and the rule against making unilateral changes in drawing the water; as far as this diverges from pre-existing rights, it requires the consent of all co-owners. The division of the use of the water between the several owners is assured either by mechanical devices(distributors or runnels with inlets of fixed size) or by the allocation of fixed periods of time. This right to use water can be separated from the land to which it belongs, not by sale but by legacy. Although the water in such a canal is privately owned, every one has the right to drink from it, to use it for performing the ritual ablution, &c., but he must not trespass on the land of another without the permission of the owner, except in a case of necessity. Full private property in water exists only if it is in custody, i.e. in a container.

20

OBLIGATIONS IN GENERAL

1. *Preliminaries.* Unjustified enrichment and risk are both rejected on ethical grounds; this prohibition pervades the whole of the law, but shows its effects most clearly in the law of obligations, and this is why these subjects are treated in the present chapter. Several obligations have been treated or will be treated in other contexts: the obligations deriving from proxy (above, p. 119 f.), those deriving from slavery (above, pp. 127 ff.), those deriving from a change of religion (above, p. 132 f.), those deriving from joint ownership (above, p. 138 f.), those deriving from pledging a security (above, p. 139 f.), those deriving from the matrimonial régime and from the duty of maintenance (below, p. 167 f.), and those deriving from torts and crimes (below, pp. 181 ff.; see also p. 160).

2. *Types of contract.* Islamic law does not recognize the liberty of contract, but it provides an appreciable measure of freedom within certain fixed types. Liberty of contract would be incompatible with the ethical control of legal transactions. A means of achieving it exists in the abstract obligation (*dayn muṭlaḳ*) which is based on the acknowledgement of a debt without regard to its cause of origin. This can be used to ensure a valuable consideration for any kind of performance, even though it be not envisaged by the types of contract provided, but it has not been used constructively in elaborating the doctrine. It was widely used, however, in practice, particularly as an element of legal devices. The concept of custom plays an important part in the law of obligations, but its function is essentially restrictive because transactions are allowed only in so far as they are customary (*muta'ārif*). There is nothing corresponding to the *bonae fidei obligatio* of Roman law.

There exists no general term for obligation; the nearest approximation to it is *dhimma*, 'care as a duty of conscience'; the debtor has the performance 'in his care'. A claim or debt, primarily of money but also of fungible things in general, is

called *dayn*. It may be, or may have become, due or matured (then it is called *dayn ḥāll*), or it may be due at a future date (then it is called *dayn ilā ajal*). The most common ground for an obligation arising is the contract (*'aḳd*); this is the field of pecuniary transactions (*mu'āmalāt*). The conclusion of the contract is essentially informal; only the literal meanings of certain technical terms, such as *ṣafḳa*, 'striking hand upon hand', for concluding a contract, reflect former symbolic acts.

The contract is a bilateral transaction, and it requires an offer (*ījāb*) and an acceptance (*ḳabūl*), both made normally in the same meeting (*majlis*, 'session') of the contracting parties; the withdrawal (*rujū'*) of the offer before the acceptance is made is possible, and so is the stipulation of the right of rescission (*sharṭ al-khiyār*). One category of contracts is the exchange of monetary assets or rights (*mu'āwaḍa māliyya*, contracts *do ut des*). Bilateral, too, and therefore concluded by offer and acceptance, are pecuniary transactions without a countervalue (*'iwaḍ*), such as the donation or the loan of non-fungible objects. Offer and acceptance can be expressed in the form of compliance with an order, e.g. by the words 'sell me' and 'I sell you herewith'. Acceptance is not required in the case of unilateral dispositions with immediate legal effect, e.g. repudiation, manumission, or acquittance of a debtor. (These dispositions are called *taṣarruf nājiz* or *taṣarruf munjaz*.)

3. *Unjustified enrichment* (*faḍl māl bilā 'iwaḍ*). It is a general principle of Islamic law, based on a number of passages in the Koran, that unjustified enrichment, or 'receiving a monetary advantage without giving a countervalue', is forbidden, and that he who receives it must give it to the poor as a charitable gift. This applies, for instance, to reletting a hired object for a greater sum, or to reselling a bought object, before payment has been made for it, for a higher price. Special cases are the giving and taking of interest, and other kinds of *ribā*, literally 'increase', 'excess'. *Ribā* is defined as 'a monetary advantage without a countervalue which has been stipulated in favour of one of the two contracting parties in an exchange of two monetary values'. The prohibition applies to objects which can be measured or weighed and which, in addition, belong to the same species. Forbidden are both an excess in quantity and a delay in performance. If only one of these two conditions is

realized (e.g. in an exchange of cloth of a certain kind for cloth of the same kind, which is not measured or weighed, or of wheat for barley, which do not belong to the same species), an excess in quantity is allowed, but a delay in performance remains forbidden. Similar rules apply to usufruct; therefore the hire of two objects, one for the other, is allowed only if they do not belong to the same species.

The prohibition of a delay in the exchange of goods which are subject to the rules concerning *ribā* finds its logical complement in the general prohibition of an exchange of obligation for obligation (*bayʿ al-dayn bil-dayn*), and the prohibition of unjustified enrichment is further strengthened by the prohibition of combining two contracts, of concluding one contract as part of another (*ṣafḳa fī ṣafḳa*), because this could lead to the stipulation of a monetary advantage without giving a countervalue.[1]

A contract concluded in contravention of the rules concerning *ribā* is *fāsid*. If two unequal quantities of the same species are exchanged, the contract is valid as far as the smaller quantity and its equivalent are concerned, and the excess quantity must be returned.

The whole prohibition applies in the first place to sale and barter, but also to the amicable settlement. It is directed against speculation in food and in precious metals, and against any transactions which are tantamount to giving and taking interest, including some old-fashioned ones, such as supplying the seed in exchange for a larger amount of corn from the harvest. The casuistry surrounding the prohibition enables us to discern some types of transaction in actual use during the early period of Islamic law, such as the exchange of animal for meat, of wheat for flour, of dried dates for fresh dates on the tree (the so-called *muzābana*), a similar contract concerning corn (the so-called *muḥāḳala*), &c.

4. *Risk* (*gharar*, literally 'hazard'). Starting from the Koranic prohibition of a certain game of hazard (*maysir*), Islamic law insists that there must be no doubt concerning the obligations undertaken by the parties to a contract. The object of the

[1] Under this rule, a contract of sale in which a non-fungible object is pledged as a security for the price would be *fāsid* because pledging a security is a separate contract; it is, however, admitted as valid by *istiḥsān*.

contract, in particular, must be determined (*ma'lūm*, 'known'; opposite *majhūl*, 'unknown'). This requirement is particularly strict as regards objects which can be measured or weighed, which are subject to the prohibition of *ribā*; no undetermined quantity (*juzāf*) is permissible here, not even if the price of a unit of weight or measure be stated. For the same reason it is forbidden to sell dates which are still unripe, to be delivered when they have ripened, because it is unknown whether they will ripen at all. The price, too, and the countervalue in general must be determined; the kind of coins in which payment is to be made must be mentioned; but it is permissible to sell for a countervalue which is present and is shown, even though it be not defined. Similar rules apply to the values exchanged in other contracts, e.g. the usufruct and the rent in a contract of lease. The same is true of any stipulated term, but a distinction is made according to the nature of the contract, and vague expressions which are rejected in the *salam* contract are admitted in the contract of suretyship. From this requirement and from the prohibition of *ribā* together derives the requirement in the case of goods which are subject to the rules concerning *ribā*, that possession must be taken and their weight or measure checked before they are resold. These rules are aimed at all kinds of gambling, one of the great passions of the ancient Arabs, and here, too, the old sources of Islamic law enable us to discern some of the aleatory transactions in which this passion found expression in the early Islamic period (the so-called *mulāmasa*, *munābadha*, and *ilḳā' bil-ḥajar*). There are only two exceptions from the general prohibition of aleatory transactions: (1) in favour of prizes for the winner or winners of horse races, on account of their importance as a training for the holy war, and (2) for the winner or winners of competitions concerning knowledge of Islamic law.

5. *Liability* (*ḍamān*; *ḍāmin*, liable). Questions of liability form one of the most intricate subject-matters in the Islamic law of obligations. Liability may arise from the non-performance of a contract (especially if the performance would have consisted in handing over an object, in cases where the object has perished so that the performance has become impossible), or from tort (*ta'addī*, literally 'transgression'), or from a combination of both. The depositary and other persons in a position of trust (*amāna*;

such a person is called *amīn*) are not liable for accidental loss, but they lose this privileged position through *ta'addī*, illicit acts which are incompatible with the fiduciary relationship, such as using the deposit, whether the loss is caused by the unlawful act or not. The concept of *ta'addī*, however, is not restricted to the doctrine of liability, it means tort in general; in other words, liability arising from non-performance of a contract is reduced to liability arising from a tort—a trace of archaic legal reasoning. Islamic law nevertheless distinguishes liability for the effect of an unlawful act or delict as such from liability for an act contrary to a contract, and it discusses both kinds of liability whenever they happen to arise concurrently.

6. *Extinction of obligations.* The normal case is the fulfilment (*īfā'*), especially the payment (*ḳaḍā'*) of a debt; the debt can also be set off against a claim. The acquittance (*ibrā'*) of the debtor by the creditor likewise extinguishes the debt; it must be unconditional and not subject to the stipulation of a term, but it can take place in the form of a legacy. It has the same effect as the relinquishment (*isḳāṭ*) of a claim. Both forms of remission must be distinguished from the cancellation (*faskh*) of a contract and from the amicable settlement (*ṣulḥ*). The *faskh* brings about a condition as if a contract had never existed; it can be produced unilaterally, by *khiyār* (below, p. 152 f.). In its turn it must be distinguished from the reversal (*iḳāla*) of a sale, which is regarded as a new sale.

The *ṣulḥ* is not only procedural, although its aim is the elimination of dispute; it is always possible as an agreement of the parties to modify an existing obligation by which the creditor, for a consideration (*badal*), waives his original claim. If the debtor acknowledges his original obligation, the *ṣulḥ* amounts to replacing a concrete debt by an abstract one; in this case the rules relating to *ribā* must be taken into account. If the debtor does not acknowledge the original obligation, the *ṣulḥ* is a separate transaction. The *ṣulḥ* is not confined to the law of obligations; claims arising from the law of slavery, family law, and penal law can also be settled by it (but not, of course, *ḥadd* punishments).

Another way of extinguishing an obligation is by transforming it into a new one by the *ḥawāla*, literally 'transfer'. This is, in the first place, a mandate to pay, i.e. I owe something to *A* and

charge *B* to pay my debt. It can also be an assumption of my debt by *B*. The practical prerequisite in both cases is that I have a claim against *B* which is equal to or higher than the claim of *A* against me. This is not necessarily a debt, it can also be a claim for the return of an object, e.g. a deposit or something taken by usurpation. Normally, therefore, the *ḥawāla* amounts to an assignment; I assign to *A* a claim of mine against *B*, in order to satisfy a claim of *A* against me. But the existence of a claim of *A* against me is not a necessary prerequisite, and the *ḥawāla* then amounts to a mandate to collect, i.e. I charge *A* to collect my claim against *B*. The element common to all cases is merely that an obligation of *B* towards *A* is created. The acceptance of the *ḥawāla* by *A* extinguishes my obligation; it revives only if *B* dies bankrupt or (in the absence of legal evidence) denies the existence of the *ḥawāla*. Performance of *B* towards *A* extinguishes my claim against him only if the *ḥawāla* was concluded with specific reference to this obligation, not if it was unconditional.

One of the practical advantages of this institution is that it enables me to make payments in another place through *B*. Its effect is the same as that of the *suftaja* or bill of exchange. This is defined as 'a loan of money in order to avoid the risk of transport'; I lend an amount to *B*, in order that he may pay it to *A* in another place. The difference between *ḥawāla* and *suftaja* is that the obligation of *B* towards me, which in the case of the *ḥawāla* is normally supposed as already existing, is, in the case of the *suftaja*, created on purpose by a payment which I make to *B*, and this can be construed only as a loan of money; the transaction is reprehensible, because it is a loan of money from which I derive, without giving a countervalue, the advantage of avoiding the risk of transport, but it is not invalid. In practice, I buy from *B* a draft on the place in question. Historically, the origin of the bill of exchange can be traced to the *suftaja* and *ḥawāla*.

