the Iraqian opposition; or that he becomes free immediately, and the payments due from him are ordinary debts. Finally, the systematically most consistent doctrine that the *mukātab* remained a slave as long as part of the stipulated sum was still unpaid prevailed in Iraq and in Medina, and it was projected back to certain Companions of the Prophet and finally to the Prophet himself, but all this is later than the simple reference, in Medina, to two of the ancient authorities of the school. Even after the final doctrine on the *mukātab* had prevailed, some concessions in favour of a defaulting *mukātab* were made; but they were subsequently reduced, though not completely eliminated, in the interest of stricter systematic consistency.

4. The opinions of Awzā'ī, in Syria, represent, as a rule, the oldest solutions adopted by Islamic jurisprudence. The archaic character of his doctrine makes it likely that he, who was himself a contemporary of Abū Ḥanīfa, conserved the teaching of his predecessors, who are nothing more than names to us, in the generation before him. When the doctrine which goes under his name was formulated, the Islamicizing and systematizing tendencies of earliest Islamic jurisprudence had, it is true, already begun to operate, but they were still far from having penetrated the whole of the raw material offered by ancient practice. His systematic reasoning, though explicit, is on the whole rudimentary; it is overshadowed by his reliance on the 'living tradition' which he identifies with the '*sunna* of the Prophet'. In this concept of *sunna* and in other respects, Awzā'ī's doctrine comes nearest to that of the ancient Iraqians.

The date of Mālik's death is only a few years earlier than the dates of the deaths of Abū Yūsuf and of Shaybānī, but Mālik's technical legal thought is considerably less developed than that of his Iraqian contemporaries. His reasoning, on the whole, is comparable to that of Awzā'ī, particularly in the dependence of both on the (idealized) practice, the 'living tradition', the consensus of the scholars. It was Mālik's aim to set forth the accepted doctrine of the school of Medina, and this was to a great extent founded on the individual reasoning of its representatives. In combining extensive use of reasoning with dependence on the 'living tradition', Mālik seems typical of the Medinese. In the majority of cases we find Mālik's own reasoning inspired by material considerations, by practical

expediency, and by the tendency to Islamicize. Mālik's *Muwaṭṭa'*, the record of his teachings which was written down by his disciples in several closely related versions, enables us to discern the actual practice in Medina in the second half of the second century of Islam.[1]

In Iraq it is not generally possible to distinguish between the common doctrine of the Kufians in the time of Ḥammād and Ḥammād's individual opinions, but a considerable progress in the discussion of technical legal problems between Ḥammād and Ibn Abī Laylā, a *ḳāḍī* of Kufa, one generation later, is obvious. Ibn Abī Laylā's technical reasoning, though generally clumsy and short-sighted, is far from rudimentary; the striving for systematic consistency, the action of general trends and principles, pervade his whole doctrine. A rigid formalism is perhaps the most persistent typical feature of his legal thought. Ibn Abī Laylā's practical, common-sense reasoning often takes material, and particularly Islamic ethical, considerations into account. Connected with this is his regard for contemporary practice. There are numerous traces of his activity as a *ḳāḍī* in his doctrine, last but not least his conservatism, so that he represents an earlier stage in the development of Islamic jurisprudence than his contemporary, Abū Ḥanīfa.

In contrast with Ibn Abī Laylā, Abū Ḥanīfa seems to have played the part of a theoretical systematizer who achieved considerable progress in technical legal thought. Not being a *ḳāḍī*, Abū Ḥanīfa was less restricted than Ibn Abī Laylā by considerations of day-to-day practice; at the same time he was less firmly guided by the realities of administration of justice. There is so much new, explicit legal thought embodied in his doctrine that an appreciable part of it was found defective and was rejected by his disciples. His legal thought is not only more broadly based and more thoroughly applied than that of his older contemporaries but technically more highly developed, more circumspect, and more refined. A high degree of reasoning, often somewhat ruthless and unbalanced, with little regard for practice, is typical of Abū Ḥanīfa's legal thought as a whole.

The doctrine of Abū Yūsuf, by and large, presupposes the doctrine of Abū Ḥanīfa, whom he regarded as his master. The most prominent peculiarity of Abū Yūsuf's own legal thought is

[1] For an example, see below, p. 79.

that he is more dependent on traditions than Abū Ḥanīfa, because there were more authoritative traditions from the Prophet in existence in his time, and compared with this dependence on traditions, Islamic ethical considerations of a material kind are less important. Secondly, the doctrine of Abū Yūsuf often represents a reaction against Abū Ḥanīfa's somewhat unrestrained reasoning, although, in diverging from his master, he occasionally abandoned the more perspicacious or more highly developed doctrine. Finally, a remarkable feature of Abū Yūsuf's doctrine is the frequency with which he changed his opinions, not always for the better. Sometimes the contemporary sources state directly, and in other cases it is probable, that Abū Yūsuf's experience as a *ḳāḍī* caused him to change his opinion. Abū Yūsuf represents the beginning of the process by which the ancient Iraqian school of Kufa was replaced by that of the followers of Abū Ḥanīfa.

Shaybānī, the great disciple both of Abū Ḥanīfa and of Abū Yūsuf, depends on traditions even more than Abū Yūsuf does. This shows itself not only in changes of doctrine but in his habit of duplicating his systematic reasoning by arguments taken from traditions, and in the habitual formula 'We follow this' by which he almost invariably rounds off his references to traditions even when he does not, in fact, follow them. Shaybānī used his personal opinion to the extent common in the ancient schools of law, but most of his reasoning that appears in this guise is in fact strict analogy or systematic reasoning. To this extent Shaybānī prepared the way for Shāfi'ī's rejection, on principle, of discretionary decisions and his insistence on strict analogy or systematic reasoning. Systematic reasoning of a high quality is the feature most typical of Shaybānī's technical legal thought. Shaybānī was the great systematizer of the Kufian doctrine. He was also a prolific writer, and his voluminous works, in which he consciously continued the doctrinal tradition of Abū Ḥanīfa and Abū Yūsuf, became the rallying-point of the Ḥanafī school which emerged from the ancient school of Kufa.

5. In Shāfi'ī, who considered himself a member of the school of Medina although he made the essential thesis of the Traditionists prevail in Islamic law, legal reasoning reached its zenith. Explicit legal reasoning, most of it of a superior quality, occupies a much more prominent place in Shāfi'ī's doctrine

than in that of any of his predecessors, even if we take differences of style and of literary form into account. When Shāfi'ī wrote, the process of Islamicizing the law, of impregnating it with religious and ethical ideas, had in the main been completed. We therefore find him hardly ever influenced in his conscious legal thought by material considerations of a religious or ethical kind, such as had played an important part in the doctrines of Awzā'ī, Mālik, Ibn Abī Laylā, and Abū Ḥanīfa. We also find him more consistent than his predecessors in separating the moral and the legal aspects, whenever both arise with regard to the same problem. In this respect, Shāfi'ī did not carry out the programme of the Traditionists who had tried to identify the categories 'forbidden' and 'invalid'. On the other hand, Shāfi'ī's fundamental dependence on traditions from the Prophet, in which he followed the Traditionists, implied a different, formal way of Islamicizing the legal doctrine. In theory, Shāfi'ī distinguished sharply between the argument taken from traditions and the result of systematic thought. In his actual reasoning, however, both aspects are closely interwoven; he shows himself tradition-bound and systematic at the same time, and we may consider this new synthesis typical of his legal thought.

Shāfi'ī recognized in principle only strict analogical and systematic reasoning (*ḳiyās*, *ijtihād*, also *'aḳl* 'reason' or *ma'ḳūl* 'what is reasonable', in a narrow technical sense), to the exclusion of arbitrary opinions and discretionary decisions (*ra'y* and *istiḥsān*, which Shāfi'ī uses as synonyms), such as had been customary among his predecessors. This is one of the important innovations by which his legal theory became utterly different from that of the ancient schools. His legal theory is much more logical and formally consistent than that of his predecessors, whom he blames continually for what appears to him as a mass of inconsistencies. It is based on the thesis of the Traditionists that nothing can override the authority of a formal tradition from the Prophet. In accepting this Shāfi'ī cut himself off from the natural and continuous development of doctrine in the ancient schools of law, and he adopted a principle which, in the long run, could only lead to inflexibility. Also the positive solutions which Shāfi'ī proposes are often, sociologically speaking, less advanced than those advocated by the contemporary Iraqians and Medinese; his systematic legal thought,

dominated as it was by a retrospective point of view, could hardly be productive of progressive solutions.

For Shāfi'ī, *sunna* is no longer the idealized practice as recognized by representative scholars; it is identical with the contents of formal traditions from the Prophet, even though such a tradition be transmitted by only one person in each generation. According to Shāfi'ī, one must not conclude, as the ancient schools of law did, that the Companions of the Prophet knew the intentions of their master best and would therefore not have held opinions incompatible with them. This led him to reject the *taḳlīd* as practised in the ancient schools. The opinions held and practices inaugurated by persons other than Companions of the Prophet were of course, in Shāfi'ī's eyes, of no authority whatsoever. This new concept of *sunna*, the *sunna* of the Prophet embodied in formal traditions from him, superseded the concept of 'living tradition' of the ancient schools. Traditions from the Prophet could not even be invalidated by reference to the Koran. Shāfi'ī took it for granted that the Koran did not contradict the traditions from the Prophet, and that the traditions explained the Koran; the Koran had therefore to be interpreted in the light of the traditions, and not vice versa. The consensus of the scholars, which expressed the living tradition of each ancient school, also became irrelevant for Shāfi'ī; he even denied the existence of any such consensus because he could always find scholars who held divergent opinions, and he fell back on the general consensus of all Muslims on essentials. The thesis that 'everything of which the Muslims approve or disapprove is good or bad in the sight of Allah' had been formulated shortly before Shāfi'ī. Shāfi'ī developed it further, but the principle, as he formulated it, that the community of Muslims would never agree on an error, was put into the form of a tradition from the Prophet only towards the middle of the third century of the hijra. Shāfi'ī held that, whatever the extent of the knowledge of individual scholars, the community of Muslims as a whole had preserved the traditions from the Prophet in their totality, so that none of them were lost, and the consensus of the Muslims could not contradict the *sunna* of the Prophet as Shāfi'ī understood it. All this left no room for the discretionary exercise of personal opinion, and human reasoning had to be restricted to making correct inferences and drawing systematic conclusions

from the traditions. Shāfi'ī was so serious in his main contention that he declared himself prepared to abandon any doctrine of his by which he might unwittingly have contradicted a tradition from the Prophet.

These, in short, were the principles of Shāfi'ī's legal theory. It was a ruthless innovation which it took him some time to elaborate, so that his writings retain numerous traces of the development of his ideas and some unsolved inconsistencies. But notwithstanding all this, Shāfi'ī's legal theory is a perfectly coherent system, superior by far to the theory of the ancient schools, and he became the founder of the *uṣūl al-fiḳh*, the discipline dealing with the theoretical bases of Islamic law. It was the achievement of a powerful mind, and at the same time the logical outcome of a process which had begun much earlier. The development of legal theory in the second century of Islam was dominated by the struggle between two concepts: that of the common doctrine of the community, and that of the authority of the traditions from the Prophet. The doctrine of the ancient schools of law represented an uneasy compromise; Shāfi'ī vindicated the thesis of the Traditionists, and the later schools had no choice but to accept his essential thesis.

We must now take up the external development of Islamic law where we left it at the end of the Umayyad period.

