ḳāḍīs, and was in fact not used in them as long as they existed in Turkey, and it contains certain modifications of the strict doctrine of Islamic law, particularly in the rules concerning evidence.[1] Nevertheless, the *Mejelle* was one of the official codes of the Ottoman Empire; it remained in force (subject to subsequent legislation) in the territories, and later states, which were detached from the Ottoman Empire after 1918, where it was applied as the 'civil law' by modern secular tribunals, until it was replaced by new civil codes in Lebanon (1932), Syria (1949), and Iraq (1953), and it is still the basis of the 'civil law' of Cyprus (detached already in 1878), Israel, and Jordan.[2]

5. In Turkey itself, not only the *Mejelle* but the whole of Islamic law and the tribunals of the *ḳāḍīs* were abolished in 1926, and the same happened in Albania in 1928. In the Muslim parts of Yugoslavia (Bosnia and Herzegovina), too, the *Mejelle* was abolished, although the institution of pre-emption was retained, but Islamic law has continued in some respects to be applied to Muslims in matters of *statut personnel*, legacies, and *waḳf*, all this by secular tribunals. In Greece, too, Islamic law, administered by *muftīs*, has remained applicable to Muslims in matters of *statut personnel*, inheritance, and *waḳf* in the territories ceded by the Ottoman Empire in 1913.

[1] For instance, all the other traditional qualifications are required of a witness and his evidence, but not the quality of being a Muslim (arts. 1684 ff.).

[2] See the bibliographies on these countries, below, pp. 255 ff. The *Mejelle* was never in force in Egypt. On the Ottoman family law of 1917 see below, p. 103.

14

ANGLO-MUHAMMADAN LAW AND *DROIT MUSULMAN ALGÉRIEN*

1. ANOTHER important though less lasting effort to apply the whole of Islamic law in practice was made in India under the Mogul emperor Awrangzīb ʿĀlamgīr (1067/1658–1118/1707) as part of the orthodox reaction against the ephemeral religious experiment of the emperor Akbar. Here, too, the Ḥanafī doctrine was followed, and an enormous compilation not of *fatwās* but of extracts from the authoritative works of the school was made by order of the emperor whose name it bears, the so-called *Fatāwā al-ʿĀlamgīriyya*. This instance of a prince appearing officially as a sponsor of a work of religious law is wellnigh unique.[1] The prevalence of the *sharīʿa* in practice, inaugurated by ʿĀlamgīr, lasted well into the period of British control in India.

2. When the East India Company in 1772 decided to claim sovereign rights and the power of jurisdiction outside its 'factories', they found not only the *statut personnel*, the inheritances, and the whole of the civil law of the Muslims, but penal law as well ruled by the *sharīʿa*. The *sharīʿa*, though successively modified, remained the basis of criminal law, applicable to all inhabitants in Bengal and other Muslim parts of British India until 1862. The Islamic law of evidence was not entirely abolished until 1872. As regards the law of family and inheritance and other matters sanctioned by religion (which included *waḳf*, gifts, and *shufʿa* or pre-emption), the continued validity of the *sharīʿa* for Muslims was guaranteed by a regulation of 1772, which has substantially remained in force until this day. From the early nineteenth century onwards, 'Twelver' Shiite law was applied to the 'Twelver' Shiites. According to strict

[1] A precedent was the *Fatāwā al-Tātārkhāniyya*, compiled by order of Tātārkhān (d. soon after 752/1351), a nobleman at the court of Muḥammad II Ṭughlāḳ (726/1324–752/1351).

theory, the whole of Islamic law, including the rest of civil law, penal law, and the law of evidence, ought to be regarded as sanctioned by religion, but no significant voice of dissent was raised when Islamic law in these last fields was superseded by codes of British inspiration in the course of the nineteenth century. This, from the systematic point of view, was an important departure, of much greater importance than the silent ignoring of the relevant sections of Islamic law which had taken place in most Islamic countries from the early Middle Ages onwards. It showed that the idea of a secular law had for the first time been accepted by the leaders of an important community of Muslims.

In 1772, too, British magistrates replaced the *ḳāḍīs* in British India, and until 1864 they were assisted by *mawlawīs* or Muslim scholars, who were in fact *muftīs* and whose duty it was to state the correct doctrine of Islamic law for the benefit of the magistrate.[1] In fact, for the time being things went on much as before, only what would formerly have been the decision of the *ḳāḍī* now became a report to the magistrate which he might or might not think fit to implement. Without any judicial function, and mainly as keepers of registers of marriages for purposes of evidence, *ḳāḍīs* have survived on a customary basis until the present time. As time went on the magistrates (judges) in the Muslim parts of British India came to be increasingly recruited from the Indian Muslims themselves. But the whole judiciary was trained in English law, and English legal concepts, such as the doctrine of precedent, and general principles of English common law and equity inevitably infiltrated more and more into Islamic law as applied in India. Last but not least, the jurisdiction of the Privy Council as a final court of appeal could not fail to influence, much against its intentions, the law itself.

3. In this manner, more than by positive legal changes which were few,[2] Islamic law in British India, which later

[1] The *mawlawīs* were, in the nature of things, purists, and under their advice the first British magistrates were inclined to reject written evidence. Occasionally these magistrates even went so far as to apply the *ḥadd* punishment of cutting off the hand for theft.

[2] e.g. the early suppression of slavery, the suppression of legal incapacities, including the disability to inherit, on the grounds of difference of religion, in 1850, and the prohibition of child marriages in 1929 by making them (not invalid but) a criminal offence.

became Pakistan and the Republic of India, has developed into an independent legal system, substantially different from the strict Islamic law of the *sharī'a*, and properly called Anglo-Muhammedan law. Out of this law there has grown a new Anglo-Muhammadan jurisprudence, the aim of which, in contrast with Islamic jurisprudence during the formative period of Islamic law, is not to evaluate a given body of legal raw material from the Islamic angle, but to apply, inspired by modern English jurisprudence, autonomous juridical principles to Anglo-Muhammadan law. This law, and the jurisprudence based on it, is a unique and a most successful and viable result of the symbiosis of Islamic and of English legal thought in British India.[1]

The most important single act in the closing years of British rule in India was the Shariat Act of 1937, which abolished the legal authority of custom among the Muslims of British India almost completely and imposed upon them the official doctrine of the *sharī'a* as modified by statute and interpreted by Anglo-Indian jurisdiction. Notwithstanding the ascendancy of the *sharī'a*, inheritance in particular had continued to be ruled by custom, often excluding women, among numerous communities of Muslims; the act in question aimed at correcting this.[2] To enforce the pure theory of the *sharī'a* against the custom in a country in which the *sharī'a* was in any case applied only in part and deeply anglicized even in its central chapters, the *statut personnel*, was an act of deliberate archaism and purism.[3]

4. The application of English legal reasoning to institutions of Islamic law occasionally led to difficulties, as in the case of *waḳf*. An essential feature of the Ḥanafī *waḳf* is the permanence of its purpose, and if the beneficiaries are, for instance, the descendants of the founder, the poor or some other permanent purpose must be appointed as subsidiary beneficiaries. The Privy Council, however, held in 1894 that the ultimate reversion

[1] A similar though more short-lived interaction of English law and of the Ottoman *Mejelle* took place in Palestine under the British Mandate. Cf. the bibliography on Palestine and Israel, below, p. 255.

[2] The Act did not apply to agricultural land; in Pakistan, the Punjab Muslim Personal Law Application Act of 1948 made the Islamic law of inheritance applicable to this too, but it has often been circumvented.

[3] On the Dissolution of Muslim Marriages Act of 1939, see below, p. 104.

to the poor was illusory, and that this kind of 'family *waḳf*' had to be treated as 'simple gifts of inalienable life-interests to remote unborn generations of descendants'[1] which were forbidden in Islamic law and therefore invalid. This decision, which invalidated a fundamental institution of Islamic law of great practical importance, created such dismay in India that the legislature had to step in and pass the Mussalman Wakf Validating Act of 1913, which restored the doctrine of Islamic jurisprudence concerning the family *waḳf*. But as this Act was not retroactive, the Privy Council in 1922 could still hold that family *waḳf*s created before 1913 were invalid, and it had to be made retroactive by another Mussalman Wakf Validating Act of 1930. Only recently, in 1956, a Pakistan Commission on Islamic family law, under the influence of modernist legislation concerning *waḳf* in the countries of the Near East (below, p. 103), expressed the opinion that the Act of 1913 had outlived its usefulness and should be repealed, but no legislative action has been taken so far.

Anglo-Muhammadan law did not apply to the Muslims in the British possessions in East Africa, but the East African Court of Appeal from 1946 onwards and the Privy Council from 1952 onwards have held themselves bound by the decision of 1894 concerning family *waḳf*s, whereas the Acts of 1913 and 1930 applied only to India and not to East Africa. Legislative measures, parallel to the Indian Acts, taken in Zanzibar and in Kenya (also in Aden) have proved unavailing against the settled intention of the courts, and representative Muslims of those territories petitioned for relief in 1958.

5. The development of Islamic law under French legal influence in Algeria was in some respects parallel to its development under British influence in India, but widely different in its results. In the greater part of Algeria, the *ḳāḍī*s continued to apply Islamic law according to Mālikī doctrine in those matters which customarily fell under their competence.[2] The French administration even extended the sphere of application of Islamic law against custom beyond what had been the case

[1] I have compressed this quotation from the judgment in the famous case *Abul Fata* v. *Russomoy* (22 *Law Reports*, Indian Appeals, 76).

[2] A Bill of 1959 proposed to abolish the tribunals of the *ḳāḍī*s and to unify the administration of justice in the hands of the (secular) civil courts, following the adoption of a similar measure in Egypt in 1955 (below, p. 103).

under the Turks. This is comparable to what happened in Northern Nigeria under British administration. Positive legislative changes have been rare in Algeria too. They were mainly concerned with the guardianship of minors and the formalities of marriage and divorce, culminating in an ordinance of 4 February 1959 (with regulations contained in a decree of 17 September 1959) which lays down that the marriage is concluded by the consent of husband and wife, fixes minimum ages for marriage, and decrees that the marriage can be dissolved, other than by death, only by a judicial decision on certain grounds at the demand of husband or wife, or at their joint demand.[1] The final court of appeal is the Muslim Appeals Division (*Chambre de revision musulmane*) of the Court of Appeal in Algiers. The influence of this court on Islamic law in Algeria is comparable to that of the Privy Council on Islamic law in British India. This court has sometimes considered itself obliged to diverge from the strict doctrine of Islamic law when the latter's rules of detail appeared to it incompatible with Western ideas of fairness, justice, or humanity. The court has sometimes seen fit, in giving the grounds for its judgments, to modify the traditional interpretation of the Muslim jurists, but its intentions appear with greater clarity and to their full advantage when they are formulated directly and frankly, without being supported by the considerations to which the court itself cannot have attached too much importance.

French case-law or precedents are the major factor which has determined the form in which Islamic law has been applied in Algeria; this case-law (*jurisprudence*), in its turn, has been to a considerable extent influenced by the *doctrine*, the legal thought of the French jurists of Algeria, and in particular of the late Marcel Morand (d. 1932) who in 1906 was commissioned to prepare a Draft Code of Algerian Muslim Law which was published in 1916 (*Avant-projet de code du droit musulman algérien*). The author incorporated in his work several modifications of strict Mālikī law, adopting the doctrines of the Ḥanafī school when these last seemed to him to correspond better with modern ideas. The *Code Morand*, as it is called, has never become law, but it is of great practical importance.[2]

[1] This recalls the Tunisian Code of Personal Status of 1956 (below, p. 108).

[2] On the *Code Santillana* for Tunisia, see below, p. 108.