7. *Plurality of persons in one contracting party.* Islamic law considers the existence of an obligatory relationship with more than one creditor, debtor, buyer, lessee, guarantor, &c. Occasionally a joint relationship comes into being; e.g. each of two buyers is entitled to take possession and to pay the price; then he has a claim against the other for his share in the price, and

the right to secure it by retaining the object. Occasionally, too, joint action is required, e.g. on the part of two proxies; and if there are two depositaries, one must give a mandate to the other. Generally, however, each acts for himself; e.g. each of two creditors is entitled to conclude an amicable settlement, but this engages his share only and the other creditor has the choice of joining in the transaction or not. All this is discussed casuistically, in detail, but general principles hardly emerge.

21

OBLIGATIONS AND CONTRACTS IN PARTICULAR

1. *Acknowledgement* (*iḳrār*). The acknowledgement has a procedural and a material aspect. It is one kind of legal evidence, and although it is in theory weaker than the evidence of witnesses, can be withdrawn in criminal proceedings involving a *ḥadd* punishment, and requires confirmation by the party concerned if it is used to establish a family relationship (e.g. by acknowledging that a person is one's son or brother), it is in practice the most conclusive and uncontrovertible means of creating an obligation on the part of the person who makes it. If a contract of sale, for instance, is proved by the evidence of witnesses, a number of pleas are open to the buyer in rebuttal of a claim for payment of the price; but *A*'s acknowledgement that he owes the sum in question to *B* cannot be withdrawn or qualified by a subsequent plea. The importance of the *iḳrār* is that it creates an abstract obligation without regard to the cause of its origin. An acknowledgement of debt made during mortal illness ranks, it is true, not together with the other debts but immediately after them, and it is not considered, as other unilaterally disadvantageous transactions during mortal illness are, a legacy which would be restricted to one-third of the estate. If someone makes an acknowledgement in the following terms, 'I have usurped this thing from *A*, no, from *B*', he owes the thing to *A* and its value to *B*, because the withdrawal (*rujū'*) of the first acknowledgement in favour of *A* (by the word 'no') is invalid, and the thing owed to *B* on the strength of the second acknowledgement is regarded as having been destroyed by the first acknowledgement, so that its value takes its place.

2. *Sale* (*bay'*; *shirā'*, the purchase). The contract of sale forms the core of the Islamic law of obligations, the categories of which have been developed in most detail with regard to this contract, and other commutative or synallagmatic contracts,

although regarded as legal institutions in their own right, are construed on the model of *bay'* and sometimes even defined as kinds of *bay'*. Sale is an exchange of goods or properties (*māl*); it therefore includes barter and exchange. As far as sale in the narrow sense is concerned, one distinguishes the object which is being sold from the price (*thaman*) and the value (*ḳīma*); each is the countervalue (*'iwaḍ*) of the other. As the price consists of fungible things (normally gold or silver), whereas the object which is being sold is, generally, a non-fungible thing, the rules applicable to both are not quite identical; the vendor, for instance, is allowed to dispose of the (fungible) price even before he has taken possession. The contract of sale becomes complete (*tāmm*) by reciprocally taking possession (*taḳābuḍ*); this terminology shows that it is not regarded as purely obligatory. A stipulation to the advantage or disadvantage of one of the parties, which is extraneous to the purpose of the contract, e.g. that the buyer should manumit the slave which he buys, is invalid and makes the contract *fāsid*. If someone buys leather on condition that the seller should make it into shoes, the contract would be *fāsid* under this rule; but because it is the generally adopted procedure, the contract is admitted as valid by *istiḥsān*.[1] A *fāsid* sale conveys, even after the two parties have taken possession, only a 'bad ownership' (*milk khabīth*) and is liable to cancellation until the object is resold. Reprehensible, but not invalid, are, among others, a sale concluded at the time of the call to the Friday prayer and a sale of slaves by which a minor is separated from his near relatives; should minor children be separated from their parents the sale is, according to some authorities, invalid.

The right of rescission (*khiyār, optio*) is the right unilaterally to cancel (*faskh*) or to ratify (*imḍā'*) a contract, and in particular a contract of sale; if it is not exercised within the proper time limit, the sale is complete (*tāmm*), with a somewhat different meaning of the term. It can be conferred by law, or agreed upon by the contracting parties. The buyer has the right of rescission at the time at which he sees the object which he has bought, the act of 'seeing' not to be taken too narrowly (*khiyār al-ru'ya*); also in the case of a defect, i.e. everything that causes a reduction in price among traders (*khiyār al-'ayb*), or lack of a

[1] See also above, p. 146, n. 1.

stipulated quality. The defect gives only the right of rescission, not of abatement; this last arises only if the return of the object of the sale has become impossible, either by its loss or by the occurrence of a new defect after delivery but before recognition of the first defect (in which case return is possible only with consent of the seller), or by increase in value (such as the dyeing of cloth). If the seller delivers less than the stipulated quantity, the buyer has the choice between rescission of the sale and abatement of the price in proportion. The buyer loses the right of rescission if, for instance, he kills or manumits the slave for a consideration, or consumes the food that he has bought. The waiver of the *khiyār al-'ayb* by the buyer in a contract of sale is possible; the resulting absence of obligation is called *barā'a*. The buyer can stipulate the right of choosing from among several objects (*khiyār al-ta'yīn*), and by agreement of the contracting parties there can be conferred on one or on both or on a third party the general right of rescission (*khiyār al-shart*) during a period of not more than three days (according to the prevailing opinion).

A special kind of sale, although regarded as a separate kind of contract, is the *salam*, the ordering of goods to be delivered later for a price paid immediately. The term *ra's al-māl*, 'capital', which is used to denote the price in this contract, shows the economic meaning of the transaction: the financing of the business of a small trader or artisan by his clients. The object of the *salam* is mostly fungible things, but it cannot be gold or silver. Because of its closeness to the subject of the prohibition of *ribā*, the contract of *salam* has been carefully worked out and is subject to numerous special rules. Its counterpart, delayed payment (*nasī'a*, the delay) for goods delivered immediately, is also possible, but this kind of sale plays a minor part in Islamic law. The name 'sale on credit' (*bay' al-'īna*) is given *a potiori* to an evasion of the prohibition of *ribā* which is based on this transaction and is reprehensible; for instance, *A* (the creditor) sells to *B* (the debtor) some object for the sum of capital and interest, payable at some future date, and immediately afterwards buys the same object back for the capital payable at once. This amounts to an unsecured loan; on another form of *'īna* which provides a security for the loan, see above, p. 79.

Islamic law discusses, with much technical detail, the *tawliya*,

resale at the stated original cost, the *waḍī'a*, resale with a rebate on the stated original cost, and the *murābaḥa*, resale with a stated surcharge which represents the profit. The main consideration is the exclusion of dishonest, unjustified enrichment, but the exact part which these transactions played in the economic life of early Islamic society is not always clear.

Islamic law prohibits the archaic contracts of *muzābana* and *muḥāḳala* (see above, p.146), but makes an exception in favour of the sale, or barter, of a strictly limited quantity of dried dates for the same estimated quantity of fresh dates on the tree (*bay' al-'arāyā*; cf. above, p. 40).

Barter of commodities hardly plays a part in Islamic law, but money-changing (*ṣarf*) and, in general, dealing in precious metals receive detailed attention on account of the prohibition of *ribā*. The exchange of precious metals is regarded as 'sale of price for price' (*bay' thaman bi-thaman*), and each is a consideration for the other. A consequence of the rules concerning *ribā* is that an exchange of gold for gold and silver for silver is possible only in equal quantities, without regard to differences in quality and to workmanship, so that a golden cup equals its weight in coins of gold; but this particular difficulty can easily be avoided by payment in the other precious metal. A rich casuistry, including many economically impossible cases, has been developed on the subject.

3. *Hire and lease* (*ijāra*; *ujra*, the hire, rent; *ajr*, the wage). The contract of *ijāra* is the sale of a usufruct, and the rules relating to a contract of sale, such as those of *khiyār al-ru'ya*, *khiyār al-'ayb*, *khiyār al-sharṭ*, *faskh*, and *iḳāla* (but not *shuf'a*), apply to it, too. A defect which occurs after the conclusion of the *ijāra* entitles the hirer or renter to cancel it, if the defect prevents or reduces the possibility of use, e.g. the illness of a hired slave, or the collapse of a rented house. The hirer or renter is further entitled to cancel the *ijāra* if he has a valid excuse (*'udhr*), particularly if the purpose of the contract is obviated; this is defined very broadly, so that even the hire of a mount can be cancelled if the hirer renounces the journey. The *ijāra* is also cancelled by the death of one of the contracting parties. In the case of a defective *ijāra* the 'fair wage or rent' (*ajr* or *ujrat al-mithl*) is applicable.

Islamic law distinguishes two kinds of *ijāra*, for a period or

for carrying out a task. The period must be determined; it is not possible to hire or rent for a stated amount per month. A special case of *ijāra* for a period is the lease of agricultural property. It is forbidden to stipulate that the lessee should undertake work from which the lessor, too, derives advantage, such as dredging canals; if the crop has not yet been harvested when the lease expires, it continues for the fair rent until the crop has ripened; the lease of one agricultural property for another is forbidden because it would amount to *ribā*. Allowed are, on the contrary, albeit not unanimously, the special contracts of *muzāra'a* and *musāḳāt*, where the rent consists of a percentage of the produce; the *muzāra'a* is the lease of a field, the *musāḳāt* the lease of a plantation of fruit trees or vines.

Services can be hired either for a period or by a contract for work (*ajīr*, the hired servant; *ajīr khāṣṣ*, the employee; *ajīr mushtarak*, the self-employed artisan). An archaic contract which is tolerated, by *istiḥsān*, because it is customary, is the hire of a wet-nurse for her food and clothing. There are special forms of *khiyār* if the artisan has carried out the work contrary to the contract; the employer has the choice either of refusing acceptance of the work and demanding compensation for his material, or of accepting the work and paying the 'fair' but not more than the stipulated wage. With regard to liability in this case, it is contested whether the artisan is in the privileged position of a depositary (above, p. 147 f.); apart from this, there exists a special kind of liability for what the artisan destroys by working on it; in most cases the employer has the choice either of paying the wage and demanding compensation for the completed work, or of not paying the wage and demanding compensation for his material. On the retention of a thing by the artisan for wages due for work done on it, see above, p. 140.

The contract of manufacture (*istiṣnā'*), on the other hand, is merely a *salam* contract; it is valid only in so far as it is customary.

4. *Society*. The concept of corporation does not exist in Islamic law (neither does that of a juristic person; cf. above, p. 125); only the *'āḳila* can be regarded as a rudimentary form of corporation. There is also no freedom of association, and only certain kinds of society (*sharika* or *shirka*; *sharīk*, the partner), or more specifically of mercantile partnership (*sharikat 'aḳd*), as

opposed to joint ownership (*sharikat māl*), are permitted. This mercantile partnership falls within the sphere of the procuration (*wakāla*). Two partners only are generally envisaged.

Islamic law distinguishes the following kinds of partnership. (*a*) the unlimited mercantile partnership (*mufāwaḍa*), with full power and liability of each partner; it amounts to a mutual procuration and suretyship, and is possible only with equal shares. It engages the whole property of both partners, excepting only food and clothing for themselves and their families, which each buys separately; there exists therefore no separate social capital. It is not possible between free men and slaves, Muslims and *dhimmīs*, &c.

(*b*) The limited liability company (*sharikat 'inān*), which amounts to a mutual procuration; each partner is responsible to third persons for his own transactions, and he has the right of recourse against the other partner to the amount of his share. This kind of partnership engages only the capital which has been brought in, and it can be restricted to certain kinds of transactions. The shares of the partners can be different, and if both do not do the same amount of work, their shares in the profit may differ from their shares in the capital.

