evidence is not admitted (the isolated case of the *ḳasāma* does not belong systematically to the context of evidence), but the knowledge of the *ḳāḍī* is a valid basis for the judgment. Written documents (*ṣakk*, *wathīḳa*) are ignored by the theory, although the *ḳāḍī* keeps written records; there are no legal acts which must be embodied in a document, and an explicit ruling of the Koran which prescribes written documents in certain cases (sura ii. 282; cf. xxiv. 33) is interpreted as a recommendation. Written documents are merely aids to memory, and their contents are evidence only in so far as they are confirmed by the testimony of witnesses. At the utmost, a written statement can be accepted as a declaration. This is the theory; on the part played by written documents in the practice of Islamic law, see above, p. 82 f.

Two men or one man and two women, who possess the quality of *'adl*, are required as witnesses (*shāhid*, pl. *shuhūd*) in a lawsuit;[1] a greater number of witnesses does not lend additional value to their testimony. (For special rules on criminal procedure, see below, section 7.) Outside a lawsuit, less stringent demands are made, down to one person who is not a fully qualified witness. For instance, if a slave delivers an object and declares that it is a donation of his master, it is lawful to accept it; or if a minor declares that he has permission to buy an object, it is lawful to sell it to him. Even in a lawsuit the evidence of two women only is accepted as valid concerning matters of which women have a special knowledge, such as birth, virginity, &c. Whether the witnesses are in fact *'adl* must be established by inquiry. Unbecoming, despicable acts, such as playing backgammon or entering a public bath without a loin-cloth, do not nullify the quality of *'adl* but nevertheless enable the *ḳāḍī* to reject the testimony of the person in question. (The same ruling applies to blind persons.) The relevant time is that of giving evidence, not of witnessing the event on which evidence is given. In order to prove that a person is incompetent to give evidence, it is not sufficient to say 'he is a sinner', but details must be given, or it must be proved that the party in whose favour he is to testify has himself acknowledged that he is not *'adl*, or that he has been hired. Also incompetent to give

[1] The other schools of law accept also the evidence of one man together with the oath of the plaintiff in lawsuits concerning property and obligations.

evidence are near relatives of the party in whose favour and personal enemies of the party against whom evidence is to be given. The witness can testify only to what he has seen himself, except in matters such as family relationship or death. The testimony of both witnesses must be identical; in certain well-defined cases only small divergencies are tolerated, for instance if one testifies with regard to 1,000 (dīnārs) and the other with regard to 1,100. But if two witnesses testify that *A* killed *B* on a certain day in Mecca, and two others that he killed him on the same day in Kufa, both testimonies are invalid. The testimony of *dhimmīs* in matters concerning other *dhimmīs* is accepted.

If the defendant is absent, the *ḳāḍī* may send a copy of the evidence to the *ḳāḍī* in whose district the defendant is living, but this must be accompanied by witnesses who can testify not only on the authenticity but on the contents of the document. If the primary witnesses do not or cannot appear, indirect evidence, i.e. evidence concerning their testimony (*shahāda 'alā shahāda*) can be submitted; two witnesses must testify on the deposition of each of the primary witnesses, but the secondary witnesses can be the same for each of them, so that two altogether are sufficient.

The technical rules concerning evidence have sometimes surprising consequences. In the example of the purchase of a slave, for instance, the statement of the seller as to the price is not taken into account at all, and in the example of litigation concerning *shuf'a* it is not taken into account if the price has been paid, because he is now a 'stranger' (*khārij, ajnabī*) and not an interested party, and is not sufficient as a witness. Valid evidence can, in fact, normally be secured only if the transaction was concluded in the presence of recognized witnesses. This is the starting-point for the institution of professional witnesses (*'udūl*, pl. of *'adl*) or 'notaries'.

If evidence is given, it is admitted only in so far as it does not necessarily contradict the assertions of the party who produces it; each party is bound by his own assertions. If someone claims to have received an object as a donation and produces evidence that he bought it at a later date, the evidence is admitted because the donor may have repudiated the donation and the donee may have had to buy the object; if he produces evidence that he bought it at an earlier date, it is not admitted because

the claim of a donation implies the acknowledgement that the object was the property of the donor before. Also, if someone claims that a house is his property and produces evidence of a specific acquisition of ownership, for instance by purchase or inheritance, the evidence is admitted, but not if he claims a specific acquisition of ownership and produces evidence of simple ownership only.