In this way, Islamic law as applied in Algeria, too, has become an independent legal system, properly called *Droit musulman algérien*. No comparative study of the different ways in which English and French juridical thought have approached the problems of Islamic law has been undertaken so far.

6. In Pakistan (and in the Republic of India) the achievement of independence has not changed the continued validity of Anglo-Muhammadan law. (On recent developments in Pakistan, see below, p. 104 f.) It remains to be seen what the position of Islamic law will be in the Republic of Algeria.

15

MODERNIST LEGISLATION

1. In the Near East, Western influence on Islamic law was not technically juridical, as it was in India, nor of the complex character which it assumed in Algeria, but it asserted itself as a consequence, first of Westernizing tendencies and later of the modernist movement, both of which arose out of the contact of the world of Islam with modern Western civilization. Modernism aims at adapting Islam to modern conditions, by renovating those parts of its traditional equipment which are considered medieval and out of keeping with modern times. Modernist criticism is in the first place directed against Islamic law in its traditional form, not indeed against the concept of a 'religious law', the postulate that Islam as a religion ought to regulate the sphere of law as well, but against the body of doctrine developed by the Muslim scholars of the Middle Ages and its claim to continued validity. A great many leading Modernists are modern lawyers by profession, and though the whole of the modernist movement extends over a variety of fields, its mainspring is the desire to put a new Islamic jurisprudence in the place of the old one.

2. During the nineteenth century, the effects on Islamic law of the contact with the West were upon the whole restricted to the adoption of the Western form of codes subdivided into articles, both in the Ottoman *Mejelle* and in the officially sponsored codification of the Ḥanafī law of family and inheritance (1292/1875) by Muḥammad Ḳadrī Pasha for Egypt.[1] The purpose of this work, too, was to provide the secular tribunals with a convenient means of ascertaining the law applied by the *ḳāḍīs*' tribunals. In contrast with the *Mejelle*, it was never officially enacted, although a project of codification of the law of marriage and divorce, based on it, was published

[1] The codifications of the law of property (1308/1891) and of the law of *wakf* (1311/1893) are private works by Ḳadrī Pasha.

by the Egyptian Ministry of Justice in 1916. Ḳadrī Pasha's codification of the law of family and inheritance inspired a few similar private efforts in other countries. The production of the *Code Morand* for Algeria and of the *Code Santillana* for Tunisia therefore followed an example given by the two main countries of the Near East.

Modifications of the rules of Islamic law concerning evidence, which correspond to and even go beyond those contained in the *Mejelle*, appear in Egypt for the first time in the *Règlement des Mehkémehs* of 1897 and, to a greater extent, in the *règlements* of 1910 and 1931.[1] These last modifications were substantially adopted by Lebanon in 1943 and by Syria in 1947. From 1880 onwards, too, the administration of *sharī'a* justice was reorganized in Egypt by the creation of a hierarchy of tribunals, the introduction of stages of appeal, and the staffing of the higher tribunals with several judges. This kind of organization of tribunals has been adopted in most of the other Islamic countries (including Saudi Arabia).

3. Only in the present generation has the ground been prepared for legislation by Islamic governments on the law of family, of inheritance, and of *waḳf*, subjects which have always formed part of the central domain of the *sharī'a*. This legislative interference with the central part of Islamic law itself (as opposed to the silent or explicit restriction of its sphere of application by custom or by legislation) presupposes the reception of Western political ideas. Whereas a traditional Muslim ruler must, by definition, remain the servant of the sacred Law of Islam, a modern government, and particularly a parliament, with the modern idea of sovereignty behind it, can constitute itself its master. The legislative power is not any more content with what the *sharī'a* is prepared to leave to it officially or in fact; it wants itself to determine and to restrict the sphere left to traditional Islamic law, and to modify according to its own requirements what has been left. This has led to an unprecedented relationship between Islamic and secular law.

It took modernist jurisprudence some time to find its own

[1] Here, too, the quality of being a Muslim is silently omitted from the list of qualifications required of a witness. Documentary evidence is required in a number of cases.

strength. It was hampered, at the beginning, by the difficulty of justifying itself within the framework of traditional Islamic jurisprudence, which denies the right of *ijtihād* to later generations. It was natural on the part of the *'ulamā'*, the traditional scholars, to confront the Modernists with this argument, and equally natural on the part of these last to try to shake the thesis of their opponents, as though their own aim did not lie outside the field to which it could consistently be held to apply. The whole discussion concerning the legitimacy or lack of legitimacy of a new *ijtihād*, which engaged the energies of many traditional scholars and modernists, has died down in the Near East since the Modernists have not only advocated a new departure in Islamic jurisprudence but actually succeeded in inspiring modernist legislation.

Nowadays a position has been reached in which many Islamic scholars of a traditional background, without necessarily sharing all the opinions of the Modernists, recognize their effort as legitimate and act, in a way, as their advisers; the uncompromising demand of *taḳlīd*, the unquestioning acceptance of the traditional doctrine of one school of law, in particular, have lost much ground. The attitude of these *'ulamā'* is comparable to that of the Mālikī scholars in Morocco in the later Middle Ages who, by recognizing *'amal*, tried to conserve as much as possible of traditional Islamic law in changed social conditions. This has remained the real aim of the traditional scholars, and they react most strongly to any attempt at applying modernist *ijtihād*, which would almost pass without comment in the field of family law, to the religious duties of Islam in the narrow meaning of the term, such as fasting. But from the point of view of strict Islamic law there is no essential difference between the two fields in question. The rearguard action of Islamic law was hardly ever seriously joined in the fields of penal and of constitutional law; in the field of contracts and obligations it was being fought, with varying success, during the whole of the Islamic Middle Ages and until well into the nineteenth century; in the fields of the law of family, of inheritance, and of *waḳf*, where the battle is still going on, it had already been lost in the second decade of the present century, although many of the defenders do not realize it as yet; there remains the last strong position, the religious duties in the narrow meaning of the term,

and it is obvious that the chances of the defenders are best here.

4. Modernist legislative interference with Islamic law started modestly with the Ottoman Law of Family Rights of 1917, which was later repealed in Turkey but remained valid in Syria, Lebanon, Palestine, and Transjordan (as they then were),[1] and is still part of the family law of the Muslims in Lebanon and in Israel. Then, from 1920 onwards, the impetus of modernist jurisprudence and of the modernist legislative movement inpired by it, came from Egypt. The most important milestones of this legislation in Egypt have been: the acts No. 25 of 1920 and No. 25 of 1929 on the law of family, No. 78 of 1931 on the organization of the *ḳāḍīs'* tribunals (incorporating further important modifications of the law of family), No. 77 of 1943 on the law of inheritance, No. 48 of 1946 on *waḳf*, No. 71 of 1946 on legacies, No. 180 of 1952 by which the private or family *waḳf*s were abolished, and finally No. 462 of 1955 which abolished the *ḳāḍīs'* tribunals (together with all denominational jurisdictions of personal status) and unified the administration of justice in the hands of the secular courts. A Bill which aims at restricting polygamy and the right of the husband unilaterally to repudiate his wife has been in preparation since 1956, and in 1962 the completion of the drafting of a new Code of Personal Status, incorporating further innovations, was announced. As a result, all those sections of Islamic law which were being applied in practice have been modified in Egypt more or less deeply.

This reshaping of Islamic law by modernist legislation has evoked much interest and inspired similar movements in other countries of the Near East, in the Sudan, Jordan, Lebanon, Syria, Iraq, and Libya, and the laws enacted in those countries occasionally went even further than their Egyptian prototypes. The Egyptian act of 1946 served as a model for the Lebanese law of 1947 on *waḳf*, and a Syrian act of 1949 anticipated the Egyptian act of 1952 in abolishing the private or family *waḳf*s.[2] The Syrian Law of Personal Status of 1953 made the permission to conclude a second marriage dependent on the proved ability of the husband to support a second wife, and a corresponding

[1] But not in Iraq, which had already been occupied by the British forces.

[2] At the same time the Islamic law of inheritance was abrogated in Syria, but this particular measure did not survive the short-lived political régime which enacted it.

Iraqian law of 1959 demanded in addition that there be some 'lawful benefit' involved, both anticipating the Egyptian project of 1956 and the resulting Egyptian Bill of 1961.

Modernist legislators in Iraq were faced by the problem, particular to that country, that its Muslim inhabitants are almost equally divided between Sunnis and 'Twelver' Shiites, whose laws of inheritance differ fundamentally from each other. A draft Code of Personal Law of 1947 which was never enacted had contained, to a large extent, alternative provisions applicable to each of the two groups, not only in the law of inheritance but in the law of family as well. The Law of Personal Status of 1959 unified all provisions and, in the matter of inheritance, adopted a radical and unprecedented solution which was derived from the rules governing the transfer of a kind of leasehold in government land, and diverged greatly both from Sunni and from 'Twelver' Shiite law. A new political régime, however, in 1963 repealed this last innovation and made the 'Twelver' Shiite law of inheritance applicable to all Iraqian Muslims.

The influence of Near Eastern legal modernism extended even to British India, where it appeared in the Dissolution of Muslim Marriages Act of 1939. This act, generally speaking, adopts the doctrines of the Mālikī school on points on which they are considered to be more in keeping with modern ideas than those of the Ḥanafī school which prevails among the Muslims of the Indian subcontinent. The whole act is typical of modernist legislation in the Near East, but it is hardly in keeping with the development of Anglo-Muhammadan law which had followed an independent course so far, nor even with the tendency underlying the Shariat Act of 1937 (cf. above, p. 96).

5. The development of modernist legal thought in Pakistan has remained under the shadow of the problem of *ijtihād*. This is not surprising, because the concept of *ijtihād* has much exercised the minds of scholars in that part of the Islamic world for the last few hundreds of years. Under the spell of this problem, modernist legal thought in Pakistan has shown itself more conditioned by the traditional system, even though in a negative way, than has the corresponding thought in the Near East. The division between the traditionalist and the modernist wings

in Pakistan, where the first piece of modernist legislation was enacted only very recently, has perhaps remained more uncompromising than it has become in the countries of the Near East. A commission was appointed to inquire whether modifications of 'the existing laws governing marriage, divorce, maintenance and other ancillary matters among Muslims' were desirable; it presented its report in 1956, and some of its recommendations concerning the law of marriage and divorce, which, though supported by a greatly different reasoning, were closely similar to legislative measures enacted in the Near East, were adopted in the Muslim Family Law Ordinance of 1961.[1] But the majority of its members had been chosen from among modernist thinkers, and the solitary traditionalist on it presented a minority report which contradicted the conclusions of the majority in all essentials. The coexistence of two opposing trends of thought in Pakistan appears, too, from the fact that, almost contemporaneously with the report of the commission on the reform of family law, there appeared in 1954 the report of another commission on *zakāt*, which proposed the reintroduction of the Islamic alms-tax, long lapsed in practice except in the form of voluntary distributions to the poor, as a fiscal ordinance of the government. There had even been, in 1952, an abortive attempt to appoint a committee of '*ulamā*' who were to approve all proposed legislation, and the constitution of 1962 provided for an Advisory Council of Islamic Ideology. All this was part of the wider discussion of the Islamic character of the constitution of Pakistan.

6. Modernist legislation does not, generally speaking, arise out of a genuine public demand. There exist the two well-defined groups of the '*ulamā*', who are for the greater part traditionalists, and of the Modernists, many of whom are modern lawyers. Modernist legislation is imposed by a government whenever the Modernists have succeeded in gaining its sympathy and the government feels strong enough to overcome the resistance of the traditionalists. Modernist Islamic legislation therefore often appears somewhat haphazard and arbitrary. In Jordan, for instance, a Law of Family Rights, based mainly on the Ottoman law of 1917, was enacted in 1927, but a law of

[1] The recommendations concerning the law of *wakf* (see above, p. 97) have not been given legal sanction so far.