8

ISLAMIC LAW UNDER THE FIRST 'ABBĀSIDS; LEGISLATION AND ADMINISTRATION

1. WHEN the Umayyads were overthrown by the 'Abbāsids in 132 of the hijra (A.D. 750), Islamic law as we know it had acquired its essential features; the need of Arab Muslim society for a new legal system had been filled. The early 'Abbāsids continued and reinforced the Islamicizing trend which had become more and more noticeable under the later Umayyads. For reasons of dynastic policy, in order to differentiate themselves and their revolution from the ruling house which they had superseded, the 'Abbāsids exaggerated the differences, and in conscious opposition to their predecessors proclaimed their programme of establishing the rule of God on earth. As part of this policy they recognized the religious law, as it was being taught by the pious specialists, as the only legitimate norm in Islam, and they set out to translate their ideal theory into practice. They regularly attracted specialists in religious law to their court and made a point of consulting them on problems that might come within their competence. A long treatise which Abū Yūsuf wrote at the request of the caliph Hārūn al-Rashīd on public finance, taxation, criminal justice, and connected subjects has come down to us. But just as the pious specialists who had formed the vanguard of the Islamicizing tendency under the Umayyads had been ahead of realities, so now the early 'Abbāsids and their religious advisers were unable to carry the whole of society with them, particularly as the caliphs themselves were not always very sincere in their professed eagerness to translate the religious ideal into practice. It soon appeared that the rule of God on earth as preached by the early 'Abbāsids was but a polite formula to cover their own absolute despotism. They were thus unable to achieve a permanent

fusion between theory and practice, and it was not long before their successors lacked not only the will but the power to continue the effort.

2. What the early 'Abbāsids did achieve was the permanent connexion of the office of *ḳāḍī* with the *sharī'a*, the sacred Law. This, too, had been prepared under the Umayyads, but under the 'Abbāsids it became a fixed rule that the *ḳāḍī* had to be a specialist in the *sharī'a*. He was no more the legal secretary of the governor but was normally appointed by the central government and, once appointed and until he was relieved of his office, he was to apply nothing but the sacred Law, without interference from the government. But this independence remained theoretical. With its increasing despotism, the temporal power became more and more unwilling to tolerate the existence of any truly independent institution; the *ḳāḍī*s were not only subject to dismissal at the whim of the central government, but had to depend on the political authorities for the execution of their judgments. This was particularly important in the administration of criminal justice.

During the Umayyad period, when the *ḳāḍī*s were the legal secretaries of the governors, they or the governors themselves exercised whatever criminal justice came within the competence of the administrative authorities. But when, under the early 'Abbāsids, the office of *ḳāḍī* was separated from the general administration and became bound to Islamic law in substance and procedure, the formal rules of evidence of this last made it impossible for the *ḳāḍī* to undertake a criminal investigation, and his inability to deal with criminal cases became apparent. Consequently the political powers stepped in and transferred the administration of the greater part of criminal justice to the police (*shurṭa*),[1] and it has normally remained outside the sphere of practical application of Islamic law. Nevertheless, the office of *ḳāḍī* in this its final form proved to be one of the most vigorous institutions evolved by Islamic society.

The centralizing tendency of the early 'Abbāsids which was responsible for the appointment of the *ḳāḍī*s by the central government also led to the creation of the dignity of Chief *Ḳāḍī* (*ḳāḍi l-ḳuḍāt*). It was originally an honorific title given to

[1] This term, which originally denoted the guard of a general or governor, is probably derived from Latin *cohort(em)*.

the *ḳāḍī* of the capital, whom the caliphs would normally consult on the administration of justice. The *ḳāḍī* Abū Yūsuf was the first to receive this title, and the caliph Hārūn not only solicited his advice on financial policy and similar questions, as mentioned above, but used to consult him on the appointment of all *ḳāḍī*s in the Empire. The Chief *Ḳāḍī* soon became one of the most important counsellors of the caliph, and the appointment and dismissal of the other *ḳāḍī*s, under the authority of the caliph, was the main function of his office. It has been suggested that the office of Chief *Ḳāḍī*, which notwithstanding its historical importance has always been somewhat neglected by the theorists of Islamic law, is of Persian origin and the translation, into an Islamic context, of that of the Zoroastrian *Mōbedhān Mōbedh*. Its introduction by the early 'Abbāsids certainly coincided with the introduction of strong Persian elements into 'Abbāsid government, and ancient Arab writers themselves have pointed out the parallels between the two institutions.

An institution which the early 'Abbāsids, and perhaps before them the later Umayyads, borrowed from the administrative tradition of the Sassanian kings, was the 'investigation of complaints' (*naẓar fil-maẓālim*). It was a prerogative of the absolute monarch by which the caliphs themselves or, by delegation, ministers or special officials and later the sultans, heard complaints concerning miscarriage or denial of justice or other allegedly unlawful acts of the *ḳāḍī*s, difficulties in securing the execution of judgments, wrongs committed by government officials or by powerful individuals (cf. below, p. 160, on *ghaṣb*), and similar matters. Very soon formal Courts of Complaints were set up. The more important lawsuits concerning property, which in theory would have come within the jurisdiction of the *ḳāḍī*, tended to be brought before the Courts of Complaints too, so that their jurisdiction became, to a great extent, concurrent with that of the *ḳāḍī*s' tribunals. The very existence of these tribunals, which were established ostensibly in order to supplement the deficiencies of the jurisdiction of the *ḳāḍī*s, shows that much of the administration of justice by the *ḳāḍī* had broken down at an early period.

At the same time at which the *ḳāḍī*s' tribunals found themselves superseded, to a considerable degree, by the Courts of Complaints, they had also to accommodate themselves to the

continued jurisdiction of the 'inspector of the market', whose office had continued into Islam from Byzantine times. The early 'Abbāsids, while maintaining his functions, superficially Islamicized this office by entrusting its holder with discharging the collective obligation, enjoined in the Koran,[1] to 'encourage good and discourage evil', making him responsible for enforcing Islamic morals and behaviour in the community of Muslims, and giving him the Islamic title of *muḥtasib* (his office is called *ḥisba*). In addition to his ancient powers of enforcing traffic, building, sanitary, and trading regulations and deciding disputes arising from them, it was now part of his duties to bring transgressors to justice and to impose summary punishments which came to include the flogging of the drunk and the unchaste and even the amputation of the hands of thieves caught in the act; but the sincere eagerness of the rulers to enforce these provisions of the *sharī'a* commonly made them overlook the fact that the procedure of the *muḥtasib* did not always satisfy the strict demands of Islamic law. These several aspects of the institution of the *ḥisba* exemplify the nature and extent of the adoption of the ideal doctrine of the sacred Law under the early 'Abbāsids. The institution itself has survived, in some Islamic countries at least, into the present, and so has the right of every Muslim, notwithstanding the presence or absence of an officially appointed *muḥtasib*, to come forth as a private prosecutor or 'common informer'.

3. Under the Umayyads the administration of justice had been left to the provincial governors and their legal secretaries, the *ḳāḍīs*, and the administrative and legislative activity of the central government, and of the provincial governors, too, had originally lain outside of, and was only gradually brought into, the orbit of nascent Islamic law. Under the 'Abbāsids, however, when the main features of the *sharī'a* had already been definitely established, when Islamic law had come to be recognized, in theory at least, as the only legitimate norm of behaviour for Muslims, and when the *ḳāḍīs*, bound to apply this law, were appointed by the central government under the direct authority of the caliph, the caliph himself had to be incorporated into the system. This was done not by attributing to him the right to legislate; it would have been difficult to acknowledge this right

[1] suras iii. 104, 110, 114; vii. 157; ix. 71, 112; xxii. 41; xxxi. 17.

of the ruler in a system of religious duties which had been formulated not on the basis of, but in a certain opposition to, the practice of the government, and which was fast falling under the influence of the Traditionists. Even speaking of the caliphs of Medina, themselves Companions of the Prophet, Shāfi'ī (who upheld the thesis of the Traditionists) could say: 'A tradition from the Prophet must be accepted as soon as it becomes known, even if it is not supported by any corresponding action of a caliph. If there has been an action on the part of a caliph and a tradition from the Prophet to the contrary becomes known later, that action must be discarded in favour of the tradition from the Prophet.' The solution which was adopted was to endow the caliph with the attributes of a religious scholar and lawyer, to bind him to the sacred Law in the same way in which the *ḳāḍīs* were bound to it, and to give him the same right to the exercise of personal opinion (*ijtihād al-ra'y*) as was admitted by the schools of law. The explicit theory of all this was formulated only much later, but the essentials were expressed in two traditions dating from the end of the second century of the hijra, which retrospectively put the doctrine into the mouth of the Umayyad caliph 'Umar ibn 'Abd al-'Azīz in the following terms: 'No one has the right to personal opinion (*ra'y*) on points settled in the Koran; the personal opinion of the caliphs concerns those points on which there is no revelation in the Koran and no valid *sunna* from the Prophet; no one has the right to personal opinion on points settled in a *sunna* enacted by the Prophet.' And: 'There is no Prophet after ours, and no holy book after ours; what Allah has allowed or forbidden through our Prophet remains so for ever; I am not one who decides but only one who carries out, not an innovator but a follower.'

According to this doctrine, which was consciously adopted very early under the 'Abbāsids, the caliph, though otherwise the absolute chief of the community of Muslims, had not the right to legislate but only to make administrative regulations within the limits laid down by the sacred Law. This doctrine, which was projected back into the preceding period, effectively concealed the fact that what was actually legislation of the caliphs of Medina, and particularly of the Umayyads, had to a great extent, directly by being approved and indirectly by provoking contrary solutions, entered into the fabric of Islamic

law. The adoption of the theory in question did not even lead to a clear division between legislation and administration for the future. The later caliphs and the other secular rulers often had occasion to enact new rules. But although this was in fact legislation, the rulers used to call it administration, and they maintained the fiction that their regulations served only to apply, to supplement, and to enforce the *sharī'a*, and were well within the limits of their political authority. This fiction was maintained as much as possible, even in the face of contradictions with and encroachments on the sacred Law.

The discretionary power of the sovereign which enables him, in theory, to apply and to complete the sacred Law and, in practice, to regulate by virtually independent legislation matters of police, taxation, and criminal justice, all of which had escaped the control of the *ḳāḍī* in early 'Abbāsid times, was later called *siyāsa*. This *siyāsa* is the expression of the full judicial power which the sovereign had retained from the Umayyad period onwards and which he can exercise whenever he thinks fit. Owing to the ambiguity explained in the preceding paragraph, its existence is admitted even by the strict theory of Islamic law. *Siyāsa* means, literally, 'policy', and it comprises the whole of administrative justice which is dispensed by the sovereign and by his political agents, in contrast with the ideal system of the *sharī'a*, the religious law of Islam, which is administered by the *ḳāḍī*. The application of *siyāsa*, in the nature of things, often touches the *naẓar fil-maẓālim*, and both terms are, to a certain extent, used as synonyms. The *ḳāḍīs*, too, are obliged to follow the instructions which the ruler may give them in exercise of his power of '*siyāsa* within the limits assigned to it by the *sharī'a*' (*siyāsa shar'iyya*). In fact, until the modern period when legal modernism led to far-reaching interference with Islamic law itself, the Islamic rulers were generally content with legislating on matters which fell outside the competence of the *ḳāḍīs*. The most important examples of this kind of secular law are the *siyāsa* of the Mamlūk sultans of Egypt which applied to the military ruling class, and the *ḳānūn-nāmes* of the Ottoman sultans.

As a result of all this, a double administration of justice, one religious and exercised by the *ḳāḍī* on the basis of the *sharī'a*, the other secular and exercised by the political authorities on the basis of custom, of equity and fairness, sometimes of arbitrariness,

of governmental regulations, and in modern times of enacted codes, has prevailed in practically the whole of the Islamic world.