5. *Consideration of evidence and judgment.* The emphasis of the Islamic law of procedure lies not so much on arriving at the truth as on applying certain formal rules. The *ḳāḍī* must not, it is true, give judgment against his own knowledge, and other provisions, too, show concern for establishing the facts, but, generally speaking, the formal rule of procedure is observed for its own sake. If in the example of litigation concerning *mahr* both parties take the oath, judgment is given for the 'fair *mahr*'. If the parties to a sale dispute the amount of the price and both take the oath, the sale is annulled at the demand of one of them. The procedure in the case of *li'ān*, if both husband and wife take the oath, reveals a similar attitude.

If both parties produce evidence, the number of the witnesses produced by each, beyond their minimum number, is irrelevant. There is no examination of the witnesses, or of the likelihood of their testimony being true. There are only two possibilities: one of the two testimonies is given preference, in analogy with the doctrine of presumptions, or *tahātur*, the conflict of equivalent testimonies, takes place.

The rule followed in the first case is that the evidence of the party who has not the benefit of the presumption is given preference; this is a consequence of the general rules concerning the burden of proof. If both the possessor and a 'stranger' produce evidence of simple ownership, the evidence of the latter is given preference because the burden of proof rests on him. But if the evidence of the possessor is more valuable because it is more specific, e.g. evidence of acquisition of ownership by purchase, this last is given preference. Another consideration that is used to decide which of two testimonies is to be given preference, often with surprising results, is that of their respective dates.

Tahātur takes place, for instance, if each of two parties proves that he has bought the same object from the other; the solution

of this case is a matter of dispute. If each of two parties has more than three beams supported by the dividing wall of their adjoining houses, the wall is adjudicated to both as common property. The same judgment is given if both prove possession of the same piece of real property; but if one can prove the factual exercise of control, e.g. that he has dug on it, his evidence is given preference. If there are several claimants, and each produces evidence equivalent to that of the others, the object is adjudicated to all in common property. For instance, *A* proves that he has bought an object, *B* that it has been donated to him and that he has taken possession, *C* that he has inherited it from his father, *D* that he has received it as a charitable gift and has taken possession; then one-quarter is adjudicated to each. In cases like this, instead of a decision being given in favour of one of several mutually exclusive claims, they are partially recognized although they cannot all be true; this shows the formalistic character of the Islamic law of procedure and evidence very clearly.

Judgment (*ḳaḍā'*) must be given according to the doctrine of the school of law to which the *ḳāḍī* belongs; should he deviate from it, the validity of his judgment is contested. The *ḳāḍī* cannot revoke his judgment once he has given it. If, in the example of the two pairs of witnesses who testify to a killing (above, p. 194), those who testify to the killing in Mecca appear first and judgment is given, and those who testify to the killing in Kufa appear afterwards, only the second testimony is invalid. A judgment given on the basis of false testimony is valid, at least before the *forum externum*, sometimes even before the *forum internum*. If a woman obtains, by false evidence, the judgment that she is married to a certain man, it is lawful for her to have intercourse with him. Retractation of the testimony does not make the judgment that is based on it invalid, but the witnesses become liable for the damage caused by the judgment.[1] What is to be considered as damage is narrowly defined from case to case; repudiation after the marriage has been consummated is not included. Another *ḳāḍī* can reverse the judgment only if it amounts to a grave mistake in law, that is to say if it goes against the Koran, a recognized tradition, or the consensus.

[1] On the punishment for giving false evidence, see above, p. 187.

The *ḳāḍī* is not liable for his official acts. If he sells a slave in order to satisfy creditors, and the slave is vindicated so that the price must be returned to the buyer, but the money has been lost while it was held by the *ḳāḍī*, the creditors bear the loss.

6. *Execution and self-help.* No sharp distinction is made between execution and self-help. Islamic law still envisages the primordial method of starting an action, which consists of the plaintiff seizing the defendant and hauling him before the judge. If the plaintiff declares that he has witnesses, the *ḳāḍī* may demand a surety for the person of the defendant for three days, or alternatively the plaintiff may watch over the person of the defendant, following him wherever he goes but not entering his house with him, for the same period (this personal supervision is called *mulāzama*). If the defendant defaults, the surety is imprisoned; he on his part may have the defendant imprisoned in order to make sure of his appearance. But the defendant cannot be forced to plead; he is entitled to decline (*nukūl*) to answer questions or to take the oath, except in the cases of *li'ān* and *ḳasāma*, where a plea or the taking of the oath may be enforced by imprisonment. Still less may a confession be extracted by torture.