1943 repealed it in favour of the traditional doctrine of the law of family. This, in its turn, was repealed by the Jordanian Law of Family Rights of 1951, some provisions of which, inspired by previous Egyptian legislation, anticipated those of the Syrian Law of Personal Status of 1953. It is difficult to believe that social conditions and public opinion in Jordan should have moved in two opposite directions between 1927 and 1951, and should have been in advance of those in Syria for some time.

7. The method used by the modernist jurists and legislators in the Near East savours of an unrestrained eclecticism which goes beyond combining the doctrines of more than one recognized school (*talfīḳ*; above, p. 67 n. 1); any opinion held at some time in the past is apt to be adopted, without regard to its historical and systematic context. Materially, the Modernists are bold innovators; formally, they try to avoid the semblance of interfering with the essential content of the *sharī'a*. Rather than changing the positive rules of traditional Islamic law outright, they take advantage of its principle that the ruler has the right to restrict the competence of the *ḳāḍīs* with regard to place, time, persons, and subject-matter, and to choose, among the opinions of the ancient authorities, those which the *ḳāḍīs* must follow (cf. above, p. 91). The ideas and arguments of the Modernists come from the West, but they do not wish to abolish Islamic law openly as Turkey has done. The postulate that law, as well as other human relationships, must be ruled by religion has become an essential part of the outlook of the Muslims in the Arab countries of the Near East.

8. This legislative interference with traditional Islamic law in the Arab Near East is accompanied by the seemingly opposite desire to create a modern law of contracts and obligations on the basis of Islamic jurisprudence.

When modern secular codes, mainly derived from French law, were introduced in Egypt in 1883, certain institutions of Islamic law, such as pre-emption (*shuf'a*), the transfer of debts (*ḥawāla*), the stipulated right of cancellation (*khiyār al-sharṭ*), the contract for delivery with prepayment (*salam*), as well as the rule that debts arising out of a sale of intoxicating liquor are unenforceable, were retained in the civil law of Egypt; even the settlement of a private prosecution for causing bodily harm by payment of blood-money, though hardly ever resorted to

in practice, is still envisaged in the Code of Criminal Procedure of 1950. The Lebanese Codes of (Real) Property of 1930 and of Obligations and Contracts of 1932 contain similar provisions.

Now something much more ambitious is suggested: adopting not the positive solutions of strict Islamic law but the general formal principles which were elaborated by the early scholars, and deriving from them a new, modern law. Those who advocate this are to a great extent persons who have been in favour of a modernist reshaping of Islamic law in those fields in which it is still being applied in practice. They also advocate a unified jurisdiction, merging the *ḳāḍīs'* tribunals into the secular courts. The common aim underlying this programme of 'secular Islamic legislation' and the modernist reshaping of Islamic law is to express modern ideas, which have come from the West, in a traditional medium.

The only tangible results of the programme in question so far, apart from the abolition of the *ḳāḍīs'* tribunals in Egypt in 1955 and in Tunisia in 1956, have been an introductory article in the Egyptian Civil Code of 1948, which mentions 'the principles of Islamic law', together with custom and natural justice, as rules to follow in cases in which the code itself gives neither an explicit nor an implicit directive, and the corresponding introductory articles (with slight differences in the relative placing of these several elements) in the Syrian Civil Code of 1949, the Iraqian Civil Code of 1953, and the Civil Code of Libya of 1954. Whatever the explanatory note of the Egyptian code may say, Islamic law has not become one of its constituent elements to any considerably greater degree than it had been in its predecessor. The civil codes of Syria and of Iraq do not essentially differ from the Egyptian code in this respect, although the influence of Islamic law is somewhat more noticeable in the Iraqian code. The Syrian Constitution, in its versions of 1950 and of 1953, has even declared that Islamic law should be the main source of legislation, but this provision has had no practical effect so far.[1]

9. A legislation based directly on Islamic jurisprudence, but destined to be applied by secular tribunals, had much earlier been introduced, under French auspices, in Tunisia. There

[1] This was imitated in the constitution of Kuwayt of 1962 which declares that the *sharī'a* is 'an essential source of legislation'.

the late David Santillana (d. 1931) produced on behalf of the Commission for the Codification of the Laws of Tunisia the draft (*avant-projet*) of a Civil and Commercial Code, as far back as 1899. This *Code Santillana*, as it is called, accentuates the features common to Islamic and to Roman law, and part of it was enacted in 1906 as the Tunisian Code of Obligations and Contracts.

In Tunisia, too, a Mālikī Grand Mufti, when he became Minister of Justice in 1947, appointed a commission and charged it with elaborating a code of the Islamic law of family which should aim at harmonizing the doctrines of the Mālikī and of the Hanafī schools, both of which enjoyed equal status in Tunisia. This project, which actually fell within the sphere of traditional Islamic jurisprudence rather than that of modernist legislation, came to nothing for political reasons.[1]

Finally, by legislation enacted in 1956, Tunisia has put herself in the forefront of the movement of legislative modernism. First of all, the so-called public *waḳf*s were abolished, and their assets became the property of the state, a measure more far-reaching than the abolition of the so-called private *waḳf*s in Syria and in Egypt;[2] secondly, and following on the Egyptian act of the year before, the separate jurisdiction of the *ḳāḍī*s' tribunals was abolished; and thirdly, a Tunisian Code of Personal Status was enacted. Although the code has retained some typically Islamic institutions, such as the nuptial gift or 'dower', and foster-parentship as an impediment of marriage, and although it still agrees in many details with the doctrine of one or the other of the two schools of Islamic law recognized in Tunisia, it cannot be regarded, even under the most accommodating interpretation, as being merely an adaptation of traditional Islamic law. Polygamy was prohibited and made a criminal offence; marriage is concluded by the consent of bridegroom and bride; and divorce can be pronounced only by a court of law (*a*) at the request of one of the spouses on the grounds specified in the code, (*b*) in the case of mutual consent, (*c*) at the request of one of the spouses, in which case the court fixes the indemnity due to one spouse by the other. The wife, there-

[1] A similar initiative in Saudi Arabia was defeated by the traditional Ḥanbalī scholars (above, p. 87).

[2] The private *waḳf*s, too, were abolished in Tunisia in the same year.

fore, has essentially been made the equal of the husband with regard to monogamy and divorce, as she has been made, too, with regard to matrimonial régime. The section of the code on the law of succession still reproduced the traditional doctrine almost without change; but a law of 1959 introduced important changes in favour of the daughter and the son's daughter, and added a whole 'book' on legacies. Although any suggestion of abolishing Islamic law was carefully avoided by the Tunisian authorities, their recent legislation differs, objectively speaking, from traditional Islamic law as much as does the 'secular' Civil Code of Turkey.

10. In Morocco the administration of Islamic law, as far as it was customarily applicable, continued on traditional lines, with due respect for Moroccan *'amal* (above, p. 61 f.), well into the present century. The withdrawal of matters of civil, commercial, and penal law from the competence of the *ḳāḍīs* was taken for granted, and the Berber tribes followed their customary law, to the exclusion of the *sharī'a*, even in matters of the law of family and inheritance. The continued validity of customary law for the Berber tribes, occasionally admitted by sultans in the past, was confirmed by a *dahir* (*ẓahīr*, decree) of 11 September 1914, but tribunals of customary law were given a formal legal basis only by a *dahir* of 16 May 1930; this, however, met with strong criticism on political grounds, though not on the part of the populations directly concerned. A *dahir* of 14 March 1938 regulated the guardianship of minors, and by drawing on the Ḥanafī doctrine introduced a mild measure of modernist legislation. Then, in 1957 and 1958, the *Mudawwana* or Code of Personal Status and Inheritance was enacted in instalments. The commission charged with drafting this *Mudawwana* laid stress not only on the Mālikī principle of *istiṣlāḥ* but on the recognized method of later Islamic jurisprudence in Morocco, of giving preference to a juridically less-sound doctrine if it agrees with *'amal*, and it appears from their statements that they saw their task as creating a new Moroccan *'amal*. This Moroccan legislation, although provoked and influenced by Near Eastern legislative modernism, stands in the tradition of Islamic legal thought particular to that country, and by frankly distinguishing between 'the best attested traditional doctrine' and *'amal*, its authors have been spared the central

ambiguity inherent in much of Near Eastern legal modernism.[1]

11. In Iran, where the officially recognized form of Islamic law is that of the 'Twelver' Shiites, the modern legislative movement started later than in Turkey and in the Arabic-speaking countries, and its results, as far as they concern the *sharī'a*, have therefore been, in some respects, more conservative, and in others more far-reaching, than those achieved elsewhere at identical times. The bulk of relevant Iranian legislation was enacted between 1926 and 1938; in particular, the first part of the Iranian Civil Code dates from 1928, and the second part from 1935. This code contains also the law of family and of inheritance. The regular jurisdiction is that of the secular tribunals; the *ḳāḍīs* are competent in a restricted number of cases concerning marriage, divorce, and guardianship, and in those lawsuits which can be decided only by the formal rules of evidence of the *sharī'a*;[2] but all these cases must first be referred to the tribunals of the *ḳāḍīs* by the secular tribunals. The modern law of family diverges only rarely from traditional Shiite law; also the law of contracts and obligations and of inheritance, all matters which normally come before the secular tribunals only, follows the *sharī'a* closely but has silently dropped institutions which are considered obsolete, such as slavery. The constitution of 1907 provided for a committee of *'ulamā'* who were to decide whether any proposed legislation was or was not in keeping with the *sharī'a*, but this provision has had no effect in practice.[3]

12. The situation in which the modernist lawyers of Islam find themselves resembles essentially that which prevailed at the end of the first and at the beginning of the second century of the hijra. Islamic jurisprudence did not grow out of an existing law, it itself created it; and once again, it has been the modernist jurists who prepared, provoked, and guided a new legislation. It had been the task of the early specialists to impose Islamic standards on law and society; the real task which confronts the contemporary jurists, beyond their immediate

[1] Already in 1930 a prominent scholar of traditional formation, who later became Moroccan Minister of Justice, discussed the question of 'renovating' Islamic jurisprudence in a most discerning way.

[2] This last provision has become largely ineffective through the increasing reliance on documentary evidence in procedure.

[3] On a similar abortive attempt in Pakistan see above, p. 105.

aim of adapting traditional Islamic law to modern conditions, is to evaluate modern social life and modern legal thought from an Islamic angle, to determine which elements in traditional Islamic doctrine represent, in their view, the essential Islamic standards. What interests the student of the history of Islamic law most is not which measures of detail may have been adopted temporarily here and there, but the extent to which the various doctrinal and historical backgrounds of the several Islamic countries may have influenced their reactions to the issue in question. But the interest and importance of traditional Islamic law, which has existed for more than a thousand years and is still eagerly studied all over the Islamic world, is not affected by these changes. It still casts its spell over the laws of contemporary Islamic states: in the states of traditional orientation, such as Saudi Arabia, as the law of the land; and in the states of modernist orientation as an ideal influencing and even inspiring their secular legislation.

SYSTEMATIC SECTION

16

THE ORIGINAL SOURCES

1. THE chapters which follow contain the substance of the doctrine of the religious law of Islam concerning those subject-matters which are legal in the narrow meaning of the term, and according to the fully developed doctrine of the Ḥanafī school. Worship and ritual, and other purely religious duties, as well as constitutional, administrative, and international law, have been omitted, the first because they developed under different conditions and in close connexion with the dogma, the second on account of its essentially theoretical and fictitious character and the intimate connexion of the relevant institutions with the political history of the Islamic states rather than with the history of Islamic law. Among the several schools of law of the main body of orthodox Muslims the Ḥanafī school has been chosen because of its historical importance and wide distribution. The account which follows is based on the *Multaḳa l-Abḥur* of Ibrāhīm al-Ḥalabī (d. 956/1549), one of the latest and most highly esteemed statements of the doctrine of the school, which presents Islamic law in its final, fully developed form without being in any way a code. The other orthodox schools, and the Ibāḍīs and the Shiites, too, possess similar authoritative works.