4. This was how Islamic law actually grew and, one might almost be tempted to say, was fated to grow, out of seeds which had been sown well before 'Abbāsid times.[1] In the first years of 'Abbāsid rule, however, an unsuccessful effort was made to introduce the idea of codification and legislation. The author of this proposal was the Secretary of State, Ibn al-Muḳaffa', an Iranian convert to Islam, who was put to death in 139/756. In a treatise or memorandum which he wrote in the last few years of his life for the caliph Manṣūr, he deplored the wide divergencies in jurisprudence and in administration of justice which existed between the several great cities (and even their several quarters), and between the main schools of law. These divergencies, he said, either perpetuated different local precedents or came from individual reasoning which was sometimes faulty or pushed too far. He suggested therefore that the caliph should review the different doctrines, codify and enact his own decisions in the interest of uniformity, and make this code binding on the *ḳāḍīs*. This code ought to be revised by successive caliphs. The caliph and the caliph alone, Ibn al-Muḳaffa' asserted, had the right to decide at his discretion; he could give binding orders on military and civil administration, and generally on all matters on which there was no precedent, but he must base himself on Koran and *sunna*. This *sunna*, however, Ibn al-Muḳaffa' realized, was based not on authentic traditions from the Prophet and the caliphs of Medina, but to a great extent on administrative regulations of the Umayyad government. Therefore, he concluded, the caliph was free to determine and codify the *sunna* as he thought fit.

Ibn al-Muḳaffa' wrote at a time when the 'Abbāsid government was attempting to make Islamic law the only law of the

[1] How much all this was the natural outcome of conditions which existed already at the end of the Umayyad period becomes evident from the fact that the theory and practice of the law in Islamic Spain, where an escaped member of the Umayyad family founded an independent principality six years after the 'Abbāsid revolution (138/756), was to all intents and purposes identical with that in the 'Abbāsid empire. Only a few of the 'Abbāsid innovations did not immediately percolate into Islamic Spain, such as the title *muḥtasib* for the old *'āmil al-sūḳ*, and the office of the *ḳāḍi l-ḳuḍāt*, to which the institution of the *ḳāḍi l-jamā'a* bears only a superficial resemblance.

state, but when that law itself was still in its formative period. The revolutionary propaganda which had brought the 'Abbāsids to power had made extravagant claims for the divine kingship of the 'cousins of the Prophet'. Though the 'Abbāsids, once they had attained their goal, quickly dissociated themselves from the more extremist of their adherents, the plea of Ibn al-Muḳaffa' for state control over law (and, incidentally, over religion too) was in full accord with the tendencies prevailing at the very beginning of the 'Abbāsid era. But this was no more than a passing phase, and orthodox Islam refused to be drawn into too close a connexion with the state. The absolute power which the caliphs, and later the governors, sultans, &c., exercised over the appointment and dismissal of the *ḳāḍī*s could not replace their lack of control over the law itself. The result was that Islamic law became more and more removed from practice, but in the long run gained more in power over the minds than it lost in control over the bodies of the Muslims. Hardly forty years after Ibn al-Muḳaffa' wrote his memorandum for Manṣūr, Abū Yūsuf composed his treatise for Hārūn; a comparison of the two documents shows well the speed with which Islamic law developed during the second century of the hijra.

9

THE LATER SCHOOLS OF LAW AND THEIR 'CLASSICAL' THEORY

1. In the early 'Abbāsid period, too, the ancient schools of law, which had the main reason for their separate existence in geography, transformed themselves into the later type of school, based on allegiance to an individual master. The religious specialists of each geographical unit in the central parts of the Islamic world had developed a certain minimum agreement on their doctrines, and by the middle of the second century of the hijra many individuals, instead of working out independent doctrines of their own, began to follow the teaching of a recognized authority in its broad outlines, while reserving to themselves the right to differ from their master on any point of detail. This led in the first place to the forming of groups or circles within the ancient schools of law. Thus there existed within the Iraqian school of Kufa the 'followers of Abū Ḥanīfa', a group which included Abū Yūsuf and Shaybānī, but, in addition, Abū Yūsuf had followers of his own. Similarly, within the school of Medina, and particularly in its dependency which was Egypt, there were 'followers of Mālik' who regarded the book of their master, the *Muwaṭṭa'*, as their authoritative work. They were originally only a fraction of the Medinese, just as the followers of Abū Ḥanīfa were only part of the Kufians. But the extensive literary activity of the followers of Abū Ḥanīfa, particularly of Shaybānī, in Iraq, and of the followers of Mālik in North Africa,[1] together with other factors, some of them accidental, brought it about that the bulk of the ancient school of Kufa transformed itself into the school of the Ḥanafīs, and the ancient school of Medina into the school of the Mālikīs, and the ancient schools of Basra and of Mecca, respectively, became merged in them. Another group of Kufians, and perhaps

[1] The *Mudawwana*, the origins of which go back to within one decade from Mālik's death, is the great corpus of their doctrine.

of Iraqians generally, formed the school of Sufyān Thawrī (d. 161/778), which counted followers for several centuries. The ancient school of the Syrians, too, transformed itself into the school of Awzā'ī which had a somewhat shorter span of life. This transformation of the ancient schools of law into 'personal' schools, which perpetuated not the living tradition of a city but the doctrine of a master and of his disciples, was completed about the middle of the third century of the hijra (*c.* A.D. 865). It was the logical outcome of a process which had started within the ancient schools themselves but was precipitated by the activity of Shāfi'ī.

Shāfi'ī, whose life spanned the second half of the second century, started as a member of the school of Medina, and continued to regard himself as one, even after he had adopted the essential thesis of the Traditionists and tried to convert to it the adherents of the ancient schools, particularly the Medinese, through vigorous polemics. He did his best to represent his new doctrine as one which followed naturally from their own premises and which, therefore, they ought to accept, but adopting the thesis of Shāfi'ī meant, nevertheless, breaking with the school of Medina or, for that matter, with any of the ancient schools. It did not mean joining the ranks of the pure Traditionists because, as Shāfi'ī himself had realized, their standards of reasoning were inferior to those of the ancient schools, quite apart from the fact that their interests were less technically legal. Any legal specialist, therefore, who became converted to Shāfi'ī's thesis became a personal follower of Shāfi'ī, and in this way Shāfi'ī became the founder of the first school of law on an exclusively personal basis, certainly with a common doctrine, but a doctrine which had once and for all been formulated by the founder. Shāfi'ī might well protest that it was not his intention to found a school, that his opinions counted for nothing, and that he was prepared to amend them if he found himself unwittingly contradicting a reliable tradition from the Prophet; already a direct disciple of his, Muzanī (d. 264/878), had composed his *Mukhtaṣar* as an 'extract from the doctrine of Shāfi'ī and from the implications of his opinions for the benefit of those who may desire it, although I must warn them that Shāfi'ī forbade anyone to follow (*taḳlīd*) him or anyone else'. The term *taḳlīd*, which in the usage of the ancient schools had

denoted the formal reference to Companions of the Prophet, had come to mean reliance on the teaching of a master. The doctrinal movement started by Shāfi'ī has always been known as the Shāfi'ī school, and it soon took its place beside the Ḥanafī and the Mālikī schools.[1]

2. Shāfi'ī's effort to supersede the ancient schools of law by a new doctrine based on the thesis of the Traditionists failed, but he succeeded in making this thesis, which was indeed the logical outcome of the search for an irrefutable Islamic basis of the *sharī'a*, prevail in legal theory. Whereas the Ḥanafīs and the Mālikīs, who continued the ancient schools of Kufa and of Medina, did not change their positive legal doctrine appreciably from what it had been when Shāfi'ī appeared, they finally adopted, together with the Shāfi'īs, a legal theory of traditionist inspiration. This 'classical' theory of Islamic law, or doctrine of the *uṣūl al-fiḳh*,[2] which was established during the third century of the hijra (ninth century A.D.), was in many respects more elaborate than Shāfi'ī's own theory, and differed from it in one essential aspect. Shāfi'ī, in order to be able to follow the traditions from the Prophet without reservation, rejected the principle of the consensus of the scholars, which embodied the living tradition of the ancient schools, and restricted his own idea of consensus to the unanimous doctrine of the community at large. The classical theory returned to the concept of the consensus of the scholars, which it considered infallible in the same way as the general consensus of the Muslims. But it had to take into account the status which Shāfi'ī had meanwhile won for the traditions from the Prophet, and it extended the sanction of the consensus of the scholars to Shāfi'ī's identification of the *sunna* with the contents of traditions from the Prophet. The main result of Shāfi'ī's break with the principle of 'living tradition' thus became itself part of the 'living tradition' at a later stage. The price that had to be paid for this recognition was that the extent to which traditions from the Prophet were in fact accepted as a basis of law was in the future to be determined by the consensus of the scholars, which left the representatives of each school free to determine it for themselves (by interpretation, and so forth), and Shāfi'ī's attempt to erect the traditions

[1] The Arabic term for a 'school' of religious law is *madhhab* (pl. *madhāhib*).

[2] In contrast with the *uṣūl*, 'roots', positive law is called *furū'*, 'branches'.

from the Prophet, instead of the living tradition and the consensus, into the highest authority in law was short-lived in its effect. The fact that the Shāfi'ī school itself had to accept this modification of the legal theory of its founder shows the hold which the idea of consensus had gained over Islamic law. It follows that the common legal theory, the discipline of the *uṣūl al-fiḳh*, has little relevance to the positive doctrine of each school.

As a result of the development described so far, the classical theory teaches that Islamic law is based on four principles or 'roots' (*uṣūl*, pl. of *aṣl*): the Koran, the *sunna* of the Prophet which is incorporated in the recognized traditions, the consensus (*ijmā'*) of the scholars of the orthodox community, and the method of reasoning by analogy (*ḳiyās*). (See further below, pp. 114 f.)

The essentials of this theory and, in particular, the fully developed concept of the consensus of the scholars occur already in the work of Ṭabarī (d. 310/923). Whereas Shāfi'ī had called Koran and *sunna* the 'two principles' and considered *ijmā'* and *ḳiyās* subordinate to them, Ṭabarī recognizes three *uṣūl*: Koran, *sunna* as expressed in traditions from the Prophet, and *ijmā'*, which for him is absolutely decisive; beside these he places *ḳiyās* (avoiding this technical term in relation to his own doctrine and using circumlocutions, such as 'parallel', 'similarity', or 'amounting to'). The later Ḥanbalīs (see below, p. 63), too, whilst treating *ḳiyās* as a recognized principle, avoid putting it formally on the same level as the other *uṣūl*, although *istiḥsān* and *istiṣlāḥ* (see the following paragraph) are admitted to the rank of 'controversial principles'. The final admission of *ḳiyās* to the 'classical' group of four *uṣūl* is the result of a compromise, on the lines envisaged by Shāfi'ī, between the old, unrestricted use of *ra'y* (or *istiḥsān*) and the rejection of all human reasoning in religious law (see below, sections 4 and 5).

3. Although the later schools of law shared the essentials of this classical theory, traces of the different doctrines of the ancient schools have survived in some of them to a greater or lesser extent. The old unfettered use of personal opinion (*ra'y*), for instance, continued to be recognized as legitimate by the Ḥanafīs under the name of 'approval' or 'preference' (*istiḥsān*) in cases where the strict application of analogy would have led

to undesirable results. (Cf. below, p. 204.) This does not mean that the followers of the Ḥanafī school are, or have been for more than a thousand years, at liberty to use their own discretionary judgement, any more than the adherents of any of the other schools; it means merely that the official doctrine of the school is in a number of cases based not on strict analogy but on the free exercise of personal opinion on the part of the school's earliest authorities. Mālik and other early authorities of the Mālikī school, too, are known to have exercised *istiḥsān* in a number of cases; the Mālikī school, however, prefers the method of *istiṣlāḥ*, 'having regard for the public interest (*maṣlaḥa*)', a consideration which differs only in name and not in kind from the reasoning of the Ḥanafīs and to which essentially the same qualification applies. The Shāfi'īs and the Ḥanbalīs (see below, section 4), too, use *istiṣlāḥ*. The exact definition of *ijmā'* has always remained somewhat controversial. The Mālikīs recognize, beside the general consensus of the scholars, the consensus of the (ancient) scholars of Medina (*ijmā' ahl al-Madīna*), the town of the Prophet and, according to them, the true home of his *sunna*. This doctrine perpetuates the ancient idea of a local, geographical consensus.