There is no execution *ex officio* in matters of *jināyāt*; the state merely puts its administrative agencies at the disposal of the interested parties; but the execution of the *ḥadd* punishments is a duty of the *imām*; the *ḳāḍī* is responsible for the carrying out of *ta'zīr*, and he controls the prison.

Judgments concerning the law of property and obligations are enforced by imprisonment (*ḥabs*) of the debtor until he pays; if he claims to be poor, he is imprisoned only for a debt arising out of transactions which imply the payment of a consideration, such as sale, loan, suretyship, also for *mahr* which is due for immediate payment, but for other debts only if the creditor proves that he has means. He is kept in prison until the *ḳāḍī* has become convinced that he would pay if he could. Also imprisoned is the usurper who claims that the object which he has usurped has perished, until the *ḳāḍī* has become convinced that he would surrender it if it still existed. This imprisonment is defined as a term of about two or three months, but it continues if the creditor proves that the debtor has means; if the debtor becomes ill, he is released from prison. Judicial

distraint is unknown in Islamic law. If the debtor is released from prison as being unable to pay, he is declared bankrupt (*muflis*); it is contested whether this wipes out his debts, or whether the creditor or creditors may still resort to self-help by watching over his person and taking from him the surplus of his earnings.

7. *Special features of criminal procedure.* No woman may act as *ḳāḍī*, and no arbitrator may be appointed, in cases concerning *ḥadd* punishments and retaliation. Proof is made more difficult than in other matters; the evidence of women is not admitted, and in the case of *zinā* four male witnesses are required. Transfer of evidence to another *ḳāḍī* and indirect evidence are not admitted, and the appointment of a deputy to exact *ḥadd* and *ḳisāṣ* is impossible. Notwithstanding these features common to *jināyāt* and *ḥadd*, the general concept of a penal law does not exist in Islam. Whereas in other matters there exists, to a certain extent, the religious duty of giving evidence, in lawsuits concerning offences punishable by *ḥadd* it is considered more meritorious to cover them up than to give evidence on them, and the oath is disregarded as an element of proof. In all these matters a surety for the person of the defendant can be demanded only if at least part of the evidence has been heard. It is true that all these dispositions had little effect in providing legal protection in practice.

26

THE NATURE OF ISLAMIC LAW

1. THE nature of Islamic law is to a great extent determined by its history, and its history is dominated by the contrast between theory and practice. The remarks that follow are intended to complete from a systematic point of view the historical account of the subject.

Islamic law does not claim universal validity; it is binding for the Muslim to its full extent in the territory of the Islamic state, to a slightly lesser extent in enemy territory,[1] and for the non-Muslim only to a limited extent in Islamic territory. More important than this self-imposed limitation is the fact that Islamic law is conscious of its character as a religious ideal; it believes in a continued decadence since the time of the caliphs of Medina, 'the caliphs who followed the right course', and it takes the corruption of contemporary conditions for granted. As far as the scope of the concepts obligatory / indifferent / forbidden is concerned, Islamic law is to some extent content with mere theoretical acknowledgement; this is obvious from the existence of the two intermediate categories, recommended and reprehensible. The same tendency appears in the treatment of infringements of those religious duties which are not sanctioned by *ḥadd* punishments; no legal penalties are provided for them unless they are accompanied by a denial of their obligatory character. Nevertheless, whether the prohibitions are sanctioned by penalties, such as that of drinking wine, or not, such as that of eating pork, they are meant as injunctions to refrain. But even the *ḥadd* punishment lapses in certain cases through active repentance. On a different systematic plane stands the theory of duress; if duress is recognized, its effect is not only to remove the penal sanction but to make the act itself allowed. Still wider is the scope of the doctrine

[1] For instance, according to Ḥanafī doctrine the Muslims may conclude transactions involving *ribā* with non-Muslims in enemy territory.

that necessity dispenses Muslims from observing the strict rules of the law. Within the orbit of the concepts valid/invalid, Islamic law, it is true, claims absolute validity, but even here a hypothetical element enters with the idea that this is what things ought to be in the ideal Islamic state. The admission of the validity of legal devices (*ḥiyal*) serves to counteract, in practice, the claims of the theory.