(*c*) The partnership of artisans (*sharikat al-ṣanā'i' wal-taḳabbul*), for the joint pursuit of a trade or of connected trades.

(*d*) The credit co-operative (*sharikat al-wujūh*), without capital; it consists of pooling the credit of the partners for buying goods on credit, reselling them, and sharing the profit.

The sleeping partnership (*muḍāraba*), which has common features with the *muzāra'a* and the *musāḳāt*, is not a society proper; it consists of a fiduciary relationship (*amāna*) and a procuration, and becomes a partnership only as far as the profit is concerned. The sleeping partner (*rabb al-māl*) bears the loss. A defective *muḍāraba* is treated as if it were a hire of services; it becomes defective if it is stipulated that a fixed sum, instead of a percentage of the profit, shall be the share of one of the partners, if it is stipulated that the working partner shall bear the loss, or if the profit cannot be determined exactly, e.g. if it is stipulated that the working partner shall live in a house belonging to the sleeping partner, so that the notional rent of the house becomes part of the profit. How far the expenses are borne by the working partner and how far by the partnership

is laid down in detail. When a profit is followed by a loss, the procedure in certain cases is the same as if the profit had been distributed already, so that the working partner is not affected by the loss. When the *muḍāraba* is dissolved, the working partner may still exchange gold for silver after notice of dissolution has been given, if the working capital was silver, and vice versa. This is admitted by *istiḥsān* because it is customary; in strict *ḳiyās* he would be entitled only to sell the remainder of the merchandise because both precious metals are regarded equally as price. The *muḍāraba* has become an important device for circumventing the prohibition of *ribā*.

5. *Deposit* (*wadī'a*). The deposit is the commission given by the owner to another to hold his property in safe custody; it is a fiduciary relationship (*amāna*). The safe-keeping must be assured by the depositary himself or by a member of his family. The depositary's refusal to return the deposit, his denial that a deposit exists, and its confusion with his own property, are usurpation and engender liability; other kinds of 'transgression' (*ta'addī*; above, p. 147 f.), particularly using the deposit, engender liability too. The effects of these other kinds of *ta'addī* in the case of a deposit are different from those in the cases of hire and lease and of the loan of non-fungible objects; in the case of a deposit, liability ceases when the *ta'addī* ceases, but in the case of the other contracts it continues until the termination of the contractual relationship.

6. *Loan of non-fungible objects* ('*āriyya*, *commodatum*). '*Āriyya* is defined as putting another temporarily and gratuitously[1] in possession of the use of a thing, the substance of which is not consumed by its use. It is distinguished as a separate contract from the loan of money and of other fungible objects which are intended to be consumed (this is the *ḳarḍ*, *mutuum*). The borrower may, generally speaking, lend the borrowed thing to a third party, but he must not hire it out or give it as a security. The owner may at any time demand the return (*rujū'*) of the thing which he has lent, but he may become liable for damages, for instance if he prematurely demands the return of a field which he has lent for a long period and the borrower has planted on it.

7. *Donation* (*hiba*). A donation becomes complete (*tāmm*) only through taking possession as fully as possible under the

[1] Any stipulated reward would be unjustified enrichment.

circumstances; this requires, generally speaking, the permission of the donor. A special case is the donation on condition of giving a countervalue; having been a donation in the first place, it becomes a sale after the countervalue has been given. It is possible to revoke (*rujū'*) a donation before the donee has taken possession; after he has taken possession, this is strongly reprehended and excluded in a number of cases, one of which is that a countervalue has been given. Should the object of the donation or the countervalue be vindicated, the return of the countervalue or of the object, respectively, may be claimed under certain conditions.

The charitable gift (*ṣadaḳa*) is treated as a donation, except that it cannot be revoked.

Archaic forms of donation are (*a*) donation for life (*'umrā*); Islamic law treats it as an unconditional donation; (*b*) donation with the stipulation that the object becomes the property of the surviving party (*ruḳbā*); it is invalid on account of uncertainty, but some authorities treat it in the same way as the *'umrā*.

8. *Suretyship* (*kafāla*; *kafīl*, the guarantor; *aṣīl*, the principal debtor). Suretyship in Islamic law is the creation of an additional liability with regard to the claim, not to the debt, the assumption not of the debt but only of a liability, and it has its origin in procedure. It is of two kinds, suretyship for the person (*kafāla bil-nafs*) and suretyship for the claim (*kafāla bil-māl*).

Standing surety for a person means undertaking the liability for the appearance of the debtor or of his agent in a lawsuit; it is effective only if a lawsuit is possible, and not if the debtor has absented himself and his whereabouts are unknown; it is extinguished by the death of the guarantor or of the debtor; in the case of non-performance, the guarantor is imprisoned.[1]

Suretyship for the claim can be independent or additional to suretyship for the person; if the guarantor stipulates that the debt of the principal debtor be remitted, its effect is that of the *ḥawāla*.

Acceptance by the creditor is necessary in either case of suretyship. Suretyship is possible only in connexion with an already existing claim concerning property; it is therefore not possible in connexion with *ḥadd* punishments, retaliation, and the payment due by the slave under a contract of *mukātaba*; on the other hand, it is possible not only in connexion with debts of

[1] See also below, p. 202.

money but also with unsecured claims to non-fungible objects. The liability of the guarantor can, generally speaking, not go beyond the liability of the debtor; therefore the acquittance of the debtor by the creditor also acquits the guarantor, but not vice versa. An exception is made in the case of suretyship for the debt of a slave for which this last would become liable only when he is manumitted (see above p. 128); then the guarantor is nevertheless liable for immediate payment, because suretyship cannot be made subject to the stipulation of a term, and it obliges with immediate effect. A recourse of the guarantor against the principal debtor is possible only if the latter has asked him to stand surety.

9. *Obligation under oath.* Islamic law regards as an oath (*yamīn*) every statement or undertaking which is emphasized by the words 'by Allah' or by a similar formula; in the case of non-fulfilment of the undertaking a religious expiation (*kaffāra*), which need not be more than fasting on three consecutive days, must be performed, but there is no punishment for perjury concerning the past. Islamic law regards as an oath, too, an undertaking with a self-imposed penalty (above, p. 117) and, in general, a declaration by which a unilateral disposition is made dependent on the occurrence of a certain event, such as 'if I do such and such a thing, or if such and such a thing happens, my wife is repudiated, or my slave is manumitted'. In these cases the disposition becomes effective automatically if the condition on which it was made dependent is fulfilled. This kind of conditional repudiation and manumission has acquired considerable importance in the practice of Islamic law.

10. *Unauthorized agency.* Islamic law does not, on principle, recognize unauthorized agency of a stranger as a source of obligations, but the principal can approve the act of an unauthorized agent (*fuḍūlī*) and thereby make it valid. Expenses made in the interest of a found object or of a foundling (*laḳīṭ*) create an obligation only if they have been made with the permission of the authorities, which, however, can be given afterwards. Correspondingly taking up a found object is merely recommended, obligatory only if its loss is to be feared. As an exception, Islamic law imposes the obligation of paying a reward (*ju'l*) for bringing back a fugitive slave from a distance of more than three days' journey (except between near relatives); this

was originally based on a public offer of reward, but has lost this character and has been fixed at 40 dirhams.

11. *Obligations arising from torts and crimes.* These comprise not only liability for damage to property but liability to retaliation for crimes against the person, and liability for monetary payments in place of retaliation, for which in many cases not the author of the tort but his *'āḳila* is responsible, and all give rise to a private claim (*ḥaḳḳ ādamī*). For practical reasons, however, these last will be discussed below, pp. 177 f., 181 ff. There remains the special case of *ghaṣb*.

Ghaṣb, usurpation of the property of another (including the abduction of a free person), is defined as the annulment of legitimate possession by establishing an illegitimate possession. It is a sin, makes the usurper (*ghāṣib*) liable to discretionary punishment, and engenders the obligation of return to the owner in the same place, as well as the highest degree of liability known to Islamic law. The usurper is liable for the loss of the usurped object, even in the case of a usurped slave's dying of a wound inflicted upon him by his owner before the usurpation (because the *ghaṣb* breaks the continuity of the effect of the owner's act), or in the case of a usurped free child's dying of lightning or of a snake bite (because the usurper has by the *ghaṣb* exposed him to the danger). The usurper is equally liable for the acquisition of ownership in the usurped object by specification, commixtion, and confusion, and the owner often has the choice of more than one way of making the usurper responsible. The usurper is further liable for a diminution of value, also indirectly for a delict of the usurped slave, that is to say, the owner is directly responsible but has the right of recourse against the usurper. The usurper is, however, not responsible for the proceeds and for an increase in value, but he is responsible for the the usufruct of a *waḳf*. The person who exercises duress is assimilated to the usurper.

These provisions, which reflect the social conditions in the formative period of Islamic law, in which acts of misappropriation of private property by high-handed action were frequent, not only protect the owner in all transactions in which possession is transferred, but cover those cases of unlawful appropriation which fall outside the very narrow definitions of delicts against property (theft and highway robbery) in penal law.

22

FAMILY

1. *The family* is the only group based on consanguinity or affinity which Islam recognizes. Islam is opposed to tribal feeling, because the solidarity of believers should supersede the solidarity of the tribe. Intermediate groups have left traces only in connexion with succession (the *'aṣaba*), with crimes against the person (the *'āḳila*), and with the duty of maintenance beyond the limits of the family in the narrow meaning of the term; but these are merely extensions of the family and not groups in their own right.

2. *Marriage* (*nikāḥ*; *zawj*, the husband; *zawja*, the wife) is a contract of civil law, and it shows traces of having developed out of the purchase of the bride; the bridegroom concludes the contract with the legal guardian (*walī*) of the bride, and he undertakes to pay the nuptial gift (*mahr*, *ṣadāḳ*) or 'dower' (in the sense in which the term is used in the Old Testament), not to the *walī* as was customary in the pre-Islamic period, but to the wife herself. The contract must be concluded in the presence of free witnesses, two men or one man and two women; this has the double aim of providing proof of marriage and disproving unchastity. The requirements made of the witnesses for the second aim are lower than those for the first, so that witnesses suffering from legal defects may assure the second aim but not the first. This contract is the only legally relevant act in concluding marriage; privacy (*khalwa*) between husband and wife, and consummation (*dukhūl*) are facts which may have legal effects when the marriage is dissolved, but are not essential for its conclusion. The *walī* is the nearest male relative, in the order of succession (as *'aṣaba*), followed by the manumitter and his *'aṣaba*, and failing those, the *ḳāḍī*. The *walī* can give his ward in marriage against her will if she is a minor, but when she comes of age she has the right of rescission; some, however, hold that she does not have this right if it was her father or

grandfather who gave her in marriage. (See also above, p. 117.) Similar rules apply if the bridgroom, as a minor, is married by his *walī*. Also the slave woman whom her master has given in marriage against her will has the right of rescission when she becomes free. A free woman who is fully responsible may give herself in marriage, but the *walī* has the right to object if the prospective husband is not of equal birth. The degrees of equality by birth (*kafā'a*), which is demanded only of the man, among the free Muslims are: members of Ḳuraysh, the tribe of the Prophet; other Arabs; and non-Arabs (with subdivisions of these degrees).

The free man may be married to up to four wives simultaneously, the slave to up to two; but the man who is already married to a free wife may not marry a wife who is a slave. There are numerous impediments to marriage, all based on relationship. (On the difference of religion, see above, p. 132).

(*a*) Marriage is forbidden with the *maḥārim* (plural of *maḥram*), the 'non-marriageable persons' *par excellence*, i.e. one's female ascendants and descendants, the (former) wives of one's ascendants and descendants, one's sister and the female descendants of one's sister and brother, one's paternal and maternal aunts and the sisters and aunts of the ascendants, one's mother-in-law and the other female ascendants of one's wife, and one's stepdaughter and the other female descendants of one's wife (this last group only if the marriage with the wife was consummated). It is therefore permitted to marry one's first cousins and the half-brother's half-sister (from another marriage).