In the later Middle Ages, when Morocco had become the most active centre of the Mālikī school where it developed in relative isolation, a number of features became prominent there which were not shared by the other schools, and not even by Mālikī doctrine in other countries. Most of these features fall under the heading of 'judicial practice' (*'amal*). The concept of *'amal* had been prominent in the theory of the ancient school of Medina, and the 'practice of Medina' continued to play a minor part in the legal theory of the Mālikī school. Now in Morocco, from the end of the ninth/fifteenth century onwards, 'judicial practice', as opposed to the strict doctrine of the school, found a recognized place in the system, and it was set down in special works. The later Mālikī school in Morocco took more notice than the other schools of law of the conditions prevailing in fact, not by changing the ideal doctrine of the law in any respect, but by recognizing that the actual conditions did not allow the strict theory to be translated into practice, and that it was better to try to control the practice as much as possible than to abandon it completely, thus maintaining a kind of

protective zone around the *sharī'a*. Later Mālikī doctrine in Morocco upheld the principle that 'judicial practice prevails over the best attested opinion', and it allowed a number of institutions rejected by strict Mālikī doctrine. This Western Mālikī *'amal* is not customary law; it is an alternative doctrine valid as long as it is felt advisable to bring custom within the orbit of the *sharī'a*, and it mirrors, on a different plane, its predecessor, the *'amal* of Medina.

If later Mālikī doctrine in the West thus took limited notice of custom and actual practice, it remains, nevertheless, true that Islamic law, including the Mālikī school, ignores custom as an official source of law. Custom (*'urf*, *'āda*) is recognized as a restrictive element in dispositions and contracts (below, pp. 126, 144, 155) and as a principle in interpreting declarations; it also serves occasionally as the basis of *istiḥsān* (below, pp. 152, 155, 157) or *istiṣlāḥ*. Besides, custom and customary law have co-existed with the ideal theory of Islamic law, while remaining outside its system, in the whole of the Islamic world. As a point of historical fact, custom contributed a great deal to the formation of Islamic law, but the classical theory of Islamic law was concerned not with its historical development but with the systematic foundation of the law, and the consensus of the scholars denied conscious recognition to custom.[1]

4. The legal doctrine as it had been elaborated by Shāfi'ī did not satisfy the uncompromising Traditionists. It was derived, it is true, from traditions from the Prophet, but with the help of a highly developed method of analogical and systematic reasoning. The Traditionists, on their part, preferred not to use any human reasoning in law and chose, as much as possible, to base every single item of their doctrine on a tradition from the Prophet, 'preferring a weak tradition to a strong analogy', as their opponents put it pointedly. Although the number of individual traditions went on increasing, they were still very far from covering every individual type of case, and the Traditionists were in fact unable to do without reasoning. But the reasoning which they used was of a cautelary nature, concerned with moral issues,

[1] Occasional references to the abstract principle that the Law changes with a change in custom or in conditions, or that it takes custom into account, should not be overrated in their import as far as positive law is concerned; they envisage either the kind of consideration which has been mentioned in the text or the confirmation of existing customs by Koran and *sunna*, &c.

and differing widely from the systematic legal thought which had been brought to technical perfection by Shāfi'ī and which the Traditionists disliked.[1] This becomes apparent in the oldest legal texts inspired by traditionist doctrine, which contain the teachings of the prominent traditionist Ibn Ḥanbal (d. 241/855) and were compiled by his disciples in the same way in which the disciples of Mālik had edited the teachings of their master. They mark the beginnings of the Ḥanbalī school which, it should be noted, never absorbed its parent movement as completely as the Ḥanafī and Mālikī schools absorbed theirs. For some time Ibn Ḥanbal and his adherents were regarded by the followers of the other schools not as real 'lawyers' but as mere specialists on traditions. Nevertheless, the Ḥanbalīs became one of the recognized schools, and although they were never numerous, they counted among their adherents a surprisingly high proportion of first-class scholars in all branches of Islamic learning. The Traditionists of the third century of the hijra do not seem to have shown much interest in legal theory except for the general idea of the authority of traditions, but when the scholars of the Ḥanbalī school, much later, came to elaborate a complete system of doctrine, they, too, had to adopt the 'classical' legal theory which was based not on traditions but on consensus, and they recognized analogical reasoning (but cf. above, p. 60). It was left to the great independent Ḥanbalī thinker Ibn Taymiyya (d. 728/1328), to whom we shall have to return later (below, p. 72), to reject the all-embracing function of the consensus of the scholars, and at the same time to affirm the necessity of analogical reasoning of an improved kind.

5. About the same time that the movement of the Traditionists gave rise to the Ḥanbalī school, Dāwūd ibn Khalaf (d. 270/884) founded the Ẓāhirī school of law, the only school which owed its existence to and took its name from a principle of legal theory. It was their principle to rely exclusively on the literal meaning (*ẓāhir*) of the Koran and the traditions from the Prophet and to reject as contrary to religion not only the free exercise of personal opinion which had been customary before Shāfi'ī, but even the use of analogical and systematic reasoning which Shāfi'ī had retained. For instance, the Koran forbids

[1] A certain interest in technical legal problems is, however, noticeable in the elaborate chapter headings of Bukhārī (on whom see below, pp. 226 f.).

interest, and many traditions relate that the Prophet forbade an excess in quantity and a delay in delivery in the barter or sale of gold, silver, wheat, barley, and dates. The other schools extended this prohibition by analogy beyond the five commodities mentioned, either to all goods that were sold by weight or measure as the Ḥanafīs do, or to all foodstuffs that could be preserved, and so on. The Ẓāhirīs, however, refused to extend the ruling to commodities other than those mentioned in traditions. In this particular case the Ẓāhirī school seems less exacting, but in others it appears much stricter than the other schools; it applies an abstract principle without regard for the consequences. It was not so much abstract thought which the Ẓāhirīs rejected as the technical methods of legal reasoning which they considered subjective and arbitrary. In the last resort they, too, were unable to do without deductions and conclusions from the proof texts, but they tried to represent their conclusions as implied in the texts themselves. Another axiom of the Ẓāhirīs was that the only legally valid *ijmā'* was the consensus of the Companions of the Prophet. It was this Ẓāhirī thesis that the Ḥanbalī Ibn Taymiyya later took over in a mitigated form.[1] The legal thought of the Ẓāhirīs, which we know mainly through the writings of Ibn Ḥazm (d. 456/1065), has certain points of resemblance with the doctrine of the Ḥanbalīs and of the Traditionists in general, but essentially it goes back to a literalist attitude which can be found among the Khārijīs, as far back as the first century of Islam, and in the theological movement of the Mu'tazila, in the second century.[2]

Ibn Tūmart (d. 534/1130), the founder of the religious and political movement of the Almohads in North Africa, held that religious law should be based on the Koran, the *sunna*, and the *ijmā'*, which last he restricted to the consensus of the Companions of the Prophet, but in establishing the *sunna* he gave the practice of the people of Medina preference over traditions, so that the practice of Medina became his decisive argument, and

[1] Cf. below, p. 72, on the rejection of *taḳlīd* which is common to them too.

[2] The Mu'tazila were extreme opponents of the Traditionists. They insisted on basing their system of religious doctrine exclusively on the Koran, and used the method of literal interpretation, together with systematic reasoning, in order to discredit traditions. Although they did not elaborate a system of legal doctrine of their own, they often discussed problems of legal theory and of positive law from their particular point of view.

Mālik's *Muwaṭṭa'* one of his authoritative books; he also admitted *ḳiyās* within very narrow limits. At the same time he was strongly opposed to the system of positive law (*furū'*) as it had been worked out in the Mālikī school and was exclusively studied under the Almoravids (below, p. 86) in North Africa in his time, and to the systems of the other schools of law as well. In particular, he repudiated the authority of the *mujtahids* (below, p. 71), the great masters of the established schools, against whom he asserted his own authority as 'infallible *imām*' (*imām ma'ṣūm*); he declared their disagreements inadmissible, and regarded the practice of *taḳlīd* with regard to them as ignorance. This legal theory of Ẓāhirī inspiration was paralleled, at least under the third Almohad ruler, Abū Ya'ḳūb Yūsuf (558/1163–580/1184), by an administration of justice on Ẓāhirī lines, closely supervised by the ruler himself, but the movement does not seem to have developed a technical legal literature of its own.

6. There were several other 'personal' schools of law, such as those of Abū Thawr (d. 240/854) and of Ṭabarī (d. 310/923), not to mention a number of more or less independent scholars, particularly in the early period. But since about 700 of the hijra or A.D. 1300 only four schools of law have survived in orthodox Islam, the Ḥanafī, the Mālikī, the Shāfi'ī, and the Ḥanbalī schools.

The Ḥanafī school is well represented in Iraq, its home country, and in Syria. It spread early to Afghanistan, the subcontinent of India,[1] and Turkish Central Asia. It became the favourite school of the Turkish Seljukid rulers and of the Ottoman Turks, and it enjoyed exclusive official recognition in the whole of the Ottoman Empire, a status which it has preserved in the *ḳāḍī*s' tribunals even of those former Ottoman provinces where the majority of the native population follows another school, such as Egypt.

The Mālikī school spread westwards from its first centres, Medina and Egypt, over practically the whole of North Africa and over Central and West Africa as far as it is Muslim; it was also predominant in medieval Muslim Spain where it had superseded the school of Awzā'ī at an early date. The Muslims of the eastern coastal territories of Arabia, as far as they

[1] Where there are minorities of Shiites.

are not Ḥanbalīs (Wahhābīs) or Sectarians (Ibāḍīs who represent the one surviving branch of the Khārijīs,[1] or Shiites), are Mālikīs too.

The Shāfi'ī school started from Cairo, where Shāfi'ī spent the last years of his life. It prevails in Lower Egypt, in Hijaz, in south Arabia as far as it is not Zaydī Shiite, and in most of East Africa as far as it is Muslim. There are a considerable number of Shāfi'īs in Iraq. In the Middle Ages the school was well represented in Persia too, before that country became 'Twelver' Shiite. There are also Shāfi'īs in some districts of central Asia and in some coastal regions of India. Finally, the Shāfi'ī school is followed by almost all Muslims in Indonesia, in Malaya, and in the rest of South-East Asia.

The Ḥanbalī school did not at once succeed, in the same way as the other surviving orthodox schools of law, in prevailing in any extensive territory, but it had followers in many parts of the Islamic world, including Persia before it became Shiite. Its two great centres were Baghdad, the home town of Ibn Ḥanbal, and, somewhat later, Damascus, where the activity of the Ḥanbalī reformer Ibn Taymiyya (d. 728/1328; cf. below, p. 72), whose teachings are, however, not typical of the Ḥanbalī school as a whole, is one of the highlights of a brilliant period in the history of the school.