Islamic law did not remain immune from malpractices within its own sphere of application, such as bribing of *ḳāḍīs* and witnesses, and high-handed acts of governments and individuals with which the *ḳāḍī* was powerless to deal. The degree to which this happened depended on the character and the strength of the government, and the most unblemished period in this respect probably coincided with the prime of the Ottoman Empire. The early 'Abbāsid period, on the other hand, was distinguished by frequent acts of usurpation (*ghaṣb*), misappropriation of private property; this is why Islamic law treats of *ghaṣb* in great detail, with the tendency to protect the lawful owner as much as possible. But Islamic law takes a matter-of-fact view of other abuses when it considers valid the appointment of a *ḳāḍī* who is not *'adl*, 'of good character', or the judgment of the *ḳāḍī* if he accepts the evidence of a witness who is not *'adl*, or even the appointment of a *ḳāḍī* by a political authority which is not legitimate.

2. The central feature that makes Islamic religious law what it is, that guarantees its unity in all its diversity, is the assessing of all human acts and relationships, including those which we call legal, from the point of view of the concepts obligatory/recommended/indifferent/reprehensible/forbidden. Law proper has been thoroughly incorporated in the system of religious duties; those fundamental concepts permeate the juridical subject-matter as well. Just as in the field of worship the obligatory and indispensable acts are accompanied by others which are only recommended, the heirs are recommended but not obliged to pay the debts of the deceased, and even the next of kin who has the right to demand retaliation for intentional homicide is recommended to waive it against payment of the blood-money. It might therefore seem as if it were not correct to speak of an Islamic law at all, as if the concept of law did not exist in Islam. The term must indeed be used with

the proviso that Islamic law is part of a system of religious duties, blended with non-legal elements. But though it was incorporated into the system of religious duties, the legal subject-matter was not completely assimilated, legal relationships were not completely reduced to and expressed in terms of religious and ethical duties, the sphere of law retained a technical character of its own, and juridical reasoning could develop along its own lines. That the concepts allowed/forbidden and valid/invalid were to a great extent coextensive, made it possible for this last pair, together with the kindred concept of a legal effect, to be fitted into the system. There exists, thus, a clear distinction between the purely religious sphere and the sphere of law proper, and we are justified in using the term Islamic law of the legal subject-matter which, by being incorporated into the system of religious duties of Islam, was either materially or formally, but in any case considerably, modified. This legal subject-matter became Islamic law not merely by having considerations of a religious or moral kind introduced into it, but by the much subtler process of being organized and systematized as part of the religious duties of the Muslims. There remains a certain contrast between the legal subject-matter and the principles of its formal organization.

Islamic law is systematic, that is to say, it represents a coherent body of doctrines. Its several institutions are well put into relation with one another; the greater part of the law of contracts and obligations, for instance, is construed by analogy with the contract of sale. Furthermore, the whole of the law is permeated by religious and ethical considerations; each institution, transaction, or obligation is measured by the standards of religious and moral rules, such as the prohibition of interest, the prohibition of uncertainty, the concern for the equality of the two parties, the concern for the just mean or average (*mithl*). In theory we can distinguish these two processes of systematization, in practice they merge into each other. The reason why the several contracts resemble one another in their structure so much is largely to be found in the fact that the same concern for the same religious and moral principles pervades them all. The two processes of Islamicizing and systematizing were concurrent; religious and moral norms and a structural order were together imposed on the raw material that was to

become Islamic law. It was the first legal specialists themselves who created the system of Islamic law; they did not borrow it from the pre-Islamic sources which provided many of its material elements.

3. Being a 'sacred law', Islamic law possesses certain heteronomous and irrational features, but only to a limited degree. It is heteronomous in so far as two of its official bases, the Koran and the *sunna* of the Prophet, are expressions of Allah's commands. But beside them stands the consensus of the community, and although this principle, too, is covered by divine authority,[1] it represents a transition to an autonomous law; it is also the decisive instance. It decides the interpretation of Koran and traditions, and determines which traditions are to be considered authentic; it even sanctions interpretations of Koranic passages which are at variance with their obvious meaning.[2] But from the fourth/tenth century onwards, and until the growth of legal modernism in the present generation, there has been no official scope for independent new developments, and what development there has been consists, on principle, only of interpretation and application. A very limited scope remains for the *ikhtiyār*, the 'choice' of or 'preference' for a given opinion, above all in consideration of the *fasād al-zamān*. If, for instance, in a contract of suretyship for the person, production of the debtor before the *ḳāḍī* is stipulated, the older Ḥanafī doctrine holds that production in the market-place is sufficient, but the opinion 'chosen in the present time' holds that it is not; this is based on the doctrine of Zufar (d. 158/775), who, although a prominent disciple and companion of Abū Ḥanīfa, does not belong to the triad of the highest authorities of the school (Abū Ḥanīfa, Abū Yūsuf, and Shaybānī). Extreme cases like this are rare; in most cases *ikhtiyār* is limited to the elimination of differences of opinion among earlier authorities, including those of the period after the 'closing of the gate of *ijtihād*'.