2. The development of the style, method, and contents of the works of Islamic law reflects the development of legal doctrine. Every work covers only those cases which it explicitly discusses and which are evidently similar; every new case represents a new problem which calls for a new decision. The several works and even, more so, the several schools, differ from one another not only by their principles and tendencies but by the groups of cases which they consider. The greater number

of cases and decisions in a later work as compared with a similar older one represents, generally speaking, the outcome of the discussion in the meantime. Whereas the decisions express the tendencies of the several authors and of their schools, the cases themselves reflect, in principle, the influx of new subject-matter. This aspect of Islamic legal literature, which in its later period was dominated by the production of commentaries, supercommentaries, glosses, extracts, further commentaries, and so on, offers a wide field for future investigation.

3. The works of Islamic law start invariably with the ritual duties; the other subjects are arranged in more or less obvious groups on traditional lines regardless of any system, with differences from school to school and occasional variations within a school. The order in which the subjects are treated is sometimes justified by specious reasonings. The several modes of arrangement are in any case connected and go back to the very beginnings of Islamic legal literature in the second century of the hijra (eighth century A.D.). The influence of foreign models has been suggested but not yet been proved.

None of the modern systematic distinctions, between private and 'public' law, or between civil and penal law, or between substantive and adjective law, exists within the religious law of Islam; there is even no clear separation of worship, ethics, and law proper. The single chapters of the works of Islamic law fall, it is true, in the main under one or the other of those headings as far as the subject-matter is concerned, but there is continual overlapping and, above all, the concept of any systematic distinction is lacking.[1] At the utmost we notice that specific concepts are proper to certain fields, for instance that the right or claim of Allah (*ḥaḳḳ Allāh*) as opposed to a private claim (*ḥaḳḳ ādamī*) is proper to a special section of penal law, or that special rules apply to proxy in the sphere of worship, or that liability to a *ḥadd* punishment is incompatible with incurring a civil obligation (above, p. 38).

In the present book, however, the subject-matter has been arranged not according to the traditional order as exemplified by the *Multaḳa 'l-Abḥur*, but according to the broad systematic

[1] It is irrelevant in this context that the distinctions in question do exist for the modern jurists, for whom the Ottoman *Mejelle* is a civil code, or for those scholars with a traditional background who have been influenced by modernist thought.

divisions of modern legal science, certainly not with any idea of imposing alien categories on Islamic law, but in order to enable the reader to appreciate its doctrines against the background of modern legal concepts, and to throw into relief not only what is peculiar to it but also what is missing there.

4. Important or difficult parts of Islamic law have often been treated in separate works, particularly the law of succession (*farā'iḍ*), and several subjects which were directly relevant to the administration of the sacred Law in practice, such as *waḳf*, legal devices (*ḥiyal*), written documents (*shurūṭ*), and the duties of the *ḳāḍī* (*adab al-ḳāḍī*); numerous monographs treat of the particularly intricate subjects of liability and of appreciation of evidence. The administration of justice in general is discussed in the works on the *aḥkām sulṭāniyya*, the government and administration of the Islamic state (below, p. 230 f.). There are further numerous treatises on *ḥisba*, the office of the *muḥtasib*, the 'inspector of the market', and on Mālikī *'amal*. An important group of works deals with the problem of distinguishing between seemingly parallel but systematically distinct cases (*furūḳ*), and with the systematic structure of positive law in general (*ashbāh wa-naẓā'ir*, *ḳawā'id*). Special works deal with the definition of technical terms. There are, further, comparative accounts of the doctrines of several schools (*ikhtilāf*, 'disagreement'); the older ones reflect the discussions between the several schools, the later ones are simple handbooks. Finally, the works on the *ṭabaḳāt*, the 'classes' or generations of lawyers, which supplement the general biographical sources, give biographical and bibliographical information on the scholars belonging to each school, and occasionally important extracts from their writings.

5. A separate branch of legal learning is the discipline of the *uṣūl al-fiḳh*, the 'roots' or principles from which Islamic law is derived, in other words, Islamic legal theory, the development of which has been traced in the first part of this book. In its final, classical form it recognizes four official bases: the Koran, the *sunna* of the Prophet, the consensus (*ijmā'*) of the scholars, and reasoning by analogy (*ḳiyās*), that is to say, two material sources, a method, and a declaratory authority. It follows that this last, the *ijmā'*, is the decisive instance; it guarantees the authenticity of the two material sources and determines their correct interpretation. The methods of interpretation and

deduction, including the theory of repeal of one verse of the Koran, or of one *sunna* of the Prophet, by another,[1] questions of *ijtihād* and *taḳlīd*, *istiḥsān* and *istiṣlāḥ*, and similar subjects form the main contents of the numerous works on *uṣūl*. All this amounts essentially to a retrospective systematizing and justification of the existing positive doctrines. Theories of *uṣūl* can be said to have led to the elaboration of complete systems of positive law only in the cases of Shāfi'ī and of Dāwūd al-Ẓāhirī. The works on *uṣūl* treat also of certain general concepts which permeate the whole of the subject-matter of positive law, such as those discussed in the following chapter and in chapter 18, section 1.

[1] Repeal, *naskh;* the repealing passage is called *nāsikh*, the repealed one *mansūkh*.

17

GENERAL CONCEPTS

1. *Intention and declaration.* A fundamental concept of the whole of Islamic religious law, be it concerned with worship or with law in the narrow sense, is the *niyya* (intent). It applied originally to acts of worship; the religious obligation is discharged not by outward performance as such but only if it is done with a pious intent. But Islamic orthodoxy insisted on the performance, and *niyya*, from being a state of mind, became an act of will directed towards performing a religious duty; it must, as a rule, be explicitly formulated, at least mentally. An act of worship without *niyya* is invalid, and so is the *niyya* without the act. The *niyya* thus comes near to the concept of animus aimed at producing legal effects, and expressed in a declaration of intention. But the declaration in Islamic law is not merely a manifestation of will; it has a value of its own and under certain circumstances can produce legal effects even without or against the will. There is a general tendency underlying many decisions of detail, though it is not a principle applicable to each individual case, that a declaration made in explicit, formal terms (*ṣarīḥ*, *expressis verbis*) is legally valid even if the *niyya* is lacking, but a declaration made implicitly or by 'allusion' (*kināya*) only if the *niyya* is present. In addition, the declaration is often valid even when its import is not understood. This tendency originates in the idea of the magical effect of the right word, and leads to formalism; the evidence of witnesses, for instance, is valid only if preceded by a derivative of the root *sh-h-d* 'to give testimony'. But this formalism has a rational basis; in order to create a *mufāwaḍa* (unlimited mercantile partnership), for instance, either this term must be used or every single legal effect mentioned. On the other hand, even a very imperfect declaration accompanied by *niyya* is regarded as legally valid whenever possible; only a very faulty one is invalid even if the *niyya* is present. By means of a complicated network of casuistry all possible forms

of declaration are tested as to whether they are valid on their own, or only if accompanied by *niyya*, or not at all. Similarly, ambiguous (*mubham*) declarations are scrutinized as to their particular meanings. This investigation often amounts to determining whether a given declaration is compatible with the existence of a certain *niyya* claimed afterwards by the person who made it, that is to say, interpreting the wording without regard to the *niyya*. The interpretation is not strictly objective; there is a tendency to restrict the effect of the declaration, to mitigate the resulting religious and legal obligation, particularly in the case of an undertaking under oath with a self-imposed penalty, such as repudiation of one's wife or manumission of one's slaves, for non-fulfilment, which amounts to a conditional repudiation or manumission (cf. below, p. 159). This tendency often affords the possibility of evading the resulting obligation.

The declaration is not defined narrowly; Islamic law recognizes also the conclusive act or 'gesture' (*ishāra ma'hūda*), not as a general principle but in a number of individual cases. Silence as such cannot replace a declaration of consent (*riḍā*), except in a few special cases; for instance, when the guardian for the purpose of marriage asks the consent of the virgin bride to a proposed marriage, her silence (or laughing, or quiet crying) is regarded as *riḍā*. The idea that silence is consent when speaking out is obligatory occurs only rarely. Writing is accepted unconditionally only from a mute person, from others, in theory at least, only with considerable reservations. (For the practice, see above, pp. 82 f.)

Among the defects of declarations, error is taken into a limited account in their casuistic interpretation. Error in a confession plays a somewhat more important part in criminal law. As regards fraud, there is little inclination to protect the victim; it manifests itself only in the case of 'grave deception' (*ghabn fāḥish, laesio enormis*). The doctrine of duress (*ikrāh*) is more developed. What is envisaged in the first place is the threat (*tahdīd*); it is recognized only if the one party is in a position to carry it out and the other party fears that this may actually happen. The effects of duress in civil and those in criminal law, how far it invalidates a declaration and how far it diminishes responsibility, are not distinguished. The effect in civil law is that the threat of death, severe beating, and long imprisonment

makes the declaration voidable (by *khiyār, optio*); exceptions, however, are made mainly in favour of desirable transactions, such as manumission of slaves and adoption of Islam. The effects in criminal law are discussed casuistically; the effect of duress, whenever it is recognized, is not only to remove the penal sanction, but to make the act itself allowed; if it is not recognized, the penalty (*ḥadd*) is applied in full. For instance, drinking wine under the threat of death or mutilation is permissible, and the refusal to do so would be sinful. Conversely, apostasy from Islam is a sin and martyrdom meritorious, but it is allowable to feign apostasy under duress. (This simulation, *taḳiyya*, plays an important part in Shiite religious law.)

2. *Term and condition.* Among the several set terms laid down by Islamic law the most important are the waiting-periods imposed on a woman after the termination of her marriage (called *'idda*) and on a female slave after a change of owner (called *istibrā'*); there are also set terms for negative and positive prescription and the presumption of death. Technical rules are laid down for interpreting the terms and periods mentioned by the parties in their declarations, particularly in contracts of hire and lease. Generally speaking, the term (*ajal*) must be certain (*ma'lūm*).

Conditions (*sharṭ*, pl. *shurūṭ*), in the wider meaning of the term, are the general prerequisites for the validity of a legal act, and in particular an act of worship (for ritual prayer, for instance, they are ritual purity, covering one's nakedness, facing the direction of the Kaaba, and *niyya*), as opposed to its essential elements (*rukn*, pl. *arkān*). Another group are the 'conditions implied in the nature of the transaction' (*shurūṭ yaḳtaḍīha l-'aḳd, condicio iuris*) and the 'conditions intimately connected with the transaction' (*shurūṭ mulāyima* or *muwāfiḳa*), e.g. in a contract of surety: 'if you buy such and such a thing from *X*, I stand security for the price'. A further group are the requirements for the incidence of a religious or legal duty (*shurūṭ wujūb*), such as the payment of the alms-tax. Related to this is the enjoinment (*modus*) by which the occurrence of a legal effect is made dependent on the fulfilment of an imposed stipulation, e.g. 'I buy this slave for you on condition that you manumit him.' Finally, there is the condition in the narrow meaning of the term.