From the eighth/fourteenth century onwards the Ḥanbalī school declined and seemed on the verge of extinction, when the puritanical movement of the Wahhābīs of the twelfth/eighteenth century, and especially the Wahhābī revival in the present century, gave it a new lease of life. The religious founder of this movement, Muḥammad ibn 'Abd al-Wahhāb (d. 1201/1787), was influenced by the works of Ibn Taymiyya. Whereas the Ḥanbalī school had always been regarded by orthodox Islam as one of the legitimate schools of law, the intolerant attitude of the earlier Wahhābīs towards their fellow Muslims caused them for a long time to be suspected as heretics, and they have come to be generally considered orthodox only since their political successes in the present generation. The Ḥanbalī school is officially recognized in Saudi Arabia, and the inhabitants of Najd, the eastern half of that country, are practically all

[1] Other groups of Ibāḍīs are found in Algeria (the Mzab), Tunisia (the island of Djerba), and Libya (the Djebel Nefūsa).

Ḥanbalīs; there are also groups of them, of varying size, in Hijaz, in the principalities on the Persian Gulf, and in the subcontinent of India.

7. In their relationship to one another, the orthodox schools of law have, notwithstanding acts of fanaticism, particularly on the part of the populace and of the rulers in the high Middle Ages, generally practised mutual toleration. This attitude goes back to the time of the ancient schools of law which had accepted geographical differences of doctrine as natural. The maxim that disagreement (*ikhtilāf*) in the community of Muslims was a sign of divine indulgence had already been formulated in the second century of the hijra, though it was put into the mouth of the Prophet only much later. This mutual recognition was not incompatible, and did indeed go together with vigorous polemics and the insistence on uniformity of doctrine within each geographical school. The opportunity for disagreements on questions of principle arose only from the time of Shāfi'ī's systematic innovation onwards. In this particular case, the several schools arrived at a compromise, and generally speaking the consensus, which acted as the integrating principle of Islam, has succeeded in making innocuous those differences of opinion that it could not eliminate. The four schools, then, are equally covered by *ijmā'*, they are all deemed to translate into individual legal rules the will of Allah as expressed in the Koran and in the *sunna* of the Prophet; their alternative interpretations are all equally valid, their methods of reasoning equally legitimate; in short, they are equally orthodox. The same held true of the other schools of law as long as they existed; before about A.D. 1300, not only four but up to seven schools were regarded as the equally valid interpretations of the sacred Law; but once a school had ceased to exist, the consensus came into action again and it was no longer permissible to adhere to those schools which once had been on an absolutely equal footing with the others. This is a telling example of the way in which consensus acts in reducing differences progressively. The success of some schools and the extinction of others were brought about partly by the growing weight of consensus itself, and partly by external circumstances, such as the favour or disfavour of princes and a more or less favourable geographical situation for attracting students and making their doctrines known. Even within the

individual schools and in their relationship to one another consensus acts as an integrating principle. Not only will the recognized doctrine of each school,[1] through the elimination of stray opinions, become more and more uniform and settled down to the most minute details as time goes on; it also happens not infrequently that a school which, from its own premises, would have to regard an act as indifferent or permissible, prefers in fact to classify it as commendable or reprehensible, so as not to diverge too far from those other schools which regard it as obligatory or forbidden.

[1] The individual Muslim may join the school of his choice or change his allegiance without any formality; he may even, for the sake of convenience or for any reason of his own, with regard to any individual act or transaction adopt the doctrine of a school other than that which he habitually follows. This procedure is called *taḳlīd*, in a sense which is derived from the later meaning of this term. If he does this, however, he ought to follow the doctrine of the chosen school in all respects until the act's completion, and ought not to combine the doctrines of more than one school (this is called *talfīḳ*). The Modernists have disregarded this last rule.

10

THE 'CLOSING OF THE GATE OF INDEPENDENT REASONING' AND THE FURTHER DEVELOPMENT OF DOCTRINE

1. In the first few decades of 'Abbāsid rule, Islamic law, with the active help of the government, seemed at last on the point of dominating the practice. But it was denied this success; the administration of the state and religious law drew apart again, and the increasing rigidity of the *sharī'a* itself prevented it from keeping pace with actual practice. This development calls for two parallel surveys: one of the later development of Islamic law in itself, and the other of the relation between theory and practice.

2. The early 'Abbāsid period saw not only the rise of the schools of law but the end of the formative period of Islamic law, of which the formation of the schools was itself a symptom. The whole sphere of law had been permeated with the religious and ethical standards proper to Islam; Islamic law had been elaborated in detail; the principle of the infallibility of the consensus of the scholars worked in favour of a progressive narrowing and hardening of doctrine; and, a little later, the doctrine which denied the further possibility of 'independent reasoning' (*ijtihād*) sanctioned officially a state of things which had come to prevail in fact. To the earliest specialists in religious law, the search for legal rulings had been identical with the exercise of their personal opinion (*ijtihād al-ra'y*), of their own judgement on what the law ought to be. They based themselves on the rudimentary guidance available in the Koran and in the practice of the local community of Muslims, and applied the standards so gained to the administrative practice and customary law prevailing in Arabia and in the recently conquered territories. The questions as to who was a qualified scholar and who had the right to independent exercise of his own opinion

had not yet arisen. It was open to anyone sufficiently interested to embark upon this kind of speculation on religious law. This freedom to exercise one's own judgement independently was progressively restricted by several factors, such as the achievement of a local, and later of a general, consensus, the formation of groups or circles within the ancient schools of law; the subjection of unfettered opinion to the increasingly strict discipline of systematic reasoning, and last but not least the appearance of numerous traditions from the Prophet (and from his Companions), traditions which embodied in authoritative form what had originally been nothing more than private opinions. Thus the field of individual decision was continually narrowed down, but nevertheless, during the whole of the formative period of Islamic law, the first two and a half centuries of Islam (or until about the middle of the ninth century A.D.), there was never any question of denying to any scholar or specialist of the sacred Law the right to find his own solutions to legal problems. The sanction which kept ignoramuses at bay was simply general disapproval by the recognized specialists. It was only after the formative period of Islamic law had come to an end that the question of *ijtihād* and of who was qualified to exercise it was raised.

The first indications of an attitude which denied to contemporary scholars the same liberty of reasoning as their predecessors had enjoyed are noticeable in Shāfi'ī, and from about the middle of the third century of the hijra (ninth century A.D.) the idea began to gain ground that only the great scholars of the past who could not be equalled, and not the epigones, had the right to 'independent reasoning'. By this time the term *ijtihād* had been separated from its old connexion with the free use of personal opinion (*ra'y*), and restricted to the drawing of valid conclusions from the Koran, the *sunna* of the Prophet, and the consensus, by analogy (*ḳiyās*) or systematic reasoning. Shāfi'ī had been instrumental in bringing about this change, but he did not hesitate to affirm the duty of individual scholars to use their own judgement in drawing these conclusions. By the beginning of the fourth century of the hijra (about A.D. 900), however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus

gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all. This 'closing of the door of *ijtihād*', as it was called, amounted to the demand for *taḳlīd*, a term which had originally denoted the kind of reference to Companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities. A person entitled to *ijtihād* is called *mujtahid*, and a person bound to practise *taḳlīd*, *muḳallid*.

Under the rule of *taḳlīd* as it was finally formulated, the doctrine must not be derived independently from Koran, *sunna*, and *ijmāʿ*, but it must be accepted as it is being taught by one of the recognized schools which are, of course, themselves covered by consensus. Again, the official doctrine of each school is to be found not in the works of the old masters, even though these had been qualified in the highest degree to exercise *ijtihād*, but in those works which the common opinion of the school recognizes as the authoritative exponents of its current teaching. These are now generally handbooks dating from the late medieval period, and subsequent works derive their authority from them. The recognized handbooks contain the latest stage of authoritative doctrine that has been reached in each school, but they are not in the nature of codes; Islamic law is not a corpus of legislation but the living result of legal science.

The transition from the régime of *ijtihād* to the régime of *taḳlīd* occurred, of course, only gradually, and this is reflected by the theory of several degrees of *ijtihād* in descending order; the very authors of the authoritative handbooks are generally denied even the lowest degree of *ijtihād* and are considered merely *muḳallids*. The final doctrine of a school may sometimes differ from, and in the nature of things inevitably goes far beyond, the opinions held by its founder or founders. The details of the growth of doctrine within each school, though amply documented by the existing works, still remain a subject for scholarly investigation. Even during the period of *taḳlīd*, Islamic law was

not lacking in manifestations of original thought in which the several schools competed with and influenced one another. But this original thought could express itself freely in nothing more than abstract systematic constructions which affected neither the established decisions of positive law nor the classical doctrine of the *uṣūl al-fiḳh*. Most of these theoretical developments, too, which are quite independent of Koran, *sunna*, and *ijmāʿ*, and which represent the most technically juridical part of Islamic legal thought, still remain to be investigated.

3. The rule of *taḳlīd* did not impose itself without opposition, however. In later generations also there were scholars who held that there would always be a *mujtahid* in existence, or who were inclined to claim for themselves that they fulfilled the incredibly high demands which the theory had, by then, laid down as a qualification for *ijtihād*. But these claims, as far as positive law was concerned, remained theoretical, and none of the scholars who made them actually produced an independent interpretation of the *sharīʿa*. Other scholars did not so much claim *ijtihād* for themselves as reject the principle of *taḳlīd*. This was the case of Dāwūd ibn Khalaf, the founder of the Ẓāhirī school (d. 270/884; above, p. 63), of Ibn Tūmart, the founder of the Almohad movement (d. 524/1130; above, p. 64), and of the eminent Ḥanbalī, Ibn Taymiyya (d. 728/1328), followed by his disciple, Ibn Ḳayyim al-Jawziyya (d. 751/1350). These scholars considered it unauthorized and dangerous to follow blindly the authority of any man, excepting only the Prophet, in matters of religion and religious law. (This applies, of course, only to scholars and not to laymen.) The theoretical rejection of *taḳlīd* became one of the tenets of the Ẓāhirī school, though in practice it left its individual adherents hardly more freedom of doctrine than did the other schools.

Ibn Taymiyya did not explicitly advocate the reopening of the 'door of *ijtihād*', let alone claim *ijtihād* for himself; but as a consequence of his narrowly formulated idea of consensus he was able to reject *taḳlīd*, to interpret the Koran and the traditions from the Prophet afresh, and to arrive at novel conclusions concerning many of the institutions of Islamic law. The Wahhābīs, who constitute the great majority of the present followers of the Ḥanbalī school, have adopted, together with Ibn Taymiyya's theological doctrines, the whole of his legal theory, including

his rejection of *taḳlīd*; but at the same time they have retained, unchanged, Ḥanbalī positive law as it had been developed in the school before Ibn Taymiyya, apparently without being troubled by the resulting inconsistency.

Parallel with and partly influenced by the Wahhābīs there arose, from the eighteenth century onwards, individuals and schools of thought who advocated a return to the pristine purity of Islam, such as the movement of the Salafiyya, who may conveniently be called Reformers, and others, from the last decades of the nineteenth century onwards, who laid the emphasis on renovating Islam by interpreting it in the light of modern conditions, and who may conveniently be called Modernists. Both tendencies, which to a certain degree overlap, reject traditional *taḳlīd*. Some Modernists, in particular, combine this with extravagant claims to a new, free *ijtihād* which goes far beyond any that was practised in the formative period of Islamic law; but neither type of movement has produced any results worth mentioning in the field of positive religious law.[1] The recent reshaping of institutions of the *sharī'a* by secular legislation in several Islamic countries takes its inspiration from modern constitutional and social ideas rather than from the essentially traditional problem of the legitimacy of *ijtihād* and *taḳlīd*. This Islamic legislative modernism will be discussed below, Chapter 15.