The irrational elements in Islamic law are partly of religious-

[1] See above, p. 47, on its having found expression in a tradition from the Prophet: 'my community will never agree on an error'.

[2] For instance, the text of sura v. 6 states quite clearly: 'O you who believe, when you rise up for worship, wash your faces and your hands up to the elbows, and wipe over your heads and your feet up to the ankles'; the law nevertheless insists on washing the feet, and this is harmonized with the text by various means. For another example, see above, p. 18 f.

Islamic and partly of pre-Islamic and magical origin. Examples are the magical formula of *ẓihār*, the Islamic procedure of *li'ān*, the ancient Arabian *ḳasāma*, and the nature and function of legal evidence in general. Even that great systematizer, Shāfi'ī, often did not succeed in rationalizing these institutions to his satisfaction. But the legal subject-matter, whatever its provenance, also contained rational elements, and, above all, it was organized, systematized, and completed not by an irrational process of continuous revelation but by the method of interpretation and application which by its very nature had to be rational. In this way Islamic law acquired its intellectualist and scholastic exterior.

It might be thought that the application of religious and moral norms, which are non-legal, to legal subject-matter would normally have led to irrational decisions. This, however, is only rarely the case, and when it happens the Muslim lawyers are generally conscious of the fact that it is an exception to the general rules, to analogy. On the contrary, the religious and moral considerations are an essential part of the systematic structure of Islamic law. Whereas Islamic law presents itself as a rational system on the basis of material considerations, its formal juridical character is little developed. Even the two formal legal concepts, valid and invalid, are continually pushed into the background by the Islamic concepts, allowed and forbidden. The aim of Islamic law is to provide concrete and material standards, and not to impose formal rules on the play of contending interests, which is the aim of secular laws. This leads to the somewhat surprising result that considerations of good faith, fairness, justice, truth, and so on, play only quite a subordinate part in the system.

4. It follows from the heteronomous and irrational side of Islamic law that its rules are valid by virtue of their mere existence and not because of their rationality. This is particularly obvious in the law of evidence, which is indeed beset with particular difficulties, but it also occurs elsewhere. If a boy is mutilated unintentionally on being circumcised, the full blood-money is to be paid, but only half the blood-money if he dies of this mutilation; half of the cause of the death is attributed to the circumcision itself, because this alone may also cause death, and only half to the mutilation; only this second half creates

liability because the performance of circumcision, which is in any case recommended (and according to the Shāfi'ī and the Ḥanbalī school even obligatory), does not in itself create liability. If the owner of a wall which threatens collapse sells it after he has been asked to demolish it, and it then collapses and kills someone, neither the seller nor the buyer is liable: not the seller because he was not the owner at the time it collapsed, and not the buyer because he had not been asked to demolish it. Islamic law allows the loan of real property, and this must necessarily be gratuitous; on the other hand, the owner is, on principle, liable for the land-tax, and the fact that he has lent the property changes nothing in that. It is no concern of the lawyers that a contract under which the owner would not only lend his property but remain liable for the land-tax, is impossible in practice, as long as they are satisfied that it does not infringe the rules of the sacred Law. The law of inheritance is particularly rich in practically impossible cases, which are discussed in detail.

The heteronomous and irrational side of Islamic law also called for the observance of the letter rather than of the spirit, and facilitated the vast development and wide recognition of legal devices, including legal fictions.

5. The opposite tendency, taking material facts into account, diverging from the formally correct decision for reasons of fairness or appropriateness, is not unknown in Islamic law; it appears in *istiḥsān* (and *istiṣlāḥ*). But this principle, both in theory and in its actual application, occupies too subordinate a position for it to be able to influence positive law to any considerable degree. However much considerations of fairness and appropriateness entered into the decisions of the earliest lawyers, in the fully developed system the principle of *istiḥsān* (and *istiṣlāḥ*) is confined to very narrow limits and never supersedes the recognized rules of the material sources (Koran and *sunna*), their recognized interpretations by the early authorities, and the unavoidable conclusions to be drawn from them; it often amounts merely to making a choice between the several opinions held by the ancient authorities, that is to say, *ikhtiyār*. Occasionally, too, custom is taken into account by *istiḥsān*. (For examples of *istiḥsān*, see above, pp. 146 n. 1, 152, 155, 157, 179, 183.)

