes into consideration the affairs of a man since before his birth—for legitimacy and genealogy—, he also does not neglect the effects of his acts after his death, such as heritage, testaments, debts, waqfs, etc. No aspect of man should prosper at the expense of another, be that spiritual matters and our duty to God or temporal ones such as marriage, commerce, contracts, crimes and the like. Shaibani includes—as did before him Zaid Ibn Ali also—international law of war and peace as an integral part of Muslim law, thus laying emphasis on diverse aspects, viz (a) that the international law is a law entailing rights and duties, and not a mere question of discretion on the part of the commanders and foreign ministers, to change with gusts of whims and fancies; (b) that it is justiceable before a Muslim court where even the enemy in war has the right to complain and to appeal against a Muslim citizen; (c) that it is fully international and universal, and no foreigner, "civilized" or "uncivilized" is excluded from the purview of this law. Further, since the head of the Muslim State has the privilege and prerogative to lead the congregational Office of Prayer in the mosque, even the constitutional law does not escape. It is true that Shaibani has not treated at length the constitutional aspect of the Imamate; other later Jurists would do that. As to Shaibani, hereunder is how he divides the material.

He begins with the ritual cleanliness, then he treats the questions of the Service of Worship and of Fasting. And before speaking of Pilgrimage, he treats at length the public finances (zakat). In fact, the zakat was the only tax paid by Muslims in the time of the Prophet and the Caliphs, and it concerned not only the savings, but also agriculture, mining, commerce, herds of animals in pastures, etc., all the taxable matters; and all taxes on Muslims were called zakat, zakat al-'ain, zakat al-aradi, zakat altijarah, zakat al-Mawashi etc. The logic of including fiscality in cult and rituals is simple. Islâm does not separate the spiritual from the temporal, the Mosque from the citadel, both being governed by the same law, the Quran and falling in the competence of the same authority, the Caliph. Again, if prayer

fasting and pligrimage are man's service unto God by his body, zekat is the same by his property ('ibadat badaniyah and 'ibadat maliyah of the jurists).

Then come contracts of all sorts. The logic of including marriage in them is that every person, be that man or woman, is equally independent, and it can only be with mutual and free consent that a contract of usufruct could unite and bind them, and hence the necessity of the Mahr as the consideration of the usufruct obtained by the husband. As any other contract, the contract of marriage could include conditions. By a condition called tafwid al-talaq, the wife could also unilaterally pronounce divorce. It may also be contracted that the husband would remain monogamous and would voluntarily not profit by the Islamic permission of polygamy, among other conditions recognized by law. Along with the contracts sale, one would of course speak of the change of different kinds of money, and also of lending money on interest.

Penal law of course includes murder, theft and brigandage. It is but natural and quite logical that international law should form part of penal laws and should follow theft, and brigandage. If brigandage requires partial mobilization of the forces of order, a war—be that against rebels or foreigners, who also do "legalized" brigandage—requires a vaster mobilisation. The Quran (5/33), when treating the question of brigandage, in fact uses the terms: «those who make war against God and His Messenger and try to create disorder on earth...»

Naturally, wills and inheritance conclude the book to describe the post mortem effects of a man's acts. There are a few more sections at the end. Apparently they were an after thought. One is insurance (ma'aqil), another on lawful means of livelihood (kasb).

Once a book got into circulation, authors in olden times had no other means to add anything to it than by supplementary volumes. Shaibani too wrote such a volume called Ziyadat (i. e. Additions), and yet another called Ziyadat az-Ziyadat (ie. Additions to Additions).

INTERNATIONAL LAW

The other great work of Shaibani is his treatise on international law. Although he had treated this question in his Kitab al-Asl, yet the importance of the subject in his time demanded independent monographs. He first write his Siyar Saghir (smaller book on international law). Criticism convinced him the need of an elaborate handing, and he wrote his Siyar Kabir (the bigger book on international law). He prepared a de luxe edition, which became so huge that he required a cart to transport it, in order to present it the Caliph Harun ar-Rashid. This latter was so pleased that he burst out: it is a thing of pride of my epoch. Muslims are the inventors of international law in the world, and Shaibani's work is one of the oldest that has survived to us. (I have spoken of it at length in my humble book Muslim Conduct of State). Its importance has incited UNESCO to prepare its French translation which is in the hand of the editor, ready to go to press, but it is a huge work, requiring 4 to 5 volumes to print.

CONCLUSION

The work of the Imam Muhammad ash-Shaibani is a pride for humanity not only because it is full of juridical erudition, bu also because at no moment of deduction and argumentation has the author neglected the moral aspect of law, for the welfare of the human society where nationals and aliens (provisional foreign residents) must receive justice and equity (istihsan).