4. Whatever the theory might say on *ijtihād* and *taḳlīd*, the activity of the later scholars, after the 'closing of the door of *ijtihād*', was no less creative, within the limits set to it by the nature of the *sharī'a*, than that of their predecessors. New sets of facts constantly arose in life, and they had to be mastered and moulded with the traditional tools provided by legal science. This activity was carried out by the *muftīs*. A *muftī* is a specialist on law who can give an authoritative opinion on points of doctrine; his considered legal opinion is called *fatwā*. The earliest specialists, such as Ibrāhīm Nakha'ī, were essentially *muftīs*; their main function was to advise interested members of the public on what was, in their opinion, the correct course of action from the point of view of the sacred Law. This cautelary and advisory element is still clearly discernible in the work of Mālik. From the beginning, the specialists had formed groups of like-minded amateurs, and in the time of Shāfi'ī a class of

[1] The operative words here are religious law, as opposed to secular legislation.

professionals had emerged. Shāfi'ī informs us that the knowledge of the details of religious law was beyond the reach of the general public, and was not even found among all specialists. The members of the public had been in need of specialist guidance from the very beginnings of Islamic law, and this need grew stronger as the law became more technical and its presentation more scholastic. The practical importance of the sacred Law for the pious Muslim is much greater than that of any secular legal system for the ordinary law-abiding citizen. It comes into play not only when he has to go to the courts; it tells him what his religious duties are, what makes him ritually clean or unclean, what he may eat or drink, how to dress and how to treat his family, and generally what he may with good conscience regard as lawful acts and possessions. There was thus a constant need of specialist guidance on these questions.

From the start the function of the *muftī* was essentially private; his authority was based on his reputation as a scholar, his opinion had no official sanction, and a layman might resort to any scholar he knew and in whom he had confidence. In order, however, to provide the general public, and also government officials, with authoritative opinions on problems of religious law, Islamic governments from some date after the final establishment of the schools of law have appointed scholars of recognized standing as official *muftīs*. (The chief *muftī* of a country is often called *Shaykh al-Islām*.) But their appointment by the government does not add to the intrinsic value of their opinions, they have no monopoly of giving *fatwās*, and the practice of consulting private scholars of high reputation has never ceased. A *ḳāḍī*, too, may consult a scholar when he is in doubt, and official *muftīs* are often attached to *ḳāḍīs*' tribunals. Parties to a lawsuit before the *ḳāḍī* will arm themselves with *fatwās* as authoritative as possible, though the *ḳāḍī* is not bound to accept any of them.

The doctrinal development of Islamic law owes much to the activity of the *muftīs*. Their *fatwās* were often collected in separate works, which are of considerable historical interest because they show us the most urgent problems which arose from the practice in a certain place and at a certain time. As soon as a decision reached by a *muftī* on a new kind of problem had been recognized by the common opinion of the scholars as correct,

it was incorporated in the handbooks of the school. On the other hand, the judgments given by the *ḳāḍī*s had no comparable influence on the development of Islamic law after the end of its formative period in early 'Abbāsid times, essential though the contribution of the earliest *ḳāḍī*s had been to laying its foundations.

5. It will have become clear from the preceding paragraphs that Islamic law, which until the early 'Abbāsid period had been adaptable and growing, from then onwards became increasingly rigid and set in its final mould. This essential rigidity of Islamic law helped it to maintain its stability over the centuries which saw the decay of the political institutions of Islam. It was not altogether immutable, but the changes which did take place were concerned more with legal theory and the systematic superstructure than with positive law. Taken as a whole, Islamic law reflects and fits the social and economic conditions of the early 'Abbāsid period, but has grown more and more out of touch with later developments of state and society.

11

THEORY AND PRACTICE

1. We can distinguish three different kinds of legal subject-matter, leaving aside the cult and ritual and other purely religious duties, according to the degree to which the ideal theory of the *sharī'a* succeeded in imposing itself on the practice. Its hold was strongest on the law of family (marriage, divorce, maintenance, &c.), of inheritance, and of pious foundations (*waḳf*); it was weakest, and in some respects even non-existent, on penal law, taxation, constitutional law, and the law of war; and the law of contracts and obligations stands in the middle.

We have seen that the political authorities took over the administration of criminal justice at an early period. As regards taxation, only lip-service was paid to the *sharī'a* and its modest demands, and Islamic law regarded all other taxes as illegal impositions.[1] As regards constitutional law, the state as envisaged by the theory of Islamic law is a fiction which has never existed in reality, and the law of war was deduced from a one-sided picture of the wars of conquest, and was hardly ever applied in practice.

On the other hand, the institutions concerning the *statut personnel* (i.e. marriage, divorce, and family relationships), inheritance, and *waḳf*, have always been, in the conscience of the Muslims, more closely connected with religion than other legal matters, and therefore generally ruled by Islamic law. This religious character of the law of family and inheritance is not a coincidence; the greater part of Koranic legislation is concerned with these matters. Nevertheless, we find that even in the field of marriage, divorce, and family relationships actual practice has been strong enough to prevail over the spirit, and in certain cases over the letter, of religious law, either de-

[1] The technical term for this kind of tax is *maks*, which meant 'market-dues' in pre-Islamic Arabia, but they were not recognized in Islamic law. They existed in south Arabia too; cf. A. F. L. Beeston, *Qahtan*, i (below, p. 219).

pressing the position of women or raising it. In addition, numerous groups of converts to Islam have retained their original law of inheritance, mostly to the disadvantage of women. Special rules concerning real estate, of which only a few rudiments exist in the *sharī'a*, have been elaborated in detail, on the bases provided by Islamic law, and they vary according to place and time; these complements to the *sharī'a* often diverge from strict theory. The institution of *wakf*, becoming an important part of the law of real estate, has been popular in most, though not all, Islamic countries; here, too, practice has often led to developments which did not agree with strict Islamic law, for instance, in the early Ottoman period. Customary penal law, often incorporating the principle of monetary fines and administered by village, tribal, and similar authorities rather than by governments, forms part of the customary law of numerous groups of Muslims; this kind of customary law was even codified in writing.

The customary law of the contemporary Bedouins deserves special mention because, though influenced by Islamic law, it goes back in the last resort to the customary law of the pre-Islamic Arabs and enables us to control the information which literary sources give us on this last. Among the tribesmen of Yemen and of south Arabia in general this tribal customary law is called, *a potiori*, *ḥukm* (*aḥkām*) *al-man'*, or *al-man'a*, 'provisions of protection', 'sanctions', and in Dhofar and Oman, *ḥukm al-ḥawz* (from *ḥawz*, the tribal law-man), and it is consciously and openly opposed to the *sharī'a*. Religiously inclined persons therefore call it *ḥukm al-ṭāghūt*, 'provisions of the idol, or idols', after sura iv. 60. Here, too, there exist written codifications of this customary law, as well as hostile references to it in the writings of the representatives of the *sharī'a*.

In the vast field of the law of contracts and obligations the *sharī'a* had to resign an ever-increasing sphere to practice and custom. The theory of the sacred Law did not fail to influence practice and custom considerably, albeit in varying degrees at different places and times, but it never succeeded in imposing itself on them completely. This failure resulted chiefly from the fact that the ideal theory, being essentially retrospective, was from the early 'Abbāsid period onwards unable to keep pace with the ever-changing demands of society and commerce.

It may be said that, as far as popular conscience is concerned, the sacred Law is observed, even in the field of purely religious duties, to the extent to which custom demands it, so that essential duties are often neglected, non-essential practices faithfully observed, and even formalities which are unknown to the *sharī'a* imposed by custom. In the field of the law of property, for instance, the right of pre-emption was eagerly adopted by popular custom in numerous Islamic countries, although Islamic law itself approves its exclusion by the use of evasions (*ḥiyal*).

2. The law of contracts and obligations was ruled by a customary law which respected the main principles and institutions of the *sharī'a*, but showed a greater flexibility and adaptability, supplementing it in many respects.[1] It developed, for instance, the sale of real property with the right of redemption (*bay' al-wafā'*, *bay' al-'uhda*); this aims at avoiding the irrevocable alienation of land but is not admissible in strict Islamic law either as a sale or as a pledge. It also used the *suftaja* and *ḥawāla* as a bill of exchange beyond the limits set to it by Islamic law; this made real banking activities, not only by Jewish bankers but by Muslim merchants, possible in the Middle Ages. Several institutions of this customary commercial law were transmitted to medieval Europe through the intermediary of the law merchant, the customary law of international trade, as is attested by medieval Latin *mohatra*, from Arabic *mukhāṭara*, a term for the evasion of the prohibition of interest by means of a double sale (see the following section), by the French term *aval*, from Arabic *ḥawāla*, for the endorsement on a bill of exchange, by the term *cheque*, from Arabic *ṣakk*, 'written document', and by the term *sensalis* (*sensale*, *Sensal*), from Arabic *simsār*, 'broker'.

3. The customary commercial law was brought into agreement with the theory of the *sharī'a* by the *ḥiyal* (sing. *ḥīla*) or 'legal devices', which were often legal fictions. The *ḥiyal*, which are not confined to commercial law but cover other subject-matters as well, can be described, in short, as the use of legal means for extra-legal ends, ends that could not, whether they themselves were legal or illegal, be achieved directly with the means provided by the *sharī'a*. The 'legal devices' enabled

[1] Islamic law does not recognize the liberty of contract (below, p. 144).

persons who would otherwise, under the pressure of circumstances, have had to act against the provisions of the sacred Law, to arrive at the desired result while actually conforming to the letter of the law. For instance, the Koran prohibits interest, and this religious prohibition was strong enough to make popular opinion unwilling to transgress it openly and directly, while at the same time there was an imperative demand for the giving and taking of interest in commercial life. In order to satisfy this need, and at the same time to observe the letter of the religious prohibition, a number of devices were developed. One consisted of giving real property as a security for the debt and allowing the creditor to use it, so that its use represented the interest; this transaction forms a close parallel to the sale with the right of redemption (above, section 2). Another, very popular, device consisted of a double sale (*bay'atān fi bay'a*), of which there are many variants. For instance, the (prospective) debtor sells to the (prospective) creditor a slave for cash, and immediately buys the slave back from him for a greater amount payable at a future date; this amounts to a loan with the slave as security, and the difference between the two prices represents the interest; the transaction is called *mukhāṭara* (above, section 2) or, more commonly, *'īna*. Euphemistically, it is also called *mu'āmala*, 'transaction', and the money-lender *tājir*, 'trader', because traders also acted as money-lenders. This custom prevailed in Medina as early as in the time of Mālik. There were hundreds of these devices, extending over all fields of the law of contracts and obligations, many of them highly technical, but all with a scrupulous regard for the letter of the law.[1] The acknowledgement plays a very important part in the construction of numerous *ḥiyal*, because it creates an abstract debt and is therefore particularly suitable for bringing about legal fictions. (cf. below, p. 151).