Terms and conditions in the several transactions are discussed casuistically and have given rise to numerous evasions. A group apart consists of those transactions which by their nature imply a term, such as the sale with future delivery (*salam*), or a condition, such as the undertaking under oath. The stipulation of a term is inadmissible in transactions which aim at immediate transfer of ownership (*tamlīk fil-ḥāl*), the stipulation of a condition in the case of an exchange of monetary assets (*mu'āwaḍa māliyya*). Therefore both are excluded in the case of sale and of division; the stipulation of a term but not of a condition is admitted in contracts of hire and lease, but conversely in the case of donation and of marriage; both are admitted in the case of repudiation, manumission, and legacy. The several contracts of association are treated differently; the stipulation of a term but not of a condition is admitted in the *muzāra'a* and the *musāḳāt* (special contracts of lease of agricultural land with profit-sharing), conversely in the *shirka* (mercantile partnership); both are admitted in the *muḍāraba* (sleeping partnership). If the stipulation of a condition is excluded, an invalid condition makes the whole transaction invalid, but not if it is admitted.

A particular case is the suspense, abeyance (*wuḳūf*) of rights and legal effects (which then are in abeyance, *mawḳūf*), for instance the marriage of the slave pending the master's consent, some rights of the missing, untraceable person, and most of the rights of the apostate; conversely, the share of a son in the inheritance is set aside for the unborn child of a deceased person. All these rights depend on a condition being realized, namely the consent of the master, the return of the missing person, the repentance of the apostate, and the live birth of the child, respectively.

3. *Agency.* Declaration by proxy (through a messenger, *rasūl*) is not clearly distinguished from procuration; for instance, if the messenger has seen the object bought, it is contested whether the right of rescission after inspection has lapsed. As to representation proper, the sphere of worship is, for once, clearly distinguished from the sphere of law in the narrow sense. Proxy in worship (*niyāba*; *nā'ib*, the deputy in matters of worship) is admitted in religious duties concerning property, but not in those concerning the person; the emphasis is on charging another with the fulfilment of an obligation. In the sphere of

law in the narrow sense, the emphasis is on conferring powers of disposal on another (*wakāla*, procuration; *muwakkil*, the principal; *wakīl*, the deputy, agent, proxy in legal affairs); the presence or absence of the principal may be relevant. In the exchange of monetary assets (*mu'āwaḍa māliyya*) the *wakīl* acts as a principal (*aṣīl*) and has the corresponding rights and duties; in other transactions, such as relinquishment of a claim, or marriage, his part is legally that of a messenger; but even in the first case the rights of ownership are transferred directly to the *muwakkil*. Exceptions from the general rules are recognized in favour of certain effects considered desirable; for instance, if a slave has been given the mandate to buy himself from his master on behalf of the mandant and he buys himself on his own behalf, the contract is valid; and if a wife has been given the mandate to repudiate herself, it cannot be withdrawn. An unlimited mandate is possible; it is given by using the words: 'act at your discretion'. Normally, however, it is limited, and its contents must be clearly defined. The deputy is then bound by this instruction, and his function approaches that of the messenger; this makes it possible to appoint persons who do not have full legal capacity. Conversely, the power of disposal of the deputy may exceed that of the mandant; a Muslim cannot buy or sell wine, but he can instruct a non-Muslim to do it on his behalf (this, however, is contested). The object of a contract of service (*ijāra*; below, p. 155) cannot form the object of a mandate; and as there is no distinction between civil law and criminal law as such, the appointment of a deputy to exact corporal punishments (*ḥadd* and *ḳiṣāṣ*), which are construed as claims against a third person, is explicitly excluded.

The effects of a procuration as regards third parties are not treated separately from its effects as between mandant and deputy, nor is the right to represent clearly distinguished from the duty to carry out a mandate; but professional brokers (*simsār*) are obliged to collect the claims of their mandants.

The legal guardian (*walī*)[1] and the guardian appointed by testament (*waṣī*) are at the same time agents and/or executors.

4. *Validity, nullity, and religious qualifications.* Islamic law

[1] *Walī* is the nearest male relative of his female relations, and of his minor male relations; he is the holder of parental authority, and, in particular, he gives his female relatives in marriage.

recognizes, first, the following scale of religious qualifications (*al-aḥkām al-khamsa*, 'the five qualifications'): (1) obligatory, duty (*wājib, farḍ*); Islamic law distinguishes the individual duty (*farḍ 'ayn*), such as ritual prayer, fasting, &c., and the collective duty (*farḍ kifāya*), the fulfilment of which by a sufficient number of individuals excuses the other individuals from fulfilling it, such as funeral prayer, holy war, &c.; (2) recommended (*sunna*,[1] *mandūb, mustaḥabb*); (3) indifferent (*mubāḥ*), to be distinguished from *jā'iz*, allowed, unobjectionable (see below); (4) reprehensible, disapproved (*makrūh*); (5) forbidden (*ḥarām*); the opposite of this is *ḥalāl*,[2] everything that is not forbidden.

There exists, secondly, a scale of legal validity, the widest concept in which is *mashrū'*, recognized by the law, corresponding with it. According to the degree of this correspondence, a transaction is (1) *ṣaḥīḥ*, valid, if both its nature (*aṣl*) and its circumstances (*waṣf*) correspond with the law; (2) *makrūh*, reprehensible, disapproved, if its *aṣl* and its *waṣf* correspond with the law, but something forbidden is connected with it; (3) *fāsid*, defective, if its *aṣl* corresponds with the law but not its *waṣf*; (4) *bāṭil*, invalid, null and void. *Aṣl* and *waṣf* correspond approximately to *rukn* and *sharṭ* (above, section 2). This second scale is less developed than the first. Transactions which are *ṣaḥīḥ* or *makrūh* produce their legal effects, and *ṣaḥīḥ* is therefore often used in the sense of legally effective, so as to cover both categories. Synonyms of *ṣaḥīḥ* in this wider meaning are *lāzim* and *wājib*,[3] binding, and *nāfidh*, operative, the first two of which emphasize the subjective, and the third the objective, effects. The distinction between *fāsid* and *bāṭil*, which is not recognized to the same extent, or not at all, by the other schools of Islamic law, is often not clearly made; the idea of *fāsid* comes near to that of 'voidable', though it is not identical with it, and *fāsid* contracts, even if they are not voided, sometimes have only restricted legal effects. To be distinguished from the quality as *fāsid* is the right of rescission (*khiyār, optio*), the right to cancel (*faskh*) or to ratify (*imḍā'*) a contract within a stipulated time; this right can be granted by law or stipulated by contract (cf. below, p. 152).

[1] *Sunna* in this sense must be distinguished from *sunna* as the 'normative practice' of the community or the example of the Prophet.

[2] Used only of things and of persons, e.g. one's wife or female slave, not of acts.

[3] With a meaning different from that of *wājib*, 'obligatory'.

Both scales of qualifications apply concurrently to the same set of facts. This appears most clearly with regard to acts that are unobjectionable; they are *jā'iz* from the religious and therefore *ṣaḥīḥ* and *wājib* from the legal point of view. If the safe-conduct given by an individual Muslim is declared *jā'iz*, this means not only that, subjectively speaking, he is not forbidden to give it, but that, objectively speaking, it is unobjectionable and therefore valid; and conversely that, objectively speaking, it is unobjectionable and therefore, subjectively speaking, permitted. Or if a contract of sale has been concluded in conformity with all provisions of the law, it is not only permitted and unobjectionable but valid and binding. The same correspondence is obvious in the concept of *ijāza*, the 'declaration that something is *jā'iz*', approval (*ratihabitio*), such as the approval of the act of an unauthorized agent (*fuḍūlī*); the principal declares that he does not object to the act of the *fuḍūlī* in question and that it is therefore valid. The concept of *jā'iz* is typical of the way in which the legal subject-matter is subjected to religious scrutiny; it comprises everything that does not provoke a religious objection. The fusion of valid and invalid with allowed and forbidden respectively, was facilitated by the fact that both pairs of concepts were coextensive in the field of worship. In the field of law in the narrow sense, it is true, this was not completely the case. Not only are there situations to which only one of the two pairs of concepts can be meaningfully applied, it seems occasionally that the same act is at the same time to be qualified as valid and as forbidden. Closer scrutiny, however, shows that the two predicates refer to separate acts or to separate aspects of the situation. For instance, a sale concluded at the time of the call to the Friday prayer is *makrūh* in the sense of the second scale of qualifications; it is legally effective but its conclusion at that particular time is forbidden. Or if the political authority appoints a *ḳāḍī* who is not *'adl*, or if the *ḳāḍī* accepts the evidence of a witness who is not *'adl*, these acts constitute breaches of duty which are forbidden, but the appointment and the judgment based on the evidence in question are nevertheless valid. The quality as *makrūh* does not prevent the legal effects from taking place; it only, in special cases, creates an additional liability for tort, e.g. if a loan for use is terminated prematurely; or it enables the

public authorities to interfere, e.g. by forcing the speculator on rising prices of food to sell. There are degrees even within the sphere of *ḥarām*; a transaction qualified as *ḥarām* is not always *bāṭil* but occasionally only *fāsid*, and sometimes even *ṣaḥīḥ* (cf. below, p. 146).

Similar to the distinction between the religious sphere and the sphere of law proper is that between *ḳaḍā'*, the judgment given by the *ḳāḍī*, *forum externum*, and *diyāna*, the conscience, *forum internum*,[1] particularly in interpreting defective declarations which, when accompanied by the relevant *niyya*, may be valid before the conscience but not before the *ḳāḍī*. Conversely, 'legal devices' or evasions are considered valid if they conform to the letter of the law, regardless of the underlying motives. To the sphere of *diyāna* belong the kindred concepts of *tanazzuh*, *wara'*, religious scruple, and *iḥtiyāṭ*, precaution. So it may happen that a wife is considered repudiated once before the *ḳāḍī*, but twice in order to allay the religious scruple, i.e. if the former husband and wife want to be quite sure that they do not commit a sin, they ought to consider themselves separated twice.

[1] Alternative terms are *ẓāhir* and *bāṭin*, the 'outward' and the 'inward' state.

18

PERSONS

1. *Capacity and responsibility.* Legal capacity begins, generally speaking, with birth. The unborn child can inherit and receive a legacy; if it is a slave it can be manumitted, it can also be bequeathed by legacy but not sold; all this becomes effective, in principle, only if it is born within six lunar months from the occurrence in question. For causing an abortion, a special indemnity (called *ghurra*), different from blood-money, is to be paid; this devolves, by a curious fiction, upon the legal heirs of the child. Legal capacity ends with death. The missing person (*mafḳūd*), some of whose rights are in abeyance (above, p. 119), is declared dead only after 90 or even 120 lunar years have elapsed since his birth.

The concept of responsibility is subsumed under that of legal capacity (*ahliyya*), within which are distinguished the *ahliyyat al-wujūb* and the *ahliyyat al-adā'*. The *ahliyyat al-wujūb*, 'capacity of obligation', is the capacity to acquire rights and duties; the *ahliyyat al-adā'*, 'capacity of execution', is the capacity to contract, to dispose, and therefore also validly to fulfil one's obligations; it can be either full or restricted, and is harmonized with the *ahliyyat al-wujūb* by considering the 'qualification' (*ḥukm*), the essential character of the obligation.

The highest degree of legal capacity is that of the free Muslim who is sane (*'āḳil*) and of age (*bāligh*); he is fully responsible (*mukallaf*). Majority is determined by physical indications, by the declaration of the youth in question, or, failing this, by reaching the age of fifteen lunar years. The *mukallaf* has the capacity to contract and to dispose (*taṣarruf*), he is bound o fulfil the religious duties, and he is fully subject to criminal law, being capable of deliberate intent (*'amd*). The insane (*majnūn*) and small children (*ṭifl*) are wholly incapable but can incur certain financial obligations; the idiot (*ma'tūh*) and the minor (*ṣabī, ṣaghīr*) have, in addition, the capacity to conclude purely

advantageous transactions and to accept donations and charitable gifts; 'intelligent', 'discriminating' minors (*ṣabī ya'ḳil, mumayyiz*) can, further, adopt Islam, enter a contract of manumission by *mukātaba* if they are slaves, and carry out a procuration. As regards a major who is irresponsible (*safīh*), for instance a spendthrift, it is contested whether he is subject to interdiction (*ḥajr*), or capable in principle and only put under the protective supervision of the authorities until he reaches the age of twenty-five lunar years.