(*b*) Fosterage (*raḍā'*), i.e. relationship by nursing, is an impediment to marriage of not quite the same extent, the wet-nurse taking the place of the mother. It can combine its effects with those of consanguinity and affinity; for instance, it is forbidden to marry the sister of one's foster-mother. To produce a relationship by nursing, the smallest amount of suckling during the first two and a half years of one's life is sufficient.

(*c*) Forbidden, too, is the 'combination' (*jam'*), i.e. simultaneous marriage with two women who are related to each other within the forbidden degrees by consanguinity, affinity, or fosterage. In this case, only one of the two women is *maḥram*, 'non-marriageable'. The same rule applies to slave women who are in this relationship; they cannot be concubines simultaneously.

To produce affinity which acts as an impediment to marriage, no valid marriage is required, not even intercourse; lustful kissing is sufficient; for instance, if the wife kisses her stepson lustfully, her marriage becomes invalid. Similarly, in the case of 'combination', if the wife suckles her fellow wife, a case not quite impossible under conditions of child marriage and extended suckling, both marriages are, for the time being, invalid until the husband decides in favour of one; these, then, are means of forcing a divorce.

Special stipulations inserted in the contract of marriage, for instance that the husband shall not marry another woman, or that the bride shall be a virgin, are not binding; if the *mahr* has been fixed in consideration of a stipulation of this kind, and it is not fulfilled, the 'fair *mahr*' takes its place; but a conditional repudiation achieves the effect of imposing a stipulation.

Temporary marriage (*mut'a*), recognized by the 'Twelver' Shiites, is not admitted by the Sunnis, but actual conditions are hardly different on both sides, because of the facility of divorce, the stability of most *mut'a* marriages among the Shiites, and the possibility of concubinage; among the Sunnis, too, the effect of a *mut'a* marriage can be achieved by an informal agreement outside the contract of marriage.

The distinction between *fāsid* and *bāṭil* is also made with regard to contracts of marriage. If a *fāsid* marriage is consummated, a *mahr* must be paid to the wife, the wife must keep the waiting period if the marriage is dissolved, and the children born of it are legitimate—all this in contrast with a marriage which is *bāṭil*. Which defects in the contract make a marriage *fāsid* and which *bāṭil*, is decided casuistically, with some controversy on details. Concurrent with this doctrine are two further considerations: the prohibition of unlawful intercourse which applies equally to *fāsid* and to *bāṭil* marriages, and the far-reaching recognition of *shubha* (below, pp. 176, 178) which makes the *ḥadd* punishment for unchastity inapplicable; as a result, the systematic discussions in the sources may seem somewhat complicated.

3. *Divorce.* The normal case is the repudiation (*ṭalāḳ*) of the wife by the husband; it is either revocable (*raj'ī*) or definite (*bā'in*). The difference depends on the way in which it is formulated; if a normal, regular expression is used, it is revocable,

otherwise (and also if the repudiation is pronounced before consummation of the marriage or for a consideration) it is definite. Therefore, and because repudiation is a disposition with immediate effect, also in order to distinguish between ordinary repudiation and its variant forms, all possible modes of expression are interpreted casuistically. A revocable repudiation does not dissolve the conjugal community and can be withdrawn during the waiting period of the wife; a definite repudiation dissolves the conjugal community, so that a new marriage is necessary if the former husband and wife wish to return to each other. After a husband has repudiated his wife three times (twice, if she is a slave), the former husband and wife can marry again only after the wife has been married to another husband and this marriage has been consummated.[1] The triple repudiation has therefore become the normal form of divorce. The husband ought to pronounce three separate repudiations during three successive states of purity from menstruation of his wife, but it has become customary to pronounce the triple repudiation in one declaration; this is considered an innovation and is forbidden, but is recognized as valid. Conditional repudiation (*ta'līḳ al-ṭalāḳ*), by which repudiation happens automatically if a certain event occurs (above, pp. 117, 159), has become very important in practice. There is also the possibility of *tafwīḍ*, conferring on the wife the power to repudiate herself; this power must, in principle, be exercised in the same meeting (*majlis*) of husband and wife, unless the declaration of *tafwīḍ* declares the contrary; but even a *tafwīḍ* in the form 'you are repudiated whenever you will' is valid.

To the variant forms of repudiation belong the *mubāra'a*, the dissolution of marriage by agreement with mutual waiving of any financial obligations, and, more important, the *khul'*, by which the wife redeems herself from the marriage for a consideration. On the part of the wife, the *khul'* is regarded as an exchange of assets, but on the part of the husband as an undertaking under oath, so that he cannot withdraw an offer of *khul'* which he has made.

A further variant form of repudiation is the *īlā'*, a dissolution of the conjugal community by the oath of the husband to abstain from marital intercourse for four months (two months

[1] On the so-called *taḥlīl*, an evasion of this rule, see above, p. 81.

if the wife is a slave); if the husband keeps the oath it has the effect of a definite repudiation, but it can, as any other oath, be withdrawn against performance of the *kaffāra* or of a self-imposed penalty, as the case may be. Presumably an old form of repudiation which Islam does not recognize as such is the *ẓihār*, the use of the formula 'you are for me (as untouchable) as the back (*ẓahr*; *pars pro toto*, for body) of my mother'; it does not dissolve the marriage but is regarded as an impious declaration which requires a particularly heavy *kaffāra* which, in contrast with the *kaffāra* in other cases, can be enforced by the *ḳāḍī*.

The *tafrīḳ* (literally 'separation', but a real dissolution of marriage) is normally pronounced by the *ḳāḍī*, on his own initiative or at the instance of one of the spouses, exceptionally by the *walī* in exercise of his right of objection or by the wife in exercise of her right of rescission at manumission. Grounds on which the wife may demand dissolution of her marriage by the *ḳāḍī* are the exercise of her right of rescission on coming of age, impotence of the husband, and, according to some authorities only, his lunacy and certain grave chronic diseases. The husband may demand dissolution of the marriage by the *ḳāḍī* in exercise of his right of rescission on coming of age; he can always exercise his right of repudiation.[1] The *ḳāḍī* pronounces *tafrīḳ* on his own initiative in the case of serious impediments to marriage, e.g. the 'combination' of two sisters; in other cases he merely forbids the conjugal community.

Marriage is also dissolved by *liʿān*, which belongs to penal law; the husband affirms under oath that the wife has committed unchastity or that the child born of her is not his, and she, if the occasion arises, affirms under oath the contrary; these affirmations are made in stringent forms of a magical character.

Finally, the marriage ceases if it becomes invalid, either through apostasy from Islam of one of the spouses, or by one of them, being a slave, becoming the property of the other.

The legal position of the wife, under a system of polygamy, concubinage, and repudiation, is obviously less favourable than that of the husband, but she has at least certain possibilities of

[1] The distinction between *ṭalāḳ* and *tafrīḳ* is not purely formal; if *tafrīḳ* takes place before consummation of the marriage for a reason inherent in the wife, no financial obligations from the marriage arise for the husband, in contrast with *ṭalāḳ*. This is of greater practical importance in the other schools of law, where there are more grounds for demanding *tafrīḳ* on the part of the husband (and of the wife).

obtaining a divorce, and her situation is in fact considerably improved by the effects of the matrimonial régime and by the institution of conditional repudiation, wherever it has become customary to pronounce it immediately after the conclusion of the marriage.

Every dissolution of a marriage which has been consummated, even by an 'untrue', i.e. not undisturbed, privacy of husband and wife, entails a waiting period (*'idda*) of the wife before she can marry another husband. The *'idda* of a pregnant woman lasts until her delivery; if she is not pregnant it lasts four months and ten days if the husband has died and she is a free woman (half that time if she is a slave); in all other cases (also after extra-matrimonial intercourse) it lasts until three menstruations have occurred if she is a free woman or an *umm walad* (two menstruations for other slave women) or, if she does not menstruate, three months (half that time if she is a slave woman other than an *umm walad*). There is an analogous period which must elapse before the owner may begin to have intercourse with a slave woman whom he has bought; it is called *istibrā'*, and lasts normally until one menstruation has occurred or, alternately, one month. It is not obligatory but only recommended if the previous owner of the female slave is herself a woman.

4. *Family relationships.* The marital power is far-reaching and includes a limited right of correction; the husband may forbid his wife to leave the house, and may restrict the access even of her own relatives to her. A disobedient wife is liable to correction by the husband and loses her right of maintenance. On the other hand, the wife may refuse, for herself and for her children, to accompany the husband on journeys.

The recognized duration of pregnancy is from six months to two years; this implies that the husband must acknowledge as his own a child born within two years from the dissolution of the marriage, and his refusal to do so would be *ḳadhf*; he may also acknowledge as his own a child born still later. Although the acknowledgement of paternity of a person of unknown origin amounts to an adoption, adoption as such does not exist; it was rejected by the Koran (sura xxxiii. 4 f.). The foundling (*laḳīṭ*) can be claimed by anyone as his offspring; until the contrary is proved he is free and a Muslim, unless he has been

found in a non-Muslim quarter; if he is claimed by no one, the person who has found him has restricted parental authority. The right of the mother in the child is stronger than that of the father; she has the right to the care of the child (*ḥaḍāna*), in the case of boys until the age of 7 or 9, in the case of girls until they become of age. It is not a duty but only a right which the mother loses if she concludes a subsequent marriage with a person other than a *maḥram* of the child, i.e. his relative within the prohibited degrees; in this case, and if the mother dies, the right of *ḥaḍāna* is transferred to the nearest female relative, first of the mother, then of the father.

5. *Matrimonial régime.* There is no matrimonial community of goods and no dot or marriage portion (dowry in the Western sense); the wife has the right to the nuptial gift (*mahr*) and to maintenance (*nafaḳa*); this gives her a strong position as against the husband. The wife may leave the fixing of the *mahr* to the husband, which may amount to a waiver. The minimum amount of the *mahr* is ten dirhams; if the amount of *mahr* has not been fixed (also in some cases if the stipulation or the marriage itself is *fāsid*), the 'fair *mahr*' (*mahr al-mithl*), which is determined with regard to the social position and the other qualities of the bride, not of the bridegroom, is payable. It is customary to pay part of the *mahr* immediately and to postpone payment of the rest, but it is possible to stipulate immediate payment or postponement of the whole. The unpaid part becomes due (1) on the death of one of the spouses in every case, (2) in the case of repudiation if the marriage has been consummated at least by a 'true', i.e. undisturbed, privacy between husband and wife. If repudiation takes place before consummation, the wife has the right to half the stipulated *mahr* (or, if no *mahr* was stipulated, to an indemnity which is called *mut'a*[1] and consists of a set of clothing, on the basis of sura ii. 236). The obligation of the husband to pay the *mahr* in full in the case of repudiation, acts as a powerful limitation of his freedom to repudiate.

The maintenance of the wife comprises food, clothing, and lodging, i.e. a separate house or at least a separate room which can be locked, for the well-to-do also a servant; she is not obliged to bear any part of the expenses of the matrimonial establishment. Her claim to maintenance is suspended if she

[1] To be distinguished from *mut'a* in the sense of temporary marriage.

is a minor, is disobedient (in particular, if she leaves the house unauthorized or refuses marital intercourse), is imprisoned for debt, performs the pilgrimage without her husband, or is abducted (by *ghaṣb*), all cases in which she cannot fulfil her marital duties. If the husband absents himself without providing for the maintenance of the wife, the *ḳāḍī* authorizes her to provide for it by pledging her husband's credit. The claim to maintenance continues during the *'idda*, provided the marriage has not been dissolved through a fault of hers (e.g. by kissing her own stepson, or by apostasy from Islam).

On inheritance between spouses, see below, p. 171. The right of the wife to inherit cannot be frustrated by repudiation, because the wife who has been definitely repudiated during the last illness of the husband inherits if he dies during the *'idda*. Conversely, the husband inherits if the wife has caused the dissolution of the marriage during her last illness and dies during the *'idda*.