Evasions and other devices are not unknown to other legal systems, including Jewish and Canon law, and legal fictions in particular played a considerable part in Roman law and elsewhere. But their function in Roman law was to provide the

[1] A special branch of *ḥiyal* consists of evasions of obligations undertaken under oath or dispositions made dependent on the fulfilment of a condition (below, pp. 117, 159); they take advantage of the tendency of Islamic law to interpret declarations restrictively in this case, so that there are numerous possibilities of avoiding the incidence of the undesirable obligation or disposition.

legal framework for new requirements of current practice with the minimum of innovation; in Islamic law it was to circumvent positive enactments.[1] The giving and taking of interest corresponded indeed with a requirement of commercial practice, but a requirement that the Koran, and Islamic law after it, had explicitly and positively banned. The legal devices represented a *modus vivendi* between theory and practice: the maximum that custom could concede, and the minimum (that is to say, formal acknowledgement) that the theory had to demand. The recognition of the validity of the *ḥiyal* by the theory of Islamic law was facilitated, on the one hand, by the heteronomous and irrational side of the *sharīʿa*, which called for observance of the letter rather than of the spirit (cf. below, p. 204), and, on the other, by the principle that the law, and the *ḳāḍī* in his judgment, are concerned with the outward aspect of things only and not with questions of conscience and hidden motives (cf. below, p. 123). The first and simplest *ḥiyal* were presumably thought out by the interested parties who felt the need for them, the merchants in particular, but it was quite beyond them to invent and apply the more complicated ones; they had to have recourse to specialists in religious law, and these last did not hesitate to supply the need. Once the system of religious law had been elaborated, the religious zeal of the first specialists was gradually replaced and superseded by the not less sincere, not less convinced, but more technical, more scholastic, interest of professionals who took pride in inventing and perfecting small masterpieces of legal construction. The inventors of *ḥiyal* had to calculate the chances of legal validity to a nicety if the *ḳāḍī*, who was bound to the sacred Law, was not to upset the real effects of the business transaction which their customers, the merchants, had in mind, effects which depended upon the validity of every single element in an often complicated series of formal transactions. The activity of the authors of *ḥiyal*, catering for the practice, shares this advisory and cautelary character with that of the early specialists who first elaborated the theory of Islamic law. The early specialists warned their contemporaries against acts incompatible with the Islamic way of life; the authors of *ḥiyal* helped

[1] There are also fictitious actions, brought by agreement of the parties in order to have a claim or right confirmed by the *ḳāḍī*; they are not necessarily connected with *ḥiyal* but are used, for instance, in order to have the validity of a *waḳf* confirmed

theirs not to conclude contracts which would be considered invalid by the fully developed system of Islamic law.

There are certain differences of degree in the attitudes of the several schools of law towards the *ḥiyal*. The Ḥanafīs are the most favourably inclined. Abū Yūsuf and Shaybānī composed treatises dealing with *ḥiyal*, and the treatise of Shaybānī has survived. Another such book, which is attributed to Khaṣṣāf (d. 261/874) but was presumably written in Iraq in the fourth century of the hijra (tenth century A.D.), enables us to discern, through the thin veil of its legally unobjectionable forms, the realities of practice in that place and time. Shāfi'ī (and the first few generations of his school after him) regarded the *ḥiyal* as forbidden or reprehensible, although he had to recognize them as legally valid; but the success of the *ḥiyal* literature of the Ḥanafīs brought about, from the fourth century of the hijra onwards, both the production of books of *ḥiyal* by Shāfi'ī authors, of which that of Ḳazwīnī (d. 440/1048 or soon afterwards) has survived, and the distinction of *ḥiyal* which are allowed and which form the great majority, from those which are reprehensible or forbidden. The Mālikīs seem to have paid less attention to the subject, but the doctrine of the school admits some *ḥiyal* and rejects others. The Traditionists, in keeping with their general approach to questions of religious law, rejected *ḥiyal*, and the section on *ḥiyal* in Bukhārī's *Ṣaḥīḥ* (below, p. 226) contains a sustained polemic against them, with quotations from otherwise unknown early treatises on *ḥiyal*. The Ḥanbalī scholar Ibn Taymiyya, in a special work of his, attacked and declared invalid the *ḥiyal* in general and the so-called *taḥlīl* ('making lawful') in particular; this last aims at removing the impediment to remarriage between the former husband and wife after a triple repudiation by arranging for the marriage of the woman to another husband with the understanding that this marriage would be immediately dissolved after (real or pretended) consummation. Ibn Taymiyya's disciple, Ibn Ḳayyim al-Jawziyya, however, distinguished *ḥiyal* which were lawful, by which a lawful end was to be achieved by lawful means, from those which were forbidden, and which he declared invalid; the first group comprises numerous devices in the field of commercial law. The Ḥanafīs, on their part, whilst they state that *ḥiyal* which cause prejudice to another

are forbidden, and are loth to suggest *ḥiyal* which comprise acts that are in themselves reprehensible, let alone forbidden, are not really concerned with the moral evaluation of *ḥiyal* in detail, and they take their being legally valid for granted. According to them many *ḥiyal* are not even reprehensible, for instance those which aim at evading the incidence of the right of pre-emption; and the device of *taḥlīl* has been widely practised, by Ḥanafīs, Mālikīs, and Shāfi'īs, down to the present generation.

4. A further feature of customary commercial law, and of Islamic law as applied in practice as a whole, was its reliance on written documents.[1] We have seen that Islamic law, at a very early period, diverged both from an explicit ruling of the Koran and from current practice by denying the validity of documentary evidence and restricting legal proof to the oral evidence of witnesses. Written documents, however, proved so indispensable in practice that, notwithstanding their persistent neglect in theory, they remained in constant use, became a normal accompaniment of every transaction of importance, and gave rise to a highly developed branch of practical law with a voluminous literature of its own, the beginnings of which go back to the second century of the hijra (eighth century A.D.). Theory continued to reason as if there were no documents but only the oral testimony of witnesses, possibly helped by private records of their own; practice continued to act as if the documents were almost essential and the 'witnessing' only a formality to make them fully valid; and the professional witnesses came, in fact, to exercise the functions of notaries public. Again, the authors of the practical books of legal formularies were themselves specialists in religious law; they and the professional witnesses themselves acted as legal advisers to the parties concerned and provided forms of documents for all possible needs of the practice and safeguards against all possible contingencies, documents which had only to be 'witnessed' in order to become legally valid. Finally, even strict theory deigned to recognize the existence of written documents and to admit them as valid evidence once they had been attested by qualified witnesses, the Mālikīs to the widest extent, the Ḥanafīs and the

[1] Documents are called *ṣakk*, pl. *ṣukūk*, or *wathīḳa*, pl. *wathā'iḳ*, or *dhukr*, pl. *adhkār*, also *dhukr ḥaḳḳ*, pl. *adhkār ḥuḳūḳ*. The branch of legal science which deals with documents is called the science of *shurūṭ* (pl. of *sharṭ*), 'stipulations'.

Ḥanbalīs with some hesitation, whereas the Shāfi'īs continued to regard them strictly as accessories; but the actual use of written documents was equally extensive among the adherents of all schools. In the modern period, during which the application of Islamic law and the organization of its tribunals have been increasingly modified by independent Islamic governments, written documents have been generally admitted as valid proof, and sometimes the competence of the *ḳāḍī*s has even been restricted to cases in which documentary evidence is produced.

Written documents often formed an essential element of *ḥiyal*. The more complicated *ḥiyal* normally consisted of several transactions between the parties concerned, each of which was perfectly legal in itself, and the combined effect of which produced the desired result. Each transaction was, as a matter of course, recorded and attested in a separate document. Taken in isolation, a document recording a single transaction or an acknowledgement made by one of the parties might be used by the other party to its exclusive advantage and for a purpose contrary to the aim of the whole of the agreement. In order to prevent this happening, the official documents were deposited in the hands of a trustworthy person (*thiḳa*) or intermediary, together with an unofficial covering document which set out the real relationship of the parties to each other and the real purport of their agreement. (This kind of document is technically called *muwāḍa'a*, 'understanding'.) The intermediary, then, acting on the contents of the covering document, handed to each party only those papers which they were entitled to use at any given stage, and prevented an unauthorized use of any document by producing, if necessary, the document of a compensating transaction or acknowledgement which had been prepared and attested beforehand for this very purpose.

The whole phenomenon of customary commercial law is of considerable importance for the legal sociology of Islam in the Middle Ages.

5. The works on *ḥiyal* and the works on *shurūṭ* belong to a well-defined branch of Ḥanafī legal literature, together with works on *waḳf*, on legacies, on the minutes (*maḥḍar*) and written judgments (*sijill*) of the *ḳāḍī*s and the duties of the *ḳāḍī* (*adab al-ḳāḍī*) in general, and, at a certain distance, on maintenance. All these subjects are of importance for the application of Islamic

law in practice, and they tend to appear in combination among the works of a series of highly esteemed Ḥanafī authors over several centuries.

6. We must think of the relationship of theory and practice in Islamic law not as a clear division of spheres but as one of interaction and mutual interference, a relationship in which the theory showed a great assimilating power, the power of imposing its spiritual ascendancy even when it could not control the material conditions. This asserted itself not only in the *ḥiyal* and in the *shurūṭ*, but in the later Mālikī *'amal* (above, p. 61 f.), in the institutions of the *naẓar fil-maẓālim* and of the *muḥtasib*, in the Ottoman *ḳānūn-nāmes*, and in numerous other ways. Also, Islamic governments in the past have always appointed *ḳāḍī*s and provided them, in principle, with the necessary means of execution; and the functions of the *ḳāḍī* extended far beyond the mere administration of justice.

Thus a balance established itself in most Islamic countries between legal theory and legal practice; an uneasy truce between the *'ulamā'* ('scholars'), the specialists in religious law, and the political authorities came into being. The *'ulamā'* themselves were conscious of this; they expressed their conviction of the ever-increasing corruption of contemporary conditions (*fasād al-zamān*), and, in the absence of a dispensing authority, formulated the doctrine that necessity (*ḍarūra*) dispensed Muslims from observing the strict rules of the Law. Whereas traditional Islamic governments were unable to change it by legislation, the scholars half sanctioned the regulations which the rulers in fact enacted, by insisting on the duty, already emphasized in the Koran (sura iv. 59, 83, and elsewhere), of obedience to the established authorities. As long as the sacred Law received formal recognition as a religious ideal, it did not insist on being fully applied in practice.

The *sharī'a* could not abandon its claim to exclusive theoretical validity and recognize the existence of an autonomous customary law; its representatives, the *'ulamā'*, were the only qualified interpreters of the religious conscience of the Muslims. It possessed an enormous prestige and an unquestioned ascendancy, so much so that the idea that law must be ruled by religion has remained an essential assumption of the Modernists, who otherwise do not hesitate to interfere deeply with the

traditional doctrine of Islamic law. But the laws which rule the lives of the Muslim peoples have never been coextensive with pure Islamic law, although this last has always formed an important ingredient of them.[1] These conditions have prevailed in all parts of the Islamic world since the early Middle Ages.

[1] Hostile references to practice in works of Islamic law are an important source of information on it for the Middle Ages.

12

PURIST REACTIONS

1. THE general and normal conditions described in the preceding chapter were occasionally disturbed by violent religious reform movements, such as that of the Almoravids in north-west Africa and Spain from about 447/1055 to 541/1146, that of the Fulānīs or Fulbe in West Africa, including Northern Nigeria, in the nineteenth century, and that of the Wahhābīs in Arabia in the nineteenth and again in the present century. The Almoravids and the Fulānīs were Mālikīs, the Wahhābīs, as mentioned before, Ḥanbalīs. All these movements made it their aim, in the states which they set up, to enforce Islamic law exclusively, to abolish the double system of administration of justice, and to outlaw customary and administrative law. In the past the effects of these religious reform movements on the observance of the *sharī'a* have usually tended to wear off, until presently a new equilibrium between theory and practice has established itself.

2. A British colonial protectorate was established over the Fulānī sultanate and emirates of Northern Nigeria in 1900, at a time when Islamic law in that region was still near its highest degree of practical application. Custom, if not entirely eradicated, had been pushed into the background, and the only existing tribunals were those of the *ḳāḍī*s who were competent in all matters, including penal law. Only the customary land law remained valid and was enforced by the councils of the sultan and of the emirs, and the occasional exercise of *siyāsa* by the rulers, parallel with the application of the *sharī'a* by the *ḳāḍī*, was taken for granted. Its natural respect for Islamic religion caused the British administration to identify 'native law and custom', the maintenance of which had been promised when the protectorate was established, with the pure theory of Mālikī Islamic law, as far as the Muslims of Northern Nigeria

were concerned.[1] The colonial administrators were also inclined to prefer a formal and explicit doctrine, such as is provided by Islamic law, to changeable and badly defined customs. The *'ulamā'*, from whom the *ḳāḍī*s were recruited, did not fail to take advantage of these favourable conditions, the rulers themselves came to repudiate the exercise of *siyāsa*, and in the later years of the British protectorate, in the absence of any desire on the part of the British administration to interfere with the law applicable to the Muslim populations, pure Islamic law acquired an even higher degree of practical application than before. This has often been the effect of a colonial administration.