Higher demanda are made of the witness who must also be 'of good character' (*'adl*), i.e. must not have committed grave sins[1] and must not persevere in small ones. The opposite of *'adl* is the sinner (*fāsiḳ*); between both stands the *mastūr*, the person of whom nothing is known to his disadvantage. But the quality of being *'adl* is a religious and not a legal requirement; the *ḳāḍī* must not accept the evidence of a *fāsiḳ*, but if he does, his judgment based on it is nevertheless valid. The *ḳāḍī*, too, must be *'adl* and possess, in addition, the necessary qualities of character and the necessary knowledge; similarly, if a *fāsiḳ* is appointed *ḳāḍī*, his appointment is valid, and if a *ḳāḍī* who has been *'adl* becomes *fāsiḳ*, his appointment does not become invalid.

A quality of importance in penal law is the quality of *muḥṣan*, applicable only to free persons and having two strictly different meanings: a *muḥṣan* in the sense of being a free person who has never committed unlawful intercourse is protected, by penal provisions, against *ḳadhf* (below, p. 179); and a *muḥṣan* in the sense of a free person who has concluded and consummated a valid marriage with a free partner is subject to a more severe punishment, stoning to death, if he or she should afterwards have illegal intercourse. These rules are directly based on the Koran and on traditions, respectively.

Islamic law does not recognize juristic persons; not even the public treasury (*bayt al-māl*) is construed as an institution, its owner is the Muslim community, i.e. the sum total of individual Muslims. As regards the *waḳf* or *ḥabs* (pious foundation, mortmain), it is construed as the withdrawal from circulation of the substance (*'ayn*) of a property owned by the founder and the

[1] Unless he has repented of them; but he must never have been punished for *ḳadhf* (below, p. 179).

spending of the proceeds (*manfa'a*) for a charitable purpose; there is no unanimous doctrine on who becomes the owner of the substance. An essential feature is the permanence of its purpose, which may be anything not incompatible with the tenets of Islam; therefore, if the beneficiaries are, for instance, the descendants of the founder, the poor or some other permanent purpose must be appointed as subsidiary beneficiaries in case the original beneficiaries should die out.[1] Objects of a *waḳf* are mostly immovables, but also movables in so far as this is customary, e.g. books. There are detailed rules concerning the administration of the *waḳf* and its use for a purpose other than that designated by the founder.

The capacity to dispose can be extended or restricted, by *idhn* or *ḥajr* respectively. The *idhn* ('permission') can be granted to a minor by the father or other legal guardian, but not with regard to purely disadvantageous transactions (e.g. divorce, manumission, acknowledgement). The term *ḥajr* ('restriction', interdiction) denotes both the status and the act of imposing it; the minor and the slave are normally, and the small child and the insane necessarily, in the status of *ḥajr*. As an act, *ḥajr* is required in order to revoke the *idhn*; it is pronounced by the authorities against the irresponsible *muftī* who teaches the public reprehensible tricks, against the ignorant physician who is a danger to his patients, and against the bankrupt transport contractor (this is singled out because the transaction in question, *ijāra*, is based on payment in advance).

2. *Legal position of women.* The legal position of women is not unfavourable. The woman is, it is true, considered inferior to the man, she has less rights and duties from the religious point of view. If she commits apostasy she is not executed but forced, by imprisonment and beatings, to return to Islam. As regards blood-money, evidence, and inheritance, she is counted as half a man; she does not belong to the *'aḳila* (below, p. 186). Also with regard to marriage and divorce her position is less advantageous than that of the man; on certain grounds, the husband has the right of correction. But as regards the law of property

[1] In modern terminology, this, the so-called private or 'family' *waḳf* (*waḳf ahlī* or *dhurrī*), is distinguished from the so-called public or 'charitable' *waḳf* (*waḳf khayrī*) which is immediately destined for some public or charitable purpose. In strict Islamic law, however, the private *waḳf*, too, is considered a charity, and the same rules apply to both kinds of *waḳf*.

and obligations, the woman is the equal of the man; the matrimonial régime is even more favourable to her in many respects. She may even act as a *ḳāḍī* in certain matters.

3. *Legal position of slaves* (*raḳīḳ*, slaves in general; *'abd* or *mamlūk*, the male slave; *ama* or *jāriya*, the female slave; *ḥurr*, the free person). From tle religious point of view the slave is considered a person, but being subject to his master he is not fully responsible; he is at the same time a thing (*chose, res*). The effects of slavery are mitigated (*a*) by restrictions on its origin, (*b*) by the legal rights of the slave, and (*c*) by facilities for and the recommendation of manumission.

(*a*) Slavery can originate only through birth or through captivity, i.e. if a non-Muslim who is protected neither by treaty nor by a safe-conduct falls into the hands of the Muslims. Sale of free persons into slavery for debt is unknown.

(*b*) The slave has rights as a person; in particular, he or she can get married. The male slave may marry up to two female slaves; the female slave may also marry a free man who is not her owner, and the male slave a free woman who is not his owner. The marriage of the slave requires the permission of the owner; he can also give the slave in marriage against his or her will. The permission implies that the owner becomes responsible with the person (*raḳaba*) of the slave for the pecuniary obligations which derive from the marriage, such as nuptial gift, and maintenance; if the owner defaults, the slave can be compulsorily sold in order to provide the cover. Minor slaves are not to be separated from their near relatives, and in particular their parents, in sale (cf. below, p. 152). The unmarried female slave is at the disposal of her male owner as a concubine, but no similar provision applies between a male slave and his female owner. The children of a female slave follow the status of their mother, except that the child of the concubine, whom the owner has recognized as his own, is free with all the rights of children from a marriage with a free woman; this rule has had the most profound influence on the development of Islamic society.

The slave is less protected than the free man by criminal law; it is true that retaliation for the intentional killing of a slave takes place even against a free man,[1] but there is no retaliation

[1] This is an important point of difference between the schools of law; the Mālikīs, Shāfi'īs, and Ḥanbalīs hold the opposite view.

for bodily harm caused to a slave; the person guilty of *ḳadhf* against a slave is not liable to the *ḥadd* punishment but only to a 'discretionary punishment' (*ta'zīr*) because the slave is not *muḥṣan* (above, section 1). Apart from this, the protection of the slave does not go beyond that of property in general. There is no protection of the slave against his owner in criminal law because retaliation, blood-money, &c. are private claims which are vested in the owner himself; the slave has no capacity to sue in this case. But the authorities must ensure that the owner fulfils the religious duties towards his slave; he must not overwork him and must give him sufficient rest; the slave of a persistent offender can be sold compulsorily. On the other hand, the criminal responsibility of a slave is less than that of a free man; he is not stoned to death for unlawful intercourse because he is not *muḥṣan*, he is only punished by half the number of lashes applicable to a free man who is not *muḥṣan*; for drinking wine, and for *ḳadhf*, too, he is liable to half the number of lashes applicable in the case of a free man; he is subject to retaliation only for intentional killing, not for causing bodily harm.

The slave has no capacity to dispose, but he can carry out a procuration; his statement is accepted to the same extent as is that of the free man in pecuniary transactions, and if he is *'adl*, also in some religious matters, but he cannot be a witness. He has the right to claim maintenance from his owner. The pecuniary liability for torts (*jināyāt*; below, p. 186 f.) caused by the slave is borne by the owner, but he can surrender the slave instead (*daf'*, *noxae deditio*); conversely, he can, in certain circumstances, redeem (*fidā'*) the slave who has become liable with his person. In certain cases the master is not responsible for the acts of his slave; a liability then emerges only if the slave later becomes free, for instance for the culpable loss of a deposit handed to the slave, or for the loan for use or the loan of money given to him. The *peculium* of the slave is not recognized, but its existence in fact is often taken into consideration.

The owner can confer the capacity to dispose upon his slave, whether for a single transaction, such as getting married, or in general, for trade; a slave who has received this last permission is called *ma'dhūn*. This permission does not include unilaterally disadvantageous transactions, such as donations, neither does it include non-pecuniary transactions, such as concluding a

marriage or redeeming one's own person from retaliation. The transactions concluded by the *ma'dhūn* engage the stock-in-trade handed over to him by the owner, and his own person; if he runs into debt, the owner must either surrender him so that he may be sold to pay off the debt, any uncleared debt reviving if the slave becomes free, or the owner must pay it on his behalf. The same rule applies to the pecuniary liability of the *ma'dhūn* for torts and to his liability for pecuniary obligations deriving from marriage (in contrast with the rule applicable to the ordinary slave). The permission is revoked either by law, e.g. if the owner becomes insane, or by *ḥajr* on the part of the master.

(*c*) Manumission (*'itk* or *i'tāḳ*) is recommended by religion; it is in certain cases prescribed as a religious expiation (*kaffāra*) and is often the self-imposed penalty for non-fulfilment of an undertaking under oath. The slave becomes free by law if he becomes the property of a person who is his *maḥram*, i.e. related to him within the forbidden degrees. The *umm walad*, the female slave who has borne a child to her owner which he has recognized, becomes free by law on his death; the owner therefore can dispose of her only by manumission or by the contract of *mukātaba*; he cannot surrender her and becomes liable to the amount of her value instead; but he can give her in marriage without her consent. Manumission is favoured by law in cases of doubt; if there is an imperfect expectancy of manumission, the slave is given the possibility of acquiring his freedom by work (*sa'y* or *si'āya*), e.g. if he is joint property and one owner manumits his share. There are several special forms of manumission, first the manumission with effect at the death of the owner (*tadbīr*), to be distinguished from a legacy; a slave manumitted in this form (*mudabbar*) has the same legal position as the *umm walad* (but see below, p. 170). Further, the sale of the slave to himself; in this case the slave becomes free immediately and owes the price to his former master. Finally, the contract of *mukātaba* by which the slave (*mukātab*) acquires his freedom against a future payment, mostly by instalments; he becomes free immediately as far as the power of disposition of the owner is concerned, and after performance of the contract as far as his substance (*raḳaba*) is concerned; he has the same capacity to dispose as the *ma'dhūn*, and the owner cannot give him in

marriage without his consent. The *mukātaba* can be revoked if the slave defaults, either by agreement or by the *ḳāḍī* on application of the master. The ownership of the possessions of the *mukātab* is in abeyance, and according to the performance or non-performance of the contract it is retrospectively attributed either to one or to the other. The *mukātab* has the expectancy of, but not a claim to, assistance from the proceeds of the alms-tax. All this has the consequence that the slave has to a great extent the capacity to sue his master.

The manumitted slave remains to his former master in the strictly personal relation of clientship (*walā'*; both patron and client are called *mawlā*); this has certain effects in the law of marriage and of inheritance.

The position of slaves is therefore not intolerable; the Islamic law of slavery is patriarchal and belongs more to the law of family than to the law of property. Apart from domestic slaves, Islamic law takes notice of trading slaves who possess a considerable liberty of action, but hardly of working slaves kept for exploiting agricultural and industrial enterprises. The last were found, indeed, only infrequently in Islamic society. The legal rules concerning slavery reflect, on the whole, actual conditions.