The children have a claim to maintenance only if they are poor and, in principle, only against their father. The maintenance of the illegitimate child and of the child whose paternity has been contested by *li'ān* is the responsibility of the mother, that of the foundling the responsibility of the public treasury. The parents have no right of usufruct in the property of their children. The right of the father or grandfather to act on behalf of his children or grandchildren is not unlimited; he cannot conclude unilaterally disadvantageous transactions, such as lending their property as *'āriyya*, making an amicable settlement if the opponent produces no evidence, or abandoning the claim to retaliation. A legal guardian who is not the father or grandfather is still further restricted in his powers.

Beyond these cases, only those who are not themselves poor are obliged to provide maintenance. In particular, the sons and daughters must provide equally for the maintenance of their parents. The incidence of the duty of maintenance differs from that of the right of inheritance; it may happen that a person is obliged to provide maintenance without being a legal heir.

23

INHERITANCE

1. *General.* There is no institution of an heir (*heredis institutio*) in Islamic law, and the testament is restricted to making legacies and to appointing an executor and/or guardian. The law of inheritance provides for fixed shares which take precedence over the succession of the next of kin to the residue. There is no universal succession (*successio in universum ius*);[1] out to the estate (*tarika*) are paid, first, the costs of the funeral and, second, the debts; these become immediately due by the death.[2] If the debts equal or exceed the assets of the estate, the assets are distributed among the creditors, if necessary in proportion to their claims. Conversely, claims form part of the estate. Obligations and rights survive to a lesser degree than debts and claims; many contracts are dissolved by death, for instance hire and lease, and in some cases suretyship. With regard to the right of rescission, the *khiyār al-ta'yīn* and the *khiyār al-'ayb* survive, but not the *khiyār al-ru'ya* and the *khiyār al-sharṭ*. From the remaining assets are further deducted the legacies, which are restricted to one-third of these assets unless the heirs give their approval or do not exist at all. The distinction between debt and legacy is often doubtful but important because the heirs have an interest in having considered as legacies as many dispositions as possible. An important distinction is that the manumission of the *umm walad* is to be debited to the whole of the assets, that of the *mudabbar* to the third. Not only monetary values but also other claims, such as the claim to exact retaliation, can be inherited.[3]

[1] But each heir is considered to have become the owner of his individual portion on the death of the deceased.

[2] On debts arising from an *iḳrār* made during the mortal illness, see above, p. 151.

[3] The waiver of the claim to blood-money by a fatally injured person in a case of *khaṭa'* is regarded as a legacy and therefore restricted to one-third of the assets, but the gratuitous waiver of retaliation, which implies the waiver of blood-money in a case of *'amd* is effective without this restriction.

2. *Succession* (*farā'iḍ*, the allotted portions). Grounds of exclusion from succession are the quality of being a slave, having caused the death of the deceased, difference of religion, and difference of domicile (between the Islamic state and a non-Islamic country, as well as between these last). Grounds of qualification as an heir (*wārith*) are consanguinity, marriage, and clientship, in the following order.

(1) those entitled to a fixed share (*farḍ, sahm*);

(2) the *'aṣaba*, roughly corresponding to the agnates; unless the shares of the first group cover the whole of the estate, groups (1) and (2) inherit together, the *'aṣaba* taking the residue after the shares of the first group have been deducted; but apart from this, each group excludes the following groups from succession;

(3) the manumitter (who is the patron, *mawlā*, of the person he has manumitted) and, after him, his *'aṣaba*;

(4) if there are no heirs belonging to groups (2) and (3), the heirs belonging to the first group once more, by having their shares increased in proportion so that they cover the whole of the estate;

(5) the *dhawu 'l-arḥām*, roughly corresponding to the cognates;

(6) the patron chosen by a convert to Islam, on conversion, by a contract of clientship (the *mawla 'l-muwālāt*);

(7) relatives who have been acknowledged as such by the deceased, without evidence;

(8) beneficiaries of legacies, without restriction to one-third of the estate, if there are no (other) heirs; this provision, systematically speaking, does not belong here;

(9) the public treasury.

These rules presuppose a patriarchal organization of the family, modified by the inclusion of some cognates in the first and the second group; clientship has precedence over the acknowledgement of relationship, which amounts to an adoption. The right of representation, the concept that a pre-deceased heir is represented by his descendants, does not exist in Sunni law.

The most typical feature of the Islamic law of inheritance is the shares of certain heirs (the first group, above), which are in all essentials laid down in the Koran.

(*a*) The daughter (and if there is no daughter, the son's

daughter) and the full sister (and if there is no full sister, the half-sister on the father's side) receive one-half, provided there are no male relatives of the same degree (see below, on the *'aṣaba bi-ghayrih*);[1] if there are several of these female relatives, the daughter and the son's daughter exclude the sister from a share (see below, on the *'aṣaba ma'a ghayrih*), two and more daughters the son's daughter, two and more full sisters the half-sister, and they receive together two-thirds (see below, (*e*)).

(*b*) The husband receives one-half if there are no children or son's children, and one-quarter in the contrary case.

(*c*) The wife receives one-quarter if there are no children or son's children, and one-eighth in the contrary case; if there are several wives, they divide this in equal portions.

(*d*) The mother receives one-third if there are no children or son's children and not more than one brother or sister, and one-sixth in the contrary case; but if in the first case husband or wife coexist with the father, the mother receives only one-third of the residue after the shares of husband or wife have been paid.[2]

(*e*) Half-brothers and half-sisters on the mother's side, if there are two or more of them, receive one-third, the males and females dividing it in equal portions; one half-brother or half-sister on the mother's side receives one-sixth. One-sixth is also the share of the father (or, if there is no father, the nearest male or female ascendant in the male line), provided there are children or son's children,[3] of the son's daughter (or son's daughters who divide it in equal portions), provided there is one daughter,[4] and of the half-sister (or half-sisters) on the father's side, provided there is one full sister (and no daughter or son's daughter; see above (*a*)).

These provisions aim at modifying a system of purely agnatic succession, under which only men inherit, in favour mainly of the nearest female relatives,[5] the spouse, and also of the father (or other ascendants). The father, who is qualified under an

[1] See also below, p. 173, n. 1.

[2] In other words, her share is reduced to half the portion of the father.

[3] If there are no children or son's children, the father is treated as *'aṣaba*; see below.

[4] This sixth 'completes' the half which is the share of the daughter, by bringing the aggregate up to two-thirds; see above (*a*). The same applies to the share of the half-sister on the father's side; see what follows.

[5] But the daughter's daughter remains excluded.

agnatic system, too, needs to be protected against being completely excluded by existing male descendants, but he is further privileged as against female descendants; if he coexists with these, he takes either his fixed share or the portion of an *aṣaba* or both. It is rare that the concurrence of several shares leads to the exclusion of near male relatives; this can never happen to the descendants and ascendants, but if a woman leaves a husband (share: one-half), the mother (share: one-sixth) and half-brothers on the mother's side (share: one-third), this exhausts the inheritance, and nothing is left over for full brothers.[1] It can even happen that the aggregate of the shares amounts to more than one unit; in this case the shares are reduced in proportion (*'awl*). For instance, a woman leaves a husband (share: one-half) and two sisters (share: two-thirds), this amounts to seven-sixths, which are reduced to sevenths.

The second group of heirs, the *'aṣaba*, is somewhat wider than that of the agnates proper. It comprises in the first place the *'aṣaba bi-nafsih* (' *'aṣaba* by themselves, in their own right'), the agnates proper, i.e. men who are connected with the deceased in the male line, in the following order: descendants, ascendants, descendants of the father, descendants of the grandfather, descendants of the great-grandfather, and so on. It comprises, secondly, and *pari passu* with the first, the *'aṣaba bi-ghayrih* (' *'aṣaba* through another'), i.e. those female relatives whose shares are one-half each (see above (*a*)); they are deemed to become *'aṣaba* through their coexisting brothers, and their portions then amount to half the respective portions of their brothers. It comprises, thirdly, the *'aṣaba ma'a ghayrih* (' *'aṣaba* in conjunction with another'), i.e. the full sister (or sisters) and the half-sister (or half-sisters) on the father's side, if they are not *'aṣaba bi-ghayrih* and are excluded from their fixed share by a daughter or son's daughter (above (*a*)). These extensions of the group of agnates, too, aim at protecting near female relatives in cases in which they receive no share, although they are less privileged than the corresponding males.

The nearer relative, in the order mentioned, excludes, generally speaking, the more remote—relatives on the father's

[1] The Mālikīs and the Shāfi'īs decide that the full brothers divide the third together with the half-brothers on the mother's side in equal portions. There are a few other similar cases.

and the mother's side exclude relatives on the father's side only, and a person entitled to inherit excludes all those who are related to the deceased through him;[1] all female ascendants are excluded by the mother, the female ascendants on the father's side also by the father and by a nearer male ascendant in the male line, but not by a male ascendant of the same degree. He who is himself excluded by having caused the death of the deceased does not exclude others; for instance, his sons are not disqualified. The transfer of the right to inherit from the manumitter to his *'aṣaba* (above, third group) takes place not simply according to the rules of inheritance, but according to a somewhat different, more archaic system. In the fourth group, husband and wife do not take part in the increase of shares. The fifth group comprises persons related to the deceased through a female, and those female relatives who are not *'aṣaba* or entitled to a fixed share; there exists a complicated system of precedence among them.

3. *Testamentary dispositions.* Testamentary dispositions are restricted to appointing an executor and/or guardian (*waṣī*) and to making legacies (*waṣiyya*; pl. *waṣāyā*). The *waṣī* must accept the charge, before or after the death; his main function in the first place is the partition of the inheritance. The *waṣī* who has been appointed by testament is not only an executor but the agent of heirs who are minor or absent, and he administers the inheritance on their behalf; or a separate person may be appointed for this last purpose. His powers as an agent are similar to those of a guardian who is not the father or grandfather; with regard to a major they are more restricted than with regard to a minor, for instance, he is not entitled to sell real property on behalf of a major. If two *waṣī*s have been appointed, each can act severally to some considerable extent. The liability of the *waṣī* is of the restricted, not of the extensive kind; the loss is borne by the estate, in certain cases even if it has occurred to the detriment of one of the heirs after the partition of the inheritance, owing to some non-malicious act of the *waṣī*. The *waṣī* is supervised by the *ḳāḍī* who may, if necessary, himself appoint a *waṣī* or remove him if he is incapable or dishonest.

[1] e.g. the full brothers and sisters and the brothers and sisters on the father's side are excluded by the male descendants and ascendants in the male line. Exceptions have been mentioned above.

The *waṣiyya* creates a right *in rem* and not merely a claim against the heirs. It cannot be made by a minor (or a slave, not even a *mukātab*). Donation, sale for less than the value, manumission, and other unilaterally disadvantageous transactions, if made during a mortal illness, are also regarded as *waṣiyya*; should the sick person not die of it in the end, these transactions are valid as if he had not been ill at all. Grounds of exclusion from a legacy are less strict than those from succession, but the person who has caused the death of the deceased is still excluded, as are the heirs themselves (unless the other heirs give their approval). Legacies must not exceed one-third of the estate; if they exceed it, their total is reduced to one-third, not in proportion but by a complicated system of reckoning based on priorities (unless the heirs give their approval). Legacies are interpreted casuistically with the tendency towards regarding them as valid whenever possible. The legacy can be revoked, either by declaration or by conduct, in particular by alienation of its object or by acts which would create ownership if applied to the property of a third party, such as specification. The legacy becomes void if the legatee dies before the legator. It needs to be accepted after the death of the legator; if the legatee dies after the legator but before he has accepted the legacy, his right is transferred to his heirs without an acceptance by these last being required.