6. Islamic law possesses an impressive number of legal concepts, both special and generic, but they are, generally speaking, broad and lacking in positive content; they are derived not from the concrete realities of legal life but from abstract thought. This has the consequence that differences between two genera are often not greater or more essential than those between several species within the same genus; instead of an antithesis between two concepts, there are graded transitions from the central core of one concept to that of another, with corresponding gradations of the legal effects. This way of thinking is typical of Islamic law. For instance, the finder may use the found property if he is poor, but not if he is rich; if he is rich, he is only entitled to make a charitable gift (*ṣadaḳa*) of it; but it is, nevertheless, not a full *ṣadaḳa* because he is entitled to give it to his poor parents or children, which he may not do if he makes a *ṣadaḳa* proper. The term is used in a still wider sense of the purpose of a *waḳf*, which may be anything not incompatible with the tenets of Islam. Another typical example is provided by the concepts of thing (*'ayn*), *res in commercio* (*māl*), substance (*raḳaba*), and usufruct (*manfa'a*), and by the contracts of which they may form the object.[1]

Closely connected with this way of thinking is the casuistical method, which is indeed one of the most striking features of traditional Islamic law. Islamic law concentrates not so much on disengaging the legally relevant elements of each case and subsuming it under general rules—as on establishing graded series of cases. The extreme links of two series proceeding from different concepts can closely approach and even almost coincide with each other, and then there is a sudden change in the legal effect; this is the subject of the doctrine of *furūḳ*. In particular, the following uses of casuistical method can be distinguished: (1) decisions concerning pre-Islamic or early Islamic transactions, such as the *muzābana*; (2) casuistical treatment as a literary form, where the underlying rule is implied by the juxtaposition of parallel and particularly of contrasting cases; (3) casuistical decision of as many cases as possible, including purely imaginary ones, in order to cover all possibilities when their subsumption under general norms proves impossible;

[1] Cf. also the several meanings of the terms *ṣaḥīḥ*, *muḥṣan*, and *tāmm* (above, pp. 121, 125. 152).

(4) decisions of intricate cases which are difficult to decide on the basis of recognized rules. Some of these are, in fact, problems which had arisen in practice, but mostly they are questions designed as exercises in ingenuity and systematic speculation; some of the *ḥiyal* belong to this category.

7. The way in which Islamic law, in various countries and at various times, reflected, reacted to, and influenced society has been the object of a number of studies. On the other hand, a sociological analysis of its structure has hardly been undertaken so far, and the elementary remarks which follow merely aim at providing a starting-point and showing the appropriateness of this approach to the subject.

One important criterion of the sociology of law is the degree to which the legal subject-matters are distinguished and differentiated from one another. There is no such distinction in Islamic law. This is why rules of procedure are invariably intertwined with rules of substantive law, and rules of constitutional and administrative law are scattered over the most diverse chapters of the original treatises. Public powers are, as a rule, reduced to private rights or duties, for instance the right to give a valid *amān* or safe-conduct, the duty to pay the *zakāt* or alms-tax, or the rights and duties of the persons who appoint an individual as *imām* or caliph, and the rights and duties of this last. This is all the more significant as the Arabic language possessed an abstract term for 'authority, dominion, ruling power' in the word *sulṭān*, a word which came to be used as a title only from the fourth/tenth century onwards; but Islamic law did not develop the corresponding legal concept. For the same reason, the essential institutions of the Islamic state are construed not as functions of the community of believers as such, but as duties the fulfilment of which by a sufficient number of individuals excuses the other individuals from fulfilling them; in fact, the whole concept of an institution is missing.