4. *Legal position of non-Muslims.* The basis of the Islamic attitude towards unbelievers is the law of war; they must be either converted[1] or subjugated or killed (excepting women, children, and slaves); the third alternative, in general, occurs only if the first two are refused. As an exception, the Arab pagans are given the choice only between conversion to Islam or death. Apart from this, prisoners of war[2] are either made slaves or killed or left alive as free *dhimmīs* (see what follows) or exchanged for Muslim prisoners of war, at the discretion of the *imām*; also a treaty of surrender is concluded which forms the legal basis for the treatment of the non-Muslims to whom it applies. It is often called *dhimma*, 'engagement', 'obligation', 'responsibility', because the Muslims by it undertake to safeguard the life and property of the non-Muslims in question, who are called *dhimmīs*. This treaty necessarily provides for

[1] Islamic law does not allow forced conversion.

[2] Islamic law does not, on principle, envisage war between Muslims but only the holy war; prisoners of war are therefore by definition unbelievers.

the surrender of the non-Muslims with all duties deriving from it, in particular the payment of tribute, i.e. the fixed poll-tax (*jizya*) and the land-tax (*kharāj*), the amount of which is determined from case to case.[1] The non-Muslims must wear distinctive clothing and must mark their houses, which must not be built higher than those of the Muslims, by distinctive signs; they must not ride horses or bear arms, and they must yield the way to Muslims; they must not scandalize the Muslims by openly performing their worship or their distinctive customs, such as drinking wine; they must not build new churches, synagogues, and hermitages; they must pay the poll-tax under humiliating conditions. It goes without saying that they are excluded from the specifically Muslim privileges, but on the other hand they are exempt from the specifically Muslim duties; in principle, non-Muslims follow the rules of their own religions with regard to what is lawful for them. In particular, they are not subject to the prohibition of wine and pork, and can therefore trade in them. Neither offences against individual Muslims, including even murder, nor refusal to pay the tribute, nor transgression of the other rules imposed upon the non-Muslims, are considered breaches of the treaty; only joining enemy territory or waging war against the Muslims in their own country are regarded as such.

A non-Muslim who is not protected by a treaty is called *ḥarbī*, 'in a state of war', 'enemy alien'; his life and property are completely unprotected by law unless he has been given a temporary safe-conduct (*amān*); this can be validly given by any Muslim, man or woman, who is *mukallaf*. He is then called *musta'min*, and his position resembles in general that of the *dhimmī*, except that he is not obliged to pay tribute for a year; should he remain in Islamic territory longer, he is made a *dhimmī*.

The former burning question as to who is to be considered an unbeliever (*kāfir*) has found a tolerant solution; the heretic is regarded as an unbeliever only if he denies an essential element of Islam. Within the unbelievers a distinction is made, in descending order of privilege, between the followers of revealed religions who believe in a prophet and possess a scripture (*ahl*

[1] The *kharāj* remains a charge on the land, even if its owner adopts Islam or it otherwise becomes the property of a Muslim.

al-kitāb), the Zoroastrians, and the pagans; the children of a mixed marriage between unbelievers belong to the higher religion. A Muslim may marry a woman belonging to the *ahl al-kitāb* (their children are, of course, Muslims), but not one of the *ahl al-kitāb* a Muslim woman. For the rest, the Muslim and the *dhimmī* are equal in practically the whole of the law of property and of contracts and obligations. But the *dhimmī* cannot be a witness, except in matters concerning other *dhimmīs* (even if they belong to different religions); he cannot be the guardian of his child who is a Muslim, although a *dhimmī* woman has the right to the personal care of her child who is a Muslim; he cannot be the executor of a Muslim; he cannot be the owner of a Muslim slave and is, if necessary, forced by the authorities to sell him. In criminal law, the *dhimmī* is liable to *ḥadd* punishments and to 'discretionary punishment' (*ta'zīr*) as far as they are not specifically Muslim, therefore not to the *ḥadd* for drinking wine and to the more severe punishment for illegal intercourse of the *muḥṣan*. The *dhimmī* is protected by penal law to the same extent as the Muslim; but because of his lesser criminal responsibility, he is protected against *ḳadhf* not by *ḥadd* but only by *ta'zīr*. The *dhimmī* is the equal of the Muslim with regard to retaliation.[1] Finally there are cases in which there exists a negative equality; neither the Muslim nor the *dhimmī* can enter a *mufāwaḍa* (unlimited mercantile partnership) with the other, neither belongs to the *'āḳila* of the other, and the difference of religion and the difference of domicile, be it the Islamic state (*dār al-Islām*) or any country within enemy territory (*dār al-ḥarb*), exclude inheritance (though not legacies) between any two persons.

The majority of rules pertaining to the *dhimmī* which are discussed in the sources are concerned with the effects of his conversion to Islam, particularly with regard to situations which are possible without, but not within, Islam (e.g. marriage to more than four wives, marriage within the prohibited degrees, ownership of wine or pork). Occasionally, if conversion to Islam of a *dhimmī* entails a legal loss for another *dhimmī* (e.g. the conversion of the wife of a *dhimmī*), this last is offered Islam

[1] The other schools of Islamic law, however, do not make a Muslim liable to retaliation for the murder of a *dhimmī*, the Shāfi'īs and the Ḥanbalīs absolutely, and the Mālikīs in most cases.

so that he may conserve his rights. The convert becomes a *mawlā*, i.e. he needs an Arab patron (also called *mawlā*), in the same way as a manumitted slave, but he is free to choose his patron by a contract of clientship (*muwālāt*). Conversion from Islam to another religion, on the contrary, is considered apostasy and is subject to penal sanctions.

To sum up, Islamic law interferes with non-Muslims only in so far as Muslims, too, are concerned directly, and very occasionally indirectly, for instance in so far as the punishment of theft constitutes a religious interest of the Muslims. Apart from this, non-Muslims are left complete legal freedom provided no Muslim, and this includes the tribunal of the *ḳāḍī*, is concerned; freedom in matters of religion is guaranteed explicitly. This is the basis of the factual legal autonomy of the non-Muslims, including their own jurisdictions, which was extensive in the Middle Ages, and has prevailed in part until the present generation.

19

PROPERTY

1. *Objects of property.* Islamic law does not strictly define the object of property as a tangible thing (*chose, res*). The thing (*'ayn*), it is true, is opposed to the claim or debt (*dayn*), but the usufruct (*manfa'a*, pl. *manāfi'*) of things that can be used forms a separate category; as opposed to *manfa'a*, the thing itself is also called *raḳaba*, substance. The usufruct is, in a certain way, regarded as a thing; the use is not a *ius in re aliena* but a property of usufruct. Then, however, usufruct is not merely assimilated to the other things but made the subject of special transactions; the contract of *'āriyya* (loan of non-fungible things) is defined as the gratuitous transfer of usufruct, the contract of *ijāra* (hire and lease) as the sale of usufruct, but they are nevertheless separate contracts. In the case of 'things that increase' (*māl nāmī*; *namā'*, the accession) the usufruct includes the proceeds (*ghalla*), including the proceeds of letting or hiring out. The proceeds can also become the object of separate rights of property, e.g. by legacy which confers a right *in rem*; these rights then do not include the right of direct use.

The thing as object of legal transactions, *res in commercio*, is called *māl*, but its opposite is not simply the *res extra commercium*, but there are several graded categories.

(*a*) things which are completely excluded from legal traffic, which cannot be objects of property, and the sale of which is null and void (*bāṭil*), e.g. a free person, animals not ritually slaughtered (*mayta*), and blood;

(*b*) things in which there is, in fact, no ownership (which are *ghayr mamlūk*), that is to say (1) things which are not under individual control (are not in custody, *ḥirz*), or which are public property (*milk al-'āmma*), such as air and water, big rivers and public roads; everyone is entitled to use them in a way which does not cause prejudice to the public, and no one can dispose of them; (2) the *waḳf* (above, p. 125 f.); according to another

opinion, the *wakf* is the property of Allah; (3) things that are 'not known' (*ghayr ma'lūm*), such as birds in the air, to which are assimilated things which are not in actual possession, such as a runaway slave (*ābiḳ*); in order to exclude uncertainty (*gharar*), Islamic law refuses the power to dispose of the right of ownership;

(*c*) things in which there is no separate ownership, that is to say (1) things which do not, or do not yet, exist independently, such as the flour in the corn or the milk in the udder; (2) constituent parts, such as a beam in the roof, but this is not worked out consistently, because the upper story of a house can be a separate property; this category merges into that of things which exist independently but usually belong to another thing, such as the key of a house; unless the contrary is stipulated, these follow the principal thing to which they belong;[1]

(*d*) those slaves in whom there is only a restricted ownership, particularly the *umm walad*, the *mudabbar*, and the *mukātab*;

(*e*) things which are objects of property but on the disposal of which there are restrictions, and in particular (1) things of trifling value; the minimum value of *māl* is 1 dirham; (2) holy things, such as the soil of Mecca the sale of which is reprehensible; (3) things which are ritually impure, such as wine and the pig; (4) other things without market value (*māl ghayr mutaḳawwim*), the sale of which is *fāsid*;

(*f*) finally, things which are not in actual possession and the recovery of which cannot be expected (*māl ḍimār*), such as things which have been lost, usurped, or confiscated.

This system is not set out as a whole but its categories are discussed piecemeal in connexion with the several transactions; also the legal effect, whether the transaction becomes *bāṭil* or *fāsid*, is often left undecided. Occasionally the legal effect differs according to the nature of the transaction; the most important distinction is that certain things cannot be sold, donated, or given as *mahr*, but can be inherited or bequeathed by legacy, e.g. the unborn child of a female slave.

Similar restrictions apply to performances, some of which cannot be paid for and cannot be offered in payment, e.g. the serving of a mare by a ṣtallion.

[1] But unless the contrary is stipulated in a contract of sale, the seed does not follow the ground, and the fruit does not follow the tree.

Māl is divided into immovables (*'aḳār*) and movables (*māl manḳūl*, *māl naḳlī*), and into fungibles (*mithlī*) and non-fungibles (*ḳīmī*). Fungibles are again divided into things that can be measured (*makīl* or *kaylī*) or weighed (*mawzūn* or *waznī*) or counted (*ma'dūd mutaḳārib*, i.e. 'homogeneous', belonging to the same kind), categories which are of importance in connexion with the prohibition of *ribā*. On the basis of traditions concerning this prohibition, wheat, barley, dates, and salt belong to the category of *makīl*, gold and silver to the category of *mawzūn*; apart from this, custom (*'urf*) decides to which category any given commodity belongs.

2. *Ownership and possession.* Ownership, the right to the complete and exclusive disposal of a thing, is called *milk*, possession *yad*, the owner *mālik* or *rabb*, the possessor *dhul-yad*. Islamic law does not distinguish between possession and *detentio*. *Milk* and *mālik* are used not only of property rights *in rem* but of rights to usufruct, or of the right to intercourse in marriage or concubinage, whereas *yad* can also denote the authority of the husband in marriage, or of the father. Categories of possession proper are fiduciary possession (*yad amāna*) and, above all, legitimate and illegitimate possession (*yad muḥiḳḳa* and *yad mubṭila*), this last, for instance, in the case of usurpation. Among the many cases in which ownership and possession are distinct, the most important is that of the *mukātab* slave; he has left the possession but not the ownership of his master.