24

PENAL LAW

1. *General survey.* The penalties envisaged by Islamic law consist of two disparate groups which correspond to the two sources from which all penal law is commonly derived, private vengeance and punishment of crimes against religion and military discipline. The first has survived in Islamic law almost without modification. The second group is represented only by crimes against religion, and that in a particular sense; certain acts which have been forbidden or sanctioned by punishments in the Koran have thereby become crimes against religion. These are: unlawful intercourse (*zinā*); its counterpart, false accusation of unlawful intercourse (*ḳadhf*); drinking wine (*shurb al-khamr*); theft (*sariḳa*); and highway robbery (*ḳaṭ' al-ṭarīḳ*). The punishments laid down for them are called *ḥadd* (plural *ḥudūd*), Allah's 'restrictive ordinances' *par excellence*; they are: the death penalty, either by stoning (the more severe punishment for unlawful intercourse) or by crucifixion or with the sword (for highway robbery with homicide); cutting off hand and/or foot (for highway robbery without homicide and for theft); and in the other cases, flogging with various numbers of lashes. Lashes can also be awarded by the *ḳāḍī* as *ta'zīr* 'chastisement'; this takes the place of the *ḥadd* in cases in which this last is not fully incurred, and it can also be awarded by the *ḳāḍī* at his discretion, starting with as little as a disapproving look or a reprimand, for any unlawful act. The number of lashes in the less-severe *ḥadd* for unlawful intercourse is 100, in the *ḥadd* punishments for false accusation of unlawful intercourse and for drinking wine 80, and in the *ta'zīr* not more than 39 (i.e. less than the lowest *ḥadd* punishment for a slave; according to others, not more than 75, less than the lowest *ḥadd* punishment for a free person). The intensity of the lashes, which is different in each case, and other details of carrying out the punishments, are regulated, too. Imprisonment (*ḥabs*) is not a punishment, except as *ta'zīr*, but

a coercive measure which aims at producing repentance (*tawba*) or ensuring a required performance. There are no fines in Islamic law.

The *ḥadd* is a right or claim of Allah (*ḥaḳḳ Allāh*), therefore no pardon or amicable settlement is possible. On the other hand, prosecutions for false accusation of unlawful intercourse and for theft, crimes which include infringing a right of humans (*ḥaḳḳ ādamī*), take place only on the demand of the persons concerned, and the applicant must be present both at the trial and the execution. In the case of unlawful intercourse the witnesses play a corresponding part; if they are not present (and, if the punishment is stoning, if they do not throw the first stones) the punishment is not carried out. The religious character of the *ḥadd* punishment manifests itself also in the part played by active repentance (*tawba*); if the thief returns the stolen object before an application for prosecution has been made, the *ḥadd* lapses; repentance from highway robbery before arrest also causes the *ḥadd* to lapse, and any offences committed are treated as ordinary delicts (*jināyāt*) so that, if the person entitled to demand retaliation is willing to pardon, blood-money may be paid instead or the punishment remitted altogether. In the case of offences against religion which are not sanctioned by *ḥadd* punishments (below, section 4), the effects of repentance are even more far-reaching. There is a strong tendency to restrict the applicability of *ḥadd* punishments as much as possible, except the *ḥadd* for false accusation of unlawful intercourse, but this in its turn serves to restrict the applicability of the *ḥadd* for unlawful intercourse itself. The most important means of restricting *ḥadd* punishments are narrow definitions. Important, too, is the part assigned to *shubha*, the 'resemblance' of the act which has been committed to another, lawful one, and therefore, subjectively speaking, the presumption of bona fides in the accused. Duress is recognized to a wide extent, in the case of unlawful intercourse and of drinking wine to the extent that it must be proved that the act was voluntary. Only one *ḥadd* is due for several offences of the same kind that have not yet been punished. There are short periods of limitation, in general one month; in the case of drinking wine, according to the prevailing opinion, the time during which the smell of wine or drunkenness persists. This does not mean that the offence

is not punishable any longer, but that the *ḳāḍī* does not accept evidence, if there is a justification for the delay in reporting the offence, such as distance, the period of limitation does not run. Finally, proof is made difficult; in contrast with the acknowledgement concerning other matters, the confession of an offence involving a *ḥadd* can be withdrawn (*rujū'*); it is even recommended that the *ḳāḍī* should suggest this possibility to the person who has confessed, except in the case of false accusation of unlawful intercourse; and particularly high demands are made of the witnesses as regards their number, their qualifications, and the content of their statements. These demands are most severe with regard to evidence on unlawful intercourse, on the basis of sura xxiv. 4 which refers to an accusation that had been raised against Muhammad's wife, 'Ā'isha; in this case four male witnesses are required instead of the normal two, and they must testify as eyewitnesses not merely to the act of intercourse but to 'unlawful intercourse' (*zinā*) as such; correspondingly, a confession of unlawful intercourse, in order to bring about the *ḥadd* punishment, must be made on four separate occasions.[1] A further safeguard lies in the fact that an accusation of unlawful intercourse which is dismissed constitutes *ḳadhf* which itself is punishable by *ḥadd*; for instance, if one of the four required witnesses turns out to be a slave or to be otherwise disqualified from giving valid evidence, or if there are discrepancies between their respective depositions, or if one of them retracts (*rujū'*) his evidence, all are, in principle, liable to the *ḥadd* for *ḳadhf*.

The liability of the slave (but not of the woman) to *ḥadd* punishments is less; he is punished with half the number of lashes applicable to a free person, and he is not subject to the penalty of being stoned to death.

The approach of Islamic law to the *jināyāt*, i.e. homicide, bodily harm, and damage to property, is thoroughly different. Whatever liability is incurred through them, be it retaliation or blood-money or damages, is the subject of a private claim (*ḥaḳḳ ādamī*); there is no prosecution or execution *ex officio*, not even for homicide, only a guarantee of the right of private vengeance, coupled with safeguards against its exceeding the

[1] But in the case of other offences sanctioned by *ḥadd* a single confession is sufficient.

legal limits; pardon (*'afw*) and amicable settlement are possible, but repentance has no effect. There is no tendency to restrict liability here, and the whole attitude of Islamic law is the same as in its law of property. (See also above, pp. 148, 160.) The concept of bona fides plays no prominent part, but there is a highly developed theory of culpability which distinguishes, not quite logically, deliberate intent, quasi-deliberate intent, mistake, and indirect causation. The life of the slave is protected in the same way as that of the free person, and on his part he is liable to retaliation for homicide with deliberate intent; in all other respects, with regard to *jināyāt* committed by him and against him, he is treated as property for which the owner is responsible and damage to which creates a liability to the owner.

There is, finally, a small group of provisions which fall under neither of the two main headings.

2. Ḥadd *punishments*

(*a*) Unlawful intercourse (*zinā*). It is defined as intercourse without *milk* or *shubhat milk*; *milk* is the right to it arising from marriage or ownership of a female slave; *shubha* with regard to the wife exists, for instance, in a marriage which is *fāsid* but which the husband might have considered valid; or during the waiting period following the definite dissolution of the marriage, which the husband might have thought similar to the waiting period after a revocable repudiation; and with regard to a female slave if the master has manumitted his *umm walad* but not yet dismissed her, or if he has sold his female slave but not yet delivered her, or if the female slave belongs to one of his ascendants or descendants (or to his wife, but not to his brother), or if he is the part-owner of a female slave. In many of these cases, in which no *ḥadd* takes place, intercourse creates a financial obligation, payment of the 'fair *mahr*' to a free woman and of a compensation (called *'uḳr*) to the owner or the part-owner of a female slave. Whether *ḥadd* is applicable or not is disputed in some cases, even important ones, e.g. if intercourse has taken place with a woman hired for that purpose, or for homosexuality. If in these cases *ḥadd* is not applicable, then at least *ta'zīr* is. The *ḥadd* is stoning to death for the *muḥṣan*, 100 lashes for others (50 for the slave in every case).

(*b*) False accusation of unlawful intercourse (*ḳadhf*). Protected by this *ḥadd* is only the *muḥṣan*, in the other meaning of this term (above, p. 125), not therefore, in particular, a person who has been convicted of *zinā* or of a similar act.[1] Only explicit accusation of unlawful intercourse or, in the case of a woman, impugning the legitimacy of her child, amounts to *ḳadhf*. The punishment is 80 lashes (40 for the slave). Here, too, *ta'zīr* is applicable if the *ḥadd* is not fully incurred, e.g. for false accusation of unlawful intercourse directed against an unbeliever or a slave, who are only technically not *muḥṣan*, or for a grave insult of a free Muslim which does not amount to *ḳadhf*, e.g. 'O son of a whore'[2] or 'O sinner (*fāsiḳ*)'; no *ta'zīr* is awarded for expressions such as 'O dog', unless the insult has been directed against a scholar in religious law or a descendant of the Prophet; this last provision is based on *istiḥsān*.

Complementary to the rules concerning *ḳadhf* is the procedure of *li'ān* between husband and wife; it makes the *ḥadd* for *ḳadhf* inapplicable to the husband, the *ḥadd* for *zinā* to the wife (provided she, too, makes the affirmation under oath). The concept of adultery, however, is unknown to Islamic law; the wife has no exclusive right on the person of the husband, and although extra-marital intercourse on her part is neglect of her marital duties, it is punished only as a crime against religion.

(*c*) Drinking wine (*shurb al-khamr*). There are two grounds for punishment, drinking wine in any quantity, and being drunk and incapable from whatever cause. The application of this *ḥadd* is made difficult by the required proof that the act was voluntary; therefore the *ḥadd* cannot be applied, without further proof, to a person found drunk and incapable. The punishment is 80 lashes (40 for the slave).

(*d*) Theft (*sariḳa*). *Sariḳa* occurs if a *mukallaf*, including a slave, takes by stealth something of the value of at least ten dirhams, in which he has neither the right of ownership (*milk*) nor *shubhat milk*, out of custody (*ḥirz*); this last consists either of keeping it in a properly secured place or of the presence of a custodian. The stipulation of *milk* or *shubhat milk* excludes everything that belongs

[1] Also the *ḳadhf* directed against a deceased person who was *muḥṣan* is punishable on the demand of his ascendant or descendant.

[2] Because the term for 'whore', *ḳaḥba*, does not amount to an explicit accusation of unlawful intercourse.

to the class of things in which the absence of the ownership is possible, therefore everything that is found in Islamic territory without an owner such as wood, grass, fishes, birds, as long as the acquisition of ownership in it is not obvious, e.g. wood that has been fashioned into a door; assimilated to this are fruits which have not been harvested and easily perishable things such as meat. The same stipulation excludes things which cannot be objects of property, such as a free person, also wine and musical instruments; assimilated to this are things which on account of their holiness are not *in commercio*, such as copies of the Koran and also books on religious sciences. It finally excludes things of which the culprit is a part-owner, including public property, or to which he has a title, including the counter-value of a claim. The stipulation of stealth excludes open robbery (*nahb*) and snatching things unawares (*ikhtilās*, used of pick-pockets, &c.). The stipulation of custody excludes theft from a near relative (*maḥram*), from a house which the accused had been permitted to enter, and embezzlement (*khiyāna*). The stipulation of 'taking' implies that the object must have been removed from the *ḥirz*; a thief who is caught red-handed within the *ḥirz*, e.g. within the house, is therefore not subject to *ḥadd* according to some, *ḥadd* does not even take place if the thief from inside the *ḥirz* hands the object to an accomplice outside). If there are several thieves, *ḥadd* takes place only if the value of the object, when divided by their number, at least equals ten dirhams. The punishment consists of cutting off the right hand and in the case of a second theft, the left foot; in the case of further thefts, and also if the other hand or other foot are not fully usable, the thief is merely imprisoned until he shows repentance. The *ḥadd* punishment excludes pecuniary liability; only if the stolen object is still in existence is it returnable to the owner.

The great majority of cases in which *ḥadd* for theft is not applicable are not punished by *ta'zīr* but fall under the rules concerning *ghaṣb*.

(*e*) Highway robbery (*ḳaṭ' al-ṭarīḳ*). This crime is regarded as related to theft on one side and to homicide on the other, but it is not subsumed under these, except in the case of active repentance before arrest; the penalties inflicted differ according to the different facts of the case. If only plunder has happened

and the value of the loot, when divided by the number of culprits, at least equals the minimum amount required for the *ḥadd* for theft to be applicable, the right hand and the left foot are cut off; if only homicide has happened, execution with the sword takes place, not as retaliation but as *ḥadd*; if both plunder and homicide have happened, execution by crucifixion alive takes place. These punishments are awarded to all accomplices, whatever their individual acts; on the other hand, if one of them is exempt from *ḥadd*, e.g. because he is a minor, the *ḥadd* for highway robbery lapses for all, although each remains criminally responsible for his own individual acts.