In the field of what, in modern terminology, is called penal law, Islamic law distinguishes between the rights of Allah and the rights of humans, and only the rights of Allah entail a penal sanction in the proper meaning of the term. Even here, in the centre of penal law, the idea of a claim on the part of Allah predominates, just as if it were a claim on the part of a human

plaintiff. The lack of an office of public prosecutions is, in part, supplied by the *ḥisba*, the office of the *muḥtasib*, but it is significant that the very term *muḥtasib* denotes a person who seeks to gain religious merit by his zeal for the sacred Law. The second great division of what we should call penal law belongs to the category of 'redress of torts', a category straddling civil and penal law which Islamic law has retained from the law of pre-Islamic Arabia, where it was an archaic but by no means unique phenomenon (cf. above, pp. 6, 148, 160, 177 f.). Already the law of pre-Islamic Arabia had placed the emphasis on the civil side, and the same holds true of Islamic law.[1] Here the concept of criminal guilt hardly exists, and apart from the religious expiation of the *kaffāra* and, particularly, the *'uḳūba* of the Mālikīs, there is no fixed penalty for any infringement of the rights of a human or the inviolability of his person and property, only the exact reparation of the damage caused; monetary fines are unknown. Also the execution of the judgment in this sphere is, in principle, a matter for the party in whose favour it is given. These two great divisions of what, in modern terminology, would be the penal law of Islam, correspond closely to the two sources from which the sociology of law derives all penal law.

Covering both fields there is the *ta'zīr*; the *ḳāḍī* may punish at his discretion any act which in his opinion calls for punishment, whether it infringes the rights of Allah or the rights of humans. The *ta'zīr* belongs therefore to penal law proper, but even here Islamic law has not envisaged the imposition of fines. Sociologically speaking, the *ta'zīr* stands by itself, and it has also a separate history. It belongs neither to ancient Arabian customary law which was ratified by Islam, nor to Islamic legislation which appeared in the Koran and in the traditions from the Prophet. It was the first Muslim *ḳāḍīs* in the Umayyad period who found themselves called upon to punish, at their discretion, all kinds of acts which threatened the peaceful existence of the new Islamic society which was coming into being. The penal sanctions which had been imposed by the caliphs of Medina in the first half of the first century of Islam had served the same purpose; as far as they survived as recognized

[1] Islamic law distinguishes, however, between civil liability for a tort and civil liability arising from a breach of contract.

rules, they were incorporated in the Islamic legislation; as far as this was not the case they, too, had to be interpreted as *ta'zīr* by the theory of Islamic law. *Ta'zīr*, being an extension of the original sphere of penal law proper, filled a need that was felt in practice, and this need made itself felt sufficiently early for the first specialists of Islamic religious law to incorporate it in its official doctrine. But the needs of Islamic society did not stop there, and further extensions of penal law, and the creation of agencies which were to apply them, such as the *ḥisba* and the *nazar fil-mazālim*, became inevitable. At the time, however, when the specialists of Islamic law had to take notice of them, the outlines of the system had already been firmly laid down, and this is why strict theory could admit them, as it were, only on sufferance. Still later developments, such as the Ottoman *ḳānūn-nāmes*, were completely ignored by the theory. The sociological character of this portion of the reality of penal law in Islam has remained constant, although its place in the official theory of Islamic law is not uniform.

8. The sociology of law shows that there are two methods by which legal subject-matter is brought into a system, the analytical and the analogical method. Islamic law represents this latter type of systematizing in great purity. The existence of well-developed legal concepts is not typical of the first method, neither is the existence of a casuistical method typical of the second. But both the nature of the Islamic legal concepts and the nature of its casuistical method show that Islamic legal thought proceeds by parataxis and association. Above all, the method of *ḳiyās*, one of the four 'roots' or principles of Islamic law, is purely analogical. All these features are manifestations of a typical way of thinking which pervades the whole of Islamic law.

As regards the formal character of positive law, the sociology of law contrasts two extreme cases. One is that of an objective law which guarantees the subjective rights of individuals; such a law is, in the last resort, the sum total of the personal privileges of all individuals. The opposite case is that of a law which reduces itself to administration, which is the sum total of particular commands. Islamic law belongs to the first type, and this agrees with what the examination of the structure of Islamic 'public' law has shown. A typical feature which results

from all this is the private and individualistic character of Islamic law. However prominent a place a programme of social reform and of improving the position of the socially weak occupied in the Koran, Islamic law, in its technical structure, is thoroughly individualistic. This shows itself, for instance, in the structure of the law of inheritance (as opposed to the social effect of its rules), where each heir becomes immediately the owner of his individual portion, or even in the institution of *wakf*, the social effects of which have been very considerable, but which, in its technical function, is strictly individualistic, in so far as the provisions laid down by the founder have the force of law. In Islamic law, as in other laws, we must distinguish between the social intentions of the legislator and the sociological character of his law.