The acquisition of ownership may be original or derivative. (*a*) Original acquisition occurs in the first place through occupancy (*istīlā'*) of things that have no owner (*res nullius*). In this connexion arises the question of expectancy. If someone sets up a net in order to catch birds, he has the expectancy of the property of the birds caught; but if he sets up a net in order to dry it, anyone who takes the birds caught in it acquires the property, even though he takes them from land belonging to another. Also, the owner of the ground has an exclusive right in trees that grow in it, and in its alluvion. As regards precious metals, a distinction is made between the mine (*ma'din*) and the treasure (*rikāz*); of both, as well as of the booty (*ghanīma*) taken from the enemy in war, one-fifth is to be paid to the public treasury. The mine belongs to the owner of the ground, to the finder only if the ground has no owner; the treasure belongs

in either case to the finder (at least according to the doctrine of Abū Yūsuf). But this applies only if the treasure dates from pre-Islamic times; a treasure dating from Islamic times is not ownerless but has only left the possession of its owner and is regarded as found property (*luḳaṭa*). Ownership can never be acquired by finding; the finder is only entitled to make a charitable gift (*ṣadaḳa*) of the found object when the legal term for giving public notice has elapsed without result; if he is poor, he is entitled to use the object himself; but it is better to hold it on trust (as *amāna*), which implies the intention of returning it to the owner; if this is lacking, its retention becomes usurpation. The acquisition of the proceeds (*istighlāl*) is an essential part of the right of ownership.

The questions of specification and of commixtion and confusion are treated not from the point of view of property, but partly from that of usurpation and partly from that of deposit; Islamic law lays the emphasis on establishing the kind and extent of liability involved. The original owner is therefore often given the choice either of claiming compensation pure and simple, or of claiming the return of the object itself with a compensatory payment on his part for an increase in valūe or with a compensatory payment by the usurper for a decrease in value; another consideration is that specification creates property in a usurped object if its name and its main uses are changed thereby. There is a difference of opinion concerning the confusion of two quantities of the same species, but if it happens without an act of the usurper, joint ownership (*ishtirāk*) in proportion to the two quantities is created. Usurpation further creates ownership if the usurper has made the object inaccessible and has been made liable for its value; through the payment of the value he acquires ownership from the time of the usurpation, but even then the original owner may, in certain circumstances, assert his right of ownership should the usurped object become accessible again.

Several kinds of original acquisition of ownership are of importance for the law of procedure. In proving ownership, preference is given to the proof of kinds of acquisition which cannot be repeated, such as weaving, milking, shearing, over those which can be repeated, such as building (because the house can have collapsed in the meantime), planting,

sowing. Acquisitive prescription is not recognized as such; its effects are, however, achieved by the procedural rule that no claim of ownership in land against the possessor can be entertained, under certain conditions, after a number of years (30 or 33 or 36 are sometimes mentioned) has passed without this claim being made.

(*b*) Derivative acquisition of ownership occurs (1) through transfer of ownership by transfer of possession, i.e. by delivery (*taslīm*) and taking possession (*ḳabḍ*; *tasallum*, taking delivery; *istīfā'*, receiving; *taḳābuḍ*, taking possession reciprocally). This kind of acquisition of property occurs in connexion with a number of obligations. *Taslīm* and *ḳabḍ* do not necessarily effect transfer of ownership in all circumstances, e.g. not in the case of a sale with the right of rescission; the reasoning that this is because the full intention of transferring ownership is lacking is, however, absent from Islamic law.

(2) Derivative acquisition of ownership occurs further through transactions which by themselves create rights *in rem*, i.e. create ownership without taking possession. The most important of these is the legacy which creates ownership and not merely a claim against the heirs. Contracts, too, are on occasion regarded as conferring by themselves rights *in rem*; Islamic law does not make a clear distinction (see below, pp. 141, 152).

(3) The pledge, pawn (*rahn*), occupies a special position, because possession is taken but the ownership is not transferred; transfer of ownership occurs only under certain conditions as an effect of the contract.

Cessation of ownership occurs normally through transfer; this may occur against the will of the owner, as in the case of usurpation when the usurper acquires ownership. An important particular case is apostasy from Islam; here the cessation of ownership is at first in abeyance and becomes definite only when the apostate (*murtadd*) dies or leaves the Islamic state without returning to Islam.

Joint ownership (*mushā'*, or, seen in its obligatory aspect, *sharikat māl*, association in property) is treated in detail, particularly with regard to land and to slaves. It arises, as a rule, from inheritance, also from confusion (intentional and unintentional), and from the acquisition of proceeds by a partnership. Joint property created by confusion is subject to a limitation

of disposal; the share can be sold other than to the partner (*sharīk*) only with his consent, because in this case each partner is the individual owner of a fraction of the component parts of the object which in actual fact cannot be separated from the fraction owned by the other. Joint property is of two kinds, according to whether it can be divided or not. Division (*ḳisma*) is the normal case. It can often be enforced without the consent of the other partners, but not if it would reduce the use that could be made of the resulting parts. There are numerous material rules on the procedure to be followed by the *ḳāḍī* who carries out the division. If the object itself is not divided, its use is distributed, either by space so that, for instance, each partner inhabits certain rooms of a house, or, if this is not possible, by time so that, for instance, each partner inhabits the house for a month, or uses the services of the slave for a day.

The protection of ownership, much pronounced in Islamic law, manifests itself, among other rules, in the protection of bona fide acquisition; if an object is vindicated, claimed by a third party (*istiḥḳāḳ*, *istirdād*), the party who has sold it becomes liable for the *darak*, the default in ownership, to the amount of the price paid. Another consequence is that the owner can make the hirer directly responsible for the loss of an object which the depositary has hired out. But the concept of protection of possession is absent from Islamic law. Possession confers a prejudice as to ownership; if possession itself is in dispute, claims are decided in a casuistic manner; the person who wears a garment prevails over him who holds its sleeve. Occasionally the special rules of the law of evidence result in putting the possessor in a less advantageous position; if both the possessor and a 'stranger' (*khārij*) produce a proof of ownership of the same kind, the proof of the 'stranger' is, under certain conditions, given preference because he is the claimant and therefore charged with the onus of proof, a fact which gives his proof a prior claim to be heard.

3. *Pledge, pawn* (*rahn*). The contract of pledging a security demands offer and acceptance; it becomes binding (*lāzim*) when possesion of the pledge is taken. The contract has an obligatory aspect which is emphasized in Islamic law; the pledgee is liable for the pledge, to the amount either of its value or of the debt secured, whichever is less, but if it gets lost through

his fault (*ta'addī*), to the amount of its value; he is also obliged to return it when the debt is paid. The aspect *in rem* of this contractual relationship becomes evident, for example, by the transfer of possession inherent in it; disposal of it by the pledgor (debtor) is absolutely excluded; he has not even the right to demand its surrender for sale in order to pay the pledgee (creditor); the transfer of possession can be replaced by depositing the pledge, by agreement, with a trustee, a 'person of good character' (*'adl*); the pledgee has the right to sell it when the debt is due in order to pay himself out of the proceeds. The pledge presupposes the existence of a debt; it cannot be given in connexion with a fiduciary relationship (*amāna*), e.g. deposit or loan of non-fungible objects, responsibility for *darak*, suretyship for the person, retaliation, pre-emption, &c. The pledge is, in principle, a collateral security; the debt remains in existence in so far as it is not covered by the sale of the pledge, and any credit balance which remains after the sale of the pledge is held by the pledgee in trust (*amāna*) for the pledgor. In exceptional cases only, the destruction or the loss of the pledge wipes out the debt, e.g. if a slave who has been given as a pledge commits a tort and is surrendered or redeemed by his owner, the pledgor. The pledgor retains the ownership of the pledge, he is therefore also the owner of any accessions, such as the young of animals, the fruit of trees, but these, too, become part of the pledge; expenses which are necessitated by the pledge itself are to be paid by the pledgor, and expenses which arise from the retention of the pledge by the pledgee are to be paid by the latter; the pledge cannot be used by either. The concept of mortgage is unknown in Islamic law.

Different from the pledge is the retention (*ḥabs*) of a thing in order to secure a claim connected with it; the law grants this right *in rem* (lien) in a number of special cases, e.g. the *ḥabs* of a thing for the wages for work done on it, or of a thing bought by procuration for the price, or of found property (and even, under certain conditions, of illegally appropriated property) for necessary expenses made for it. It is contested whether the liability of the lienor is the same as that of the pledgee or more extensive.

4. *Immovables* (including the *iura in re aliena* which arise only in this connexion). The law of real estate shows minor

divergencies from the general law of property. The concept of a thing as a separate entity is to some degree set aside; separate ownership in the upper story of a building is possible; this is regarded not as a servitude or easement but as a real right of property; when the upper story has collapsed it cannot be sold. Separate ownership is possible, too, in single rooms or apartments of a house. No taking of possession is necessary for the transfer of ownership in the case of sale (this is, however, contested); the contract of sale is not purely obligatory. This leads to stricter rules of evidence in the proof of ownership. Vindication of real property requires, as a rule, the proof that the defendant is the possessor, and still higher demands are made if an inheritance of real property is vindicated. Usurpation of immovables affects only the usufruct.

Public property (*milk al-'āmma*) as such, as distinguished from the related concepts of the public treasury and the *waḳf*, is greatly restricted in scope; it exists, for instance, in a thoroughfare, whereas the blind alley is the joint property of the abutters. The use of public property is to a certain degree free to every person; he may even erect a booth, &c. on it, as long as it does not cause prejudice to the public, but every person can sue for its removal. Land in the vicinity of an inhabited place is reserved for its inhabitants, as a kind of common, for pasturage, estovers, &c.

The occupancy of real property takes the form of cultivating waste land (*iḥyā' al-mawāt*); this is land which is not put to use and has no determined owner, be it a Muslim or a *dhimmī*; the licence of the *imām* to do so is necessary. The occupied land is marked by an enclosure; the occupant is obliged to cultivate it within three years; should he fail to do so, the licence lapses. Special cases in which, according to the prevailing opinion, the licence of the *imām* is not required, are the digging of a well and the planting of a tree in waste land; the occupant acquires around it a reserved zone of a diameter which varies according to circumstances.

To the law of real estate belong restrictions of ownership in favour of the neighbour, deriving from the duty of avoiding acts which are likely to disturb the neighbour in the exercise of his ownership. This gives right only to personal claims, not to interference with the property of another.

There is further the right of pre-emption (*shuf'a*), the right to substitute oneself for the buyer in a completed sale of real property (which includes the upper story of a building). It is granted by law and cannot be bought. Entitled to its exercise are, in the following order, (1) the co-owner, (2) the owner of a servitude in the property, and (3) the owner of an adjoining property. The exercise of *shuf'a* is precluded by a number of grounds, for instance if the person who would be entitled to it has himself made a bid, and the use of evasions in order to prevent its incidence is approved by the majority of scholars.[1] It is exercised in stages, the first being the immediate raising of the claim to it before witnesses, as soon as the entitled party comes to know of the sale; failure to do so is considered an abandonment of the claim.

Servitudes in real property are the right of passage, the right to let flow or to pour out water, and, conversely, the right to draw water or to water one's animals, and others. The right to build an upper story, in contrast with those just mentioned, adheres not to the property but to the person of the owner of the existing upper story; therefore the upper story itself can be sold, but not the right to build it.

Expropriation in the public interest exists only within very narrow limits.

The theory of Islamic law has thus developed only a few rudiments of a special law of real estate; conditions of land tenure in practice were often different from theory, varying according to place and time, and here the institution of *wakf* has become of great practical importance.

5. *Water.* Questions of irrigation have always been particularly important in the Near East. The origin of the provisions of Islamic law concerning rights in water must be looked for not in Arabia, where there are no perennial streams, but in Iraq, a country of artificial irrigation from time immemorial.

Big rivers, such as the Euphrates and the Tigris, are not private property; small watercourses and canals are the joint property of the owners of the adjoining land. This has numerous obligatory effects, in particular the duty of maintenance by dredging,

[1] One such device consists of making a charitable gift of one room to the prospective buyer, who thereby becomes a co-owner, and then selling him the rest of the house.