3. *Jināyāt* (literally 'offences', sing. *jināya*), i.e. *homicide, bodily harm*, and *damage to property*. The scale of punishments is developed in most detail for homicide (*ḳatl*). There are, on the one hand, degrees of culpability, and, on the other, degrees of legal sanctions, where a distinction is made between retaliation (*ḳiṣāṣ, ḳawad*), expiation (*kaffāra*), and blood-money (*diya*), payable either by the culprit himself or by his *'āḳila* (below, p. 186). Islamic law distinguishes:

(*a*) deliberate intent (*'amd*; *ḳaṣd*, the aim, purpose), which implies the use of a deadly implement; this entails retaliation but no *kaffāra*; the *walī al-dam*, the next of kin who has the right to demand retaliation, may waive it, either gratuitously (this is the pardon, *'afw*) or by settlement (*ṣulḥ*) with the culprit, for the blood-money, or for more, or for less, and then the *kaffāra* must be performed;

(*b*) quasi-deliberate intent (*shibh al-'amd*), i.e. an intentional act but without using a deadly implement; this entails the performance of *kaffāra* by the culprit and the payment of the 'heavier' blood-money by his *'āḳila*;

(*c*) mistake (*khaṭa'*), and cases assimilated to mistake (*mā ujriya mujra l-khaṭa'*); these entail the same, but only the normal blood-money;

(*d*) indirect homicide (*ḳatl bi-sabab*), opposed to direct, bodily causation; this entails payment of the normal blood-money by the *'āḳila* but no *kaffāra*. Cases (*a*) to (*c*) have the further effect that they exclude the culprit from inheritance from the deceased.

This scheme applies to homicide. If it is a question of bodily harm, case (*b*) is merged into case (*a*), but retaliation takes place

only for a few kinds of injuries (see below), and in all other cases normal blood-money or a fixed percentage of it is to be paid, in cases (*a*) and (*b*) by the culprit himself, in cases (*c*) and (*d*) by his *'āḳila*. Damage to property entails in all cases liability of the culprit.

There are a few cases of homicide with *'amd* in which there is no retaliation but the culprit must pay the 'heavier' blood-money: if the ascendant kills his own descendant, and if the master kills his own slave[1] or the slave of his descendant. If there are several culprits and one is exempt from retaliation for this or any other reason, the others are exempt too, but must pay the 'heavier' blood-money. The 'heavier' blood-money must further be paid by him who kills an insane or a minor with *'amd* in self-defence; in this particular case, self-defence is not recognized as such because the insane and the minor are not *mukallaf* and therefore not responsible for their acts. They are also incapable of *'amd* and a homicide committed by them is never more than *khaṭa'*, with the special provision that their *'āḳila* must also perform the *kaffāra* for them and that they are not excluded from inheritance.

As regards the distinction between *'amd* and *shibh al-'amd*, it is discussed with much casuistry which implements are to be regarded as deadly or not so, and which other methods of homicide fall into one or the other category. Burning to death is *'amd*, flogging to death is *shibh al-'amd*, homicide by drowning and strangling are controversial.

In the case of *khaṭa'*, one distinguishes whether it resides in the purpose (*fil-ḳaṣd*), e.g. if someone shoots at a man because he takes him for an animal, or in the act (*fil-fi'l*), e.g. if someone shoots at a target and accidentally hits a man, or whether the act can be assimilated to mistake (*mā ujriya mujra l-khaṭa'*), e.g. when a person turns over in his sleep and suffocates another. The concept of negligence is unknown to Islamic law.

Indirect causation (*tasbīb*) creates liability only if the act in question was unauthorized. If someone digs a well and another falls into it, he is not liable if he did it on his own property, or on the property of another with the permission of the owner, or on public property with the permission of the *imām*. The sphere of authorized acts is very extensive; if someone performs

[1] In this particular case, no blood-money is due either.

the ritual ablution in a blind alley of which he is an abutter and therefore a joint owner and another slips in the water which has been poured out, or if someone builds a bridge on public property, even without the permission of the *imām*, and someone falls through it, no liability arises; if a wall threatens collapse, the owner becomes liable only after the owner of the adjoining threatened property has asked him to demolish it. As regards liability for acts of animals, the person in charge of an animal is liable for the damage caused by certain, in fact by most, acts of the animal; equally liable is he who incites or pricks an animal, without regard to the lawfulness or unlawfulness of his act. On the other hand, if a donkey-driver lets his animal out on hire and because of a non-malicious act on his part the hirer falls from the donkey and dies, contractual liability is in any case excluded, and delictual liability does not arise either. The (unaccompanied) rider, however, is regarded as the direct, and not the indirect, cause of the acts of the animal caused by him; he may therefore become liable to *kaffāra* and be excluded from inheritance.

Occasionally there arises the question who is liable for damage by indirect causation. If a stone from a construction falls on to a public road, the workmen are liable until completion and delivery, the owner only after that; the workmen are not liable for unauthorized acts if their unauthorized character is not obvious to them, e.g. if they dig a well on property which has been designated to them by their employer as his own although he is not in fact the owner. If someone hires a workman to sprinkle water on the public road in front of his shop, the workman would be liable in strict analogy because he knows that the public road is not private property, but it is decided by *istiḥsān* that the employer is liable. Liability for damage caused by an unauthorized construction, &c., on public property does not cease with its sale, but liability for damage caused by a wall on private property that collapses does, even if the seller has been asked to demolish it.[1] Occasionally the party that is liable in the first place is given the right of recourse; if someone ties an animal to a string of animals without the knowledge of the person in charge, this last is liable but has the right of recourse against the person who has tied the animal on; if someone orders

[1] See also below, p. 204.

a minor to kill someone, the *'āḳila* of the minor is liable but has the right of recourse against the person who gave the order.

There is no liability for acts against a person who is not protected, whose blood is *hadr* (or *hadar*; opposite *ma'ṣūm*, inviolable). This is in the first place the *ḥarbī*; further, a person killed or wounded in self-defence (excepting the case mentioned above, p. 182). The limits of self-defence are determined casuistically; in general, it is recognized only in a case of dangerous attack (not, for instance, of an attack with a stick in a city in daytime, in contrast with a similar attack outside a city or at night), also in a case of theft at night if it can be prevented only by attacking the thief, and in forcing access to water in a case of extremity if access to water is denied. There is further no liability, of course, for carrying out the death penalty, or for death caused by carrying out *ḥadd* or *ta'zīr* punishments; also if a man surprises his wife or his female *maḥram* in unlawful intercourse and kills her and/or her accomplice; finally, for suicide and in a few other cases.

If the killer is not known, the ancient procedure of *ḳasāma*, a kind of compurgation, takes place. If the body of a person is found who has obviously been killed, the inhabitants of the quarter, the owner of the house (and his *'āḳila*), the passengers and crew of the boat in which he is found, must swear fifty oaths that they have not killed him and do not know who has killed him; if there are not fifty of them, they must swear more than once. Should they refuse to swear, they are imprisoned until they do. They thereby become free from liability to *ḳiṣāṣ* but must, as *'āḳila*, pay the blood-money. If the body of a killed person is found in the main mosque, the public treasury pays his blood-money; if it is found in open country, his blood is not avenged (*hadr* or *hadar*, in a semantic meaning slightly different from that above).

Entitled to prosecute for homicide (and in the case of *ḳasāma*, entitled to demand the oath and, if there are more than fifty persons eligible to swear it, to designate the fifty who swear) is the *walī al-dam* (literally, 'avenger of the blood'), who is the next of kin (the nearest of the *'aṣaba*) according to the law of succession, or several as the case may be. He carries out retaliation, he may waive it, either gratuitously or by settlement, and he receives the blood-money or may waive his claim to it. An

injured person himself has the right to demand retaliation, if applicable, or the payment of the blood-money to himself.

The considerable restriction of blood feuds was a great merit of Muhammad's. According to Bedouin ideas, any member of the tribe of the killer, and even more than one, could be killed if homicide had occurred. Islam allows only the killer himself (or several killers for one slain) to be put to death, and only if he is fully responsible and has acted clearly with deliberate intent; Islamic law further recommends waiving retaliation. The execution is carried out with the sword. Retaliation for bodily harm is restricted to those cases in which exact equality can be assured, e.g. the loss of a hand, a foot, a tooth, &c. If the culprit with *'amd* has made two persons lose the same hand, only his corresponding hand is cut off in retaliation, and the proper percentage of the blood-money is paid for the other hand. Retaliation for the loss of an eye takes place only if its seeing power has been destroyed (in this case the same is done to the culprit with a red-hot needle), not if it has been knocked out. Retaliation also takes place for a wound in the head which lays bare the bone.

Retaliation is regarded as full amends for an intentional homicide; if it does not or cannot take place, both *kaffāra* must be performed and blood-money must be paid (see above), but no *kaffāra* is due when no sin was committed.[1] The *kaffāra* consists of the manumission of a Muslim slave-or, if the culprit is unable to perform this, in fasting during two consecutive months. The 'heavier' blood-money (*diya mughallaẓa*) amounts to 100 camels of a determined high quality, the 'normal' blood-money (*diya muḫaḳḳaḳa*) to 100 less valuable camels or 1,000 dīnārs or 10,000 dirhams. The blood-money for a woman is half of that for a man. The full blood-money is to be paid not only for homicide but for grievous bodily harm, particularly the loss of organs which exist singly, e.g. the tongue (also for the loss of the beard and of the head of hair); half the blood-money for the loss of organs which exist in pairs, one-tenth for one finger or one toe, one-twentieth for one tooth; a detailed

[1] According to the Mālikīs (who do not distinguish between *'amd* and *shibh al-'amd*), every intentional homicide for which retaliation does not or cannot take place is punished by the so-called *'uḳūba* ('punishment') which consists of 100 lashes and imprisonment of one year; this punishment is systematically isolated and is neither a *ḥadd* nor a *ta'zīr*.

tariff covers most other wounds. This penalty for wounds is called *arsh*; if no percentage of the blood-money is prescribed, the so-called *ḥukūma* becomes due, i.e. it is estimated by how much the bodily harm in question would reduce the value of a slave, and the corresponding percentage of the blood-money must be paid. A special case is that of causing a miscarriage by hurting a pregnant woman; for this, the so-called *ghurra*, which amounts to 500 dirhams, must be paid; it is deemed to belong to the dead child, and is therefore inherited from it. The same applies to abortion without the father's consent; in this case the *ʿāḳila* of the wife must pay the *ghurra*.

In most cases it is not the culprit himself but his *ʿāḳila* who must pay the blood-money. The payment is made in three yearly instalments, with the provision that each member of the *ʿāḳila* has to pay not more than 3 or 4 dirhams altogether. If the amount is less than one-twentieth of the blood-money, not the *ʿāḳila* but the culprit himself must pay. The *ʿāḳila* consists of those who, as members of the Muslim army, have their names inscribed in the list (*dīwān*) and receive pay, provided the culprit belongs to them; alternatively, of the male members of his tribe (if their numbers are not sufficient, the nearest related tribes are included); alternatively, of the fellow workers in his craft or his confederates; and the *ʿāḳila* of the client, both in the sense of a manumitted slave and of a convert to Islam, is his patron and the *ʿāḳila* of his patron. This institution has its roots in the pre-Islamic customary law of the Bedouins, where the culprit could be ransomed from retaliation by his tribe, and the inclusion of confederates and of clientship seems to be ancient Arabian too. The concept of *ʿākila* was Islamicized by introducing the *dīwān* which replaces tribal relationship, but the adaptation to urban conditions by introducing the fellow workers in a craft was insufficient, and the whole institution fell into disuse at an early date.