3. Ḥanbalī Islamic law is to its full extent applied in Saudi Arabia by *ḳāḍī*s' tribunals (and in Najd, the eastern part of the country, directly by the governors, too). King Ibn Saud in 1346/1927 conceived the project of having a code of Islamic law elaborated; this code was to be based not on the Ḥanbalī doctrine only, but following the thought of Ibn Taymiyya, each particular norm was to be taken from that school whose doctrine on the point in question appeared to be most solidly based on Koran and *sunna*. Under the protests of the Ḥanbalī *'ulamā'*, however, he had to abandon the project, and Saudi Arabian regulations of 1347/1928 and 1349/1930 make it obligatory on the *ḳāḍī*s to apply the recognized texts of the Ḥanbalī school. Beside the *sharī'a* (according to Ḥanbalī doctrine) stand the administrative regulations of the government which, in fact, have the force of law although, in order to avoid the appearance of a secular legislation, they are called *niẓām* 'ordinance', or *marsūm* 'decree', and not *ḳānūn* which has become the technical term for the secular laws of the Islamic countries in the Near East. An Ordinance on Commerce was promulgated in 1350/1931, and commercial courts were set up in Jeddah, Yanbu', and Dammam, but they were abolished again and their functions taken over by the Ministry of Commerce established in 1954.[2] The penal law of the *sharī'a* is not formally but materially affected by the ordinances on Work and Workmen, on Motor Vehicles, and others. Under the first, claims of

[1] Slavery and the *ḥadd* punishments of mutilation, stoning, and crucifixion were, however, abolished, but not the punishment of flogging, which used to be carried out in a very mild way in Northern Nigeria.

[2] The Ordinance on Commerce is based on the Ottoman Code of Commerce, but all references to interest have been expunged.

'compensation' for accidents at work are decided by the Ministry of Finance, whilst the *ḳāḍī* declares himself incompetent to deal with these matters but gives judgment on questions of blood-money concurrently; under the second, the police investigate and decide on the guilt, if any, of the driver, and the *ḳāḍī* then allots the blood-money on the basis of their decision; numerous ordinances provide for monetary fines and imprisonment as punishments which, should the occasion arise, are imposed together with those prescribed by the *sharī'a*. Finally, in 1373/1954, a Court of Complaints (*dīwān al-maẓālim*) was established.

In Yemen, Imām Yaḥyā tried to enforce pure Islamic law (according to the Zaydī Shiite doctrine), against the opposition of the people.

4. The example of Afghanistan shows that purism in the sphere left to Islamic law may exist together with the restriction of its application in practice by customary law. Tribal customs prevail in that country, and the *sharī'a* (according to Ḥanafī doctrine) is subsidiary to them. But when King Amanullah in 1924 tried to introduce a Penal Code which, too, out of respect to the *sharī'a* was called *niẓām-nāme* and not *ḳānūn*, and the innovations of which amounted to nothing more than the introduction of monetary fines and the restriction of the discretion of the *ḳāḍī* with regard to the *ta'zīr* by introducing a graded system of punishments, he was forced by the *'ulamā'* to replace it by an amended version which amounted to its repeal.

13

ISLAMIC LAW IN THE OTTOMAN EMPIRE

1. Of essentially the same kind, though sensibly different in their effects, were the efforts of established Islamic states (later than the early 'Abbāsid period) to subject the actual practice to the rule of the sacred Law. The most remarkable and, for a time, the most successful of these efforts was made in the Ottoman Empire.

The Islamization of the Ottoman Turks was an event of far-reaching importance in the history of Islamic law. Having entered Islam recently, and being free from the restraints of history, they took Islam more seriously than those peoples who had professed it for a long time. At the beginning, mystical and antinomian tendencies prevailed among them, customary and administrative law predominated, and institutions incompatible with the *sharī'a* were taken for granted, such as the *devshirme*, the periodical forced levy of children from the Christian subjects for recruitment into the standing army and their forced conversion to Islam, fiscal measures such as a tax on brides (*'arūs resmi*), and the system of land tenure (see below). These particular features, and others, survived into the following period.

2. Early in the sixteenth century, however, Islamic orthodoxy, represented by the *'ulamā'*, the Islamic scholars, and in particular the specialists in Islamic law, emerged victorious. The Ottoman sultans, particularly Selim I (1512–20) and Süleymān I (1520–60), and their immediate successors, were more serious than the first 'Abbāsids in their desire to be 'pious' rulers, and they endowed Islamic law, in its Ḥanafī form, which had always been the favourite of the Turkish peoples, with the highest degree of actual efficiency which it had ever possessed in a society of high material civilization since early 'Abbāsid times. They based the whole administration of justice on the *sharī'a*, they even made the smallest unit of their civil administration coextensive

with the *ḳaḍā'*, the district in which a *ḳāḍī* was competent, and put the local chief of police, the *subashī*, under the orders of the *ḳāḍī*; they provided for a uniform training of scholars and *ḳāḍīs* and organized them in a graded professional hierarchy; and they endowed the Grand Mufti, the *muftī* of Istanbul who was at the head of the hierarchy and bore the title of *Shaykh al-Islām*, with a special authority. He became one of the highest officers of state, and he was charged with assuring the observance of the sacred Law in the state and with supervising the activity of the *ḳāḍīs*. On all important occasions he was consulted on whether the action envisaged by the government was in keeping with the *sharī'a*. The office reached the zenith of its power under Süleymān I, particularly in the person of Abul-Su'ūd (Grand Mufti from 952/1545 until his death in 982/1574).

Abul-Su'ūd succeeded in bringing the *ḳānūn*, the administrative law of the Ottoman Empire, into agreement with the *sharī'a*. Supported by Süleymān, he completed and consolidated a development which had already started under Meḥemmed II (see below, section 3). Already before his appointment as Grand Mufti he had begun, on the orders of the sultan, to revise the land law of the European provinces and to apply to it the principles of the *sharī'a*. The uncompromising application of these principles, however, proved impracticable, and Abul-Su'ūd finally arrived at a workable compromise between the Islamic concept of *waḳf* and the Ottoman fiscal institution of *tapu*. On the other hand, Abul-Su'ūd reformulated, consciously and in sweeping terms, the principle that the competence of the *ḳāḍīs* derived from their appointment by the sultan and that they were therefore bound to follow his directives in applying the *sharī'a*. These directives, which were thirty-two in number in the time of Abul-Su'ūd, took two forms: instructing the *ḳāḍīs* to follow one of several opinions admitted by the Ḥanafī authorities, and withdrawing certain matters from their competence. *Ḳāḍīs* had always been appointed each for a certain circumscription, or even to hear, within their respective circumscriptions, certain classes of causes only (for instance, causes concerning marriage or succession). It was therefore nothing unprecedented when Sultan Süleymān in 1550, at the suggestion of Abul-Su'ūd and in order to secure uniformity of judgments (cf. below, p. 138), instructed the *ḳāḍīs* not to hear actions

which without a valid grond had not been brought for more than fifteen years. This introduced, in fact, a period of prescription, or statute of limitation, of fifteen years, which became typical of Islamic law as applied in the Ottoman Empire. The restriction of the competence of the *ḳāḍīs* became a favourite device of the modernists for introducing material changes into Islamic law (see below, p. 106), although this idea was far from the minds of the Ottomans.

3. The Ottoman sultans distinguished themselves not only by their zeal for the sacred Law but by their legislative activity; Süleymān I himself bears the appellation of *Ḳānūnī* (which refers, it is true, not exclusively to his legislative activity but to his care for an efficient administration in general). In perfect good faith they enacted *ḳānūns* or *ḳānūn-nāmes* which were real laws, convinced that in doing so they neither abrogated nor contradicted the sacred Law but supplemented it by religiously indifferent regulations.[1] In fact the very first of these Ottoman *ḳānūn-nāmes*, that of Sultan Meḥemmed II (1451–81), repeatedly refers to Islamic law and freely uses its concepts. It treats, among other matters (office of the Grand Vizier, court ceremonial, financial ordinances), of penal law; it presupposes that the *ḥadd* punishments are obsolete and replaces them by *ta'zīr*, i.e. beating, and/or monetary fines which are graded according to the economic position of the culprit. In fact, these provisions go beyond merely supplementing the *sharī'a* by the *siyāsa* of the ruler, and amount to superseding it. The so-called *ḳānūn-nāme* of Süleymān I, which in its major parts seems to have been compiled previously under Bāyezīd II (1481–1512), shows a considerable development along these lines; it treats in greater detail of military fiefs, of the position of non-Muslim subjects, of matters of police and penal law, of land law, and of the law of war. In the field of penal law, a considerable place is given to bodily punishments, such as emasculating the seducer, hanging incendiaries and certain thieves and housebreakers, cutting off the hands of forgers and coiners 'where it is customary', and, as an alternative to fines, of thieves (which

[1] The Ottomans were not the first to introduce either the technique or the term, both of which are attested for the states of the Mamlūks in Syria and Egypt and of the Aḳ-Ḳoyunlu in northern Mesopotamia before their time, but they developed the practice considerably.

revives this particular *ḥadd* punishment), and the use of torture when there is circumstantial evidence of theft or receiving.

The supervision of public morals was the responsibility of the *ḳāḍīs*; numerous instructions concerning these matters were issued to them, and they had them carried out by the *subashī* or chief of police, whilst the *muḥtasib* supervised trade and industry on their behalf.

4. The legal order in the Ottoman Empire in the sixteenth century was far superior to that prevailing in contemporary Europe, if only because of its uniformity, but the subsequent decadence of the empire could not fail to affect it adversely. The efforts at reform which had started with energy under Maḥmūd II (1808–39) led unavoidably to a conflict with the *sharī'a*; in the *Khaṭṭ-i sherīf* of Gülhane (end of 1839), enacted by Maḥmūd's successor 'Abdülmejīd (1839–61), the Muslims and non-Muslims were for the first time uniformly called 'subjects'. In the following decade there began the legislation of the *Tanẓīmāt* after European models; its first important manifestation was the Code of Commerce (1850), and one legal subject-matter after another was withdrawn from the orbit of Islamic law.

The *sharī'a* was, however, not officially abandoned as yet; on the contrary, Ottoman Turkey is the only Islamic country to have tried to codify and to have enacted as a law of the state parts of the religious law of Islam. This is the *Mejelle* (with its full title *Mejelle-i aḥkām-i 'adliyye*; in modern Turkish orthography *Mecelle*), which covers the law of contracts and obligations and of civil procedure in the form of articles, and was promulgated as the Ottoman Civil Code in 1877. According to the explanatory memorandum, its purpose was to provide the recently created (secular) tribunals with an authoritative statement of the doctrine of Islamic law and to obviate (without forbidding it) recourse to the works of Islamic jurisprudence which had proved difficult and impracticable. Strict Islamic law is by its nature not suitable for codification because it possesses authoritative character only in so far as it is taught in the traditional way by one of the recognized schools. The experiment of the *Mejelle* was undertaken under the influence of European ideas, and it is, strictly speaking, not an Islamic but a secular code. It was not intended for the tribunals of the