Liability for *jināyāt* of a slave stands apart; it is analogous to liability for acts of an animal, with the provision that the owner does not become liable for more than the value of the slave, which is a rule of civil law. The slave is subject to retaliation only for homicide with *ʿamd*, not for causing bodily harm. In other cases of *ʿamd* he is surrendered as property to the claimant, unless this becomes impossible by his or her quality

as *umm walad*, *mudabbar*, or *mukātab*, or by his master having alienated him after the commission of the *jināya* but without knowledge of it; then the *arsh* or the value of the slave, whichever is less, must be paid. If it is a case of *khaṭa'*, the master may choose between surrendering the slave or paying the *arsh* or his value, whichever is less. Conversely, the blood-money for a slave is his value but not more than the blood-money for a free person less a token reduction of 10 dirhams.

4. *Special measures*, preventive or punitive, may be taken for reasons of public policy (*siyāsa*), e.g. the banishment (*nafy*) or the imprisonment (*ḥabs*) of a beautiful youth, or the execution of criminals who strangle their victims in a city. Rebels (*bughāt*), i.e. Muslims who refuse to obey the *imām*, are fought only in order to reduce them to obedience and are not subject to any special penal sanction; they are to be fought as clemently as possible, and their property is inviolable. The male apostate from Islam, however, is killed; it is recommended to offer him return to Islam and to give him a reprieve of three days. The woman who commits apostasy is imprisoned and beaten every three days (the female slave by her master) until she returns to Islam. No legal penalties are provided for other offences against religion as such; they will be atoned for in the world to come. Even neglect of ritual prayer, the performance of which is regarded as particularly important, is punished only by *ta'zīr*, unless it is accompanied by a denial of its obligatory character, which would be unbelief and therefore apostasy. There is no punishment for perjury, nor for giving false evidence; it is merely made known publicly (*ta'rīf*), and in certain cases liability for the damage caused arises; according to some authorities only, the false witness is severely beaten and imprisoned.

5. There exists, therefore, *no general concept of penal law* in Islam. The concepts of guilt and criminal responsibility are little developed, that of mitigating circumstances does not exist; any theory of attempt, of complicity, of concurrence is lacking. On the other hand, the theory of punishments, with its distinction of private vengeance, *ḥadd* punishments, *ta'zīr*, and coercive and preventive measures, shows a considerable variety of ideas.

25

PROCEDURE

1. *The judge* (*ḳāḍī*, *ḥākim*). The *ḳāḍī* is a single judge. He is appointed by the political authority, but the validity of his appointment does not depend on the legitimate character of that authority—one of the matter-of-fact features in Islamic law. On the qualities required of the *ḳāḍī*, see above, p. 125; a woman may, in theory, qualify to be a *ḳāḍī* (but see below, section 7). An appointment secured by bribery (*rashwa*) is invalid. To gain one's livelihood from the office of *ḳāḍī* is permissible if it was not stipulated, because if it were stipulated it would be an invalid hire of services. Court costs are unknown in theory. The *ḳāḍī* possesses competence within his jurisdiction (both are called *wilāya*), but this is limitative only with regard to real property, and even this is contested. In fact, the competence of the *ḳāḍī* is limited by the rule that he cannot give judgment against an absent party (*ghā'ib*) who is not represented by a deputy. The *ḳāḍī* cannot give judgment in favour of his near relatives. On the other hand, his competence extends beyond the judicial office, and includes the control of the property of the missing person, the orphan, the foundling, and the person with restricted capacity to dispose, of found objects, pious foundations, and estates of inheritance. His power to dispose goes further than that of the guardian, even than that of the father; he may, for instance, lend the money of an orphan. His approval validates acts of unauthorized agency in these fields. Beyond these fields, too, the *ḳāḍī* is competent, for instance, to authorize the wife to incur debts in satisfaction of her claim to maintenance; if he has not done that, claims for maintenance relating to the past are not actionable. Finally, the *ḳāḍī* is in charge of public welfare in general, e.g. he forces the speculator on rising prices of food (*muḥtakir*) to sell; he is, generally speaking, 'the guardian of those who have no other guardian'.

Of the *ḳāḍī*'s assistants, the most important is the secretary

(*kātib*); the judgment is committed to writing (*sijill*, from *sigillum*, the written judgment; *maḥḍar*, the minutes), in two copies, one of which is kept in the records (*dīwān*) of the tribunal. There are, further, the interpreter, the agent (*amīn*, literally 'fiduciary') of the *ḳāḍī*, particularly for the administration of property, the divider of inheritances (*ḳāsim*), the witnesses, and the experts; they must all be *'adl*.

The essence of the Islamic law of procedure consists of instructions to the *ḳāḍī*, whose duty it is to act in a certain way, e.g. to treat both parties equally, not to distort their statements, nor to suggest answers to the witnesses, but beside this, the aspect of validity, too, is recognized. The two aspects, duty and validity, may deviate from each other; the *ḳāḍī* must not accept the evidence of a *fāsiḳ*, but if he does, his judgment based on it is nevertheless valid. The *ḳāḍī* has the duty of giving just judgment, a duty which is enjoined in the Koran, but there is no means of reversing an unjust judgment, because strict Islamic law does not recognize stages of appeal; only the tribunal of *maẓālim* can, in a way, be regarded as an appellate court. This lack is to a certain extent made good through control on the part of the *ḳāḍī*'s successor; when he takes over the records and the prison, he instructs two fiduciaries to check everything, in particular whether the prisoners have been imprisoned justly, i.e. on account of an acknowledgement or confession or of a legal proof; if this is not the case, he has the name of the prisoner published so that any claims may be lodged against him, demands a surety for his person if necessary, and then releases him.

Instead of applying to the *ḳāḍī* it is possible to appoint an arbitrator (*ḥakam*). Only a person qualified to be a *ḳāḍī* may be a *ḥakam*; he is bound to apply Islamic law, and his judgment can be set aside by the ordinary *ḳāḍī* if it does not correspond with the doctrine of the school law of the latter. The judgment of the *ḥakam* is binding only on the parties who have appointed him; he can therefore not give judgment against the *'āḳila* for the blood-money in a case of homicide with *khaṭa'*.

2. *Action in general* (*khuṣūma*, the litigation; *da'wā*, the claim, lawsuit; *mudda'ī*, the claimant, plaintiff; *mudda'ā 'alayh*, the defendant). No action is possible without a claimant, but there is no office of public prosecutions. This principle is limited by the competence of the *ḳāḍī* to take action in matters of public

welfare; also the office of the *muḥtasib*, who in theory is the representative of the community in fulfilling the duty of 'encouraging good and discouraging evil', has in practice become an office of public prosecutions. It is not compulsory to apply to the *ḳāḍī*, and there are possibilities of settling disputes out of court other than the appointment of a *ḥakam*. This, in addition to the rules of substantive law which apply to non-Muslims, gives them, in fact, legal autonomy; as long as no party applies to the *ḳāḍī* he takes no notice.

The first question to be decided is whether the action is admissible ('valid', *ṣaḥīḥ*), and, in particular, whether the defendant is capable of being sued (whether he is *khaṣm*, a term which is also used of the parties to a lawsuit in general); if that is the case, the action takes place in public. The *ḳāḍī* questions the defendant concerning the claim; if he acknowledges it, the lawsuit is decided; if he denies it, the *ḳāḍī* asks the plaintiff to produce his evidence; if he cannot produce evidence or if his witnesses are absent, the *ḳāḍī* orders the defendant, provided the plaintiff demands it, to take the oath, relating to facts only and not to right or wrong; if the defendant takes the oath, the case is dismissed; if he declines to take it (*nukūl*), judgment is given for the plaintiff (it is recommended that the oath be offered to the defendant three times).[1] Only the defendant takes the oath, not the witnesses. Representation by attorney (*wakīl*) is possible, although the normal procedure is to plead in person.

It is sometimes difficult to determine whether the defendant is capable of being sued. The agent who has been given a mandate to buy real property is capable of being sued under a claim of pre-emption as long as he has not delivered the property to the mandant; the possessor of an object is not capable of being sued for delivery if he declares that he holds it in deposit for a third party who is absent, but he is capable of being sued if he declares that he has bought it from a third party who is absent, or if the plaintiff claims that the defendant possesses it by usurpation.

Typical of the action in Islamic law is a very sharp distinction between the parts of the plaintiff (claimant) on whom the onus

[1] According to the other schools of Islamic law, judgment for the plaintiff is given only if he himself takes the oath.

of proof lies, and the defendant whose statement, confirmed by the oath, holds good, that is to say, in whose favour the presumption operates if there is no proof. It is therefore of great importance that these parts should be assigned correctly. Because the stringent rules of Islamic law as regards evidence bring it about that no proof can be offered in many lawsuits, the problem of deciding who is plaintiff and who defendant often amounts to deciding whose statement holds good, in whose favour the presumption operates. It is not always possible to give an unqualified answer to this question; very often each party raises claims against the other, and then both have to take the oath (this procedure is called *taḥāluf*).

3. *Presumptions.* The general principle is that the presumption operates in favour of the party who denies, in contrast to the party who affirms, or claims. In a litigation concerning the usufruct in a contract of *ijāra* this is the lessor, but in a litigation concerning the rent it is the lessee. Simple cases like this are numerous, but even more numerous are the complicated examples which taken in their totality constitute a very intricate subject with a great many differences of opinion between the authorities of the school in question. The following examples are intended to illustrate certain relevant considerations. In the first place, objective probability is taken into account. In litigation concerning the ownership of domestic utensils, the presumption operates in favour of the wife as regards articles destined to be used by women, and vice versa. *A* instructs *B* to buy a slave for 1,000 (dīnārs) and hands the money over to him; the slave whom *B* has bought is worth 1,000 but *A* claims that *B* has paid only 500; then the presumption operates in favour of *B*. But if *A* has not yet handed over the money and the slave is in fact worth only 500, the presumption operates in favour of *A*. In a litigation concerning *mahr* the presumption operates in favour of the husband if the amount stated by him equals the 'fair *mahr*' or is more, and in favour of the wife if the amount stated by her equals the 'fair *mahr*' or is less; if neither is the case, the oath is offered to both parties and if both take it judgment is given for the 'fair *mahr*'. Expediency is taken into account too. If a minor is in the 'possession' (cf. above, p. 136) of a Muslim and of a *dhimmī*, and the Muslim claims him as his Muslim slave but the *dhimmī* claims

him as his son, the presumption operates in favour of the *dhimmī*; being free is to the advantage of the minor, and he can always become a Muslim. Or, by a more technically legal reasoning, the statement itself is regarded as a declaration of intention. For instance, in a litigation concerning *shuf'a* the seller mentions a lower price than the buyer; if it has not been paid yet, the statement of the seller holds good because it can be interpreted as a remission; but if it has been paid, the statement of the buyer holds good because the seller is not an interested party any longer. Similarly, if the husband sends something to his wife and she claims it was a gift, but he claims it was a payment of *mahr*, the presumption operates in his favour because it is he who transfers the ownership. Singularly formal is the principle of regarding the present condition as decisive. If the water of a rented mill ceases to flow and the lessee claims that this has been the case from the beginning of the lease, but the lessor claims that it has only just happened, the statement of the lessor or of the lessee holds good according to whether the water flows at the moment of litigation or not. Concurrently there exists the opposite principle of antedating an event as little as possible. These two principles can come into conflict. A Christian dies and his widow is a Muslim but declares that she adopted Islam after the death of her husband, so that she should be entitled to inherit, but the other heirs contest this; according to the first principle, the presumption operates in favour of the heirs, and this is the prevailing opinion; according to the second principle, it operates in favour of the widow, but although this agrees with objective probability it is the opinion of a minority only. There are cases where a statement holds good only in part. If an 'intelligent' (*mumayyiz*) minor is in the possession of a man and claims to be the slave of another, he is considered the slave of the first.

4. *Evidence* (*bayyina*). By far the most important kind of evidence is the testimony (*shahāda*) of witnesses, so much so that the term *bayyina* is sometimes used as a synonym for 'witnesses'. The acknowledgement is, strictly speaking, not 'evidence' if it is made during the action; in theory it is weaker than the evidence of witnesses, and in order to gain its full effect as the most conclusive and incontrovertible means of creating obligations, it must be proved by the testimony of witnesses. Circumstantial