9. Islamic law represents an extreme case of a 'jurists' law'; it was created and further developed by private specialists, a phenomenon well known to the sociology of law. There are certain parallels between the functions of these specialists in Islamic and in Roman law, but the differences are more important. In Roman law it was the growing importance of commercial life which called for the creation of corresponding legal forms; in Islamic law it was the religious zeal of a growing number of Muslims which demanded the application of religious norms to all problems of behaviour. The formation of Islamic law took place neither under the impetus of the needs of practice, nor under that of juridical technique, but under that of religious and ethical ideas. If the Roman jurists were to be useful to their clients, they had to try to predict the probable reactions of the magistrates and judges to each transaction; if the earliest Islamic lawyers (and if we are entitled to speak of an Islamic law, we are entitled to call the specialists in it lawyers) were to fulfil their religious duty as they saw it, they had to search their consciences in order to know what good Muslims were allowed or forbidden to do, which acts of the administration they ought to accept or to reject, which institutions of the customary practice they were entitled to use and which they ought to avoid. At the very time that Islamic law came into existence, its perpetual problem, that of the contrast between theory and practice, was already posed. That this contrast was not fortuitous is shown both by historical and by sociological analysis.

The way in which Islamic law reacted to practice is well illustrated by the *ḥiyal*. The *ḥiyal* offer an instructive example of what, according to the sociology of law, is one of the two primary sources of law, the 'concerted action of interested parties'. This action leads to 'typical agreements', which are the *ḥiyal*. In concluding their agreements, the interested parties calculate to a nicety the chances of their receiving 'legal sanction' by the *ḳāḍī*, and they adapt their formal engagements to 'calculated risks'. The formal engagements do not exist for their own sake, they are concluded for an ulterior purpose. The accretions to the law which were brought about by the concerted action of interested parties existed, to begin with, 'outside the law'; the guaranty of legal sanction which the official administration of justice could provide was not sufficient to assure the effectiveness of their agreements; they required an additional guaranty, and this was provided by 'convention'.

The *ḥiyal* form only part of the customary commercial law which developed, beside the ideal law of strict theory, in the Islamic countries of the Middle Ages. Because Islamic law is a jurists' law, legal science is amply documented, whereas the realities of legal life are much less known and must be laboriously reconstructed from occasional evidence. It was the 'learned jurists', the specialists in Islamic law, themselves, who by their 'creative imagination' not only invented the more complicated *ḥiyal* for their customers, the merchants, but reconciled the existing customary law with the official administration of justice by the *ḳāḍī*. One result of their activity is the Mālikī *'amal*; another exists in the works on *shurūṭ* and kindred subjects. The concept of 'precaution' dominates the literature of *ḥiyal* and *shurūṭ*, as it had dominated the activity of the earliest specialists in Islamic law. These three manifestations of legal life in Islam have little in common from the Muslim doctrinal point of view; but sociological analysis shows their inherent parallelism.

10. Islamic law provides the unique phenomenon of legal science and not the state playing the part of a legislator, of scholarly handbooks having the force of law (to the extent to which Islamic law was applied in practice). This depended on two conditions: that legal science guaranteed its own stability and continuity, and that the place of the state was taken by

another authority, high enough to impose itself on both the government and the governed. The first condition was met by the doctrine of consensus which led to a cumulative elimination of differences of opinion; what differences could not be eliminated were made innocuous by the mutual recognition of the several schools of law as equally orthodox. The second condition was met by the fact that Islamic law claimed to be based on divine authority. This claim was reinforced by the progressive reduction of the human element of personal opinion, until only the mechanical method of reasoning by analogy remained, and even the use of this method was put out of reach of the later generations by the doctrine of the 'closing of the gate of independent reasoning (*ijtihād*)'. The traditionalism of Islamic law, which is perhaps its most essential feature, is typical of a 'sacred law'.

CHRONOLOGICAL TABLE

(The first of two, where combined numbers are given, refers to the Islamic, and the second to the Christian era)

A.D. 622. Emigration (*hijra*) of Muhammad, the Prophet, from Mecca to Medina; beginning of the Islamic era.

A.D. 632. Death of Muhammad.

9/632–40/661. The caliphs of Medina: Abū Bakr, 'Umar, 'Uthmān, 'Alī.

41/661–132/750. The dynasty of the Umayyads.

65/685–86/705. The Umayyad caliph 'Abd al-Malik.

95/713 or 96/715. Death of Ibrāhīm al-Nakha'ī of Kufa; in the same and in the following decade: deaths of the 'seven lawyers of Medina'.

114/732 or 115/733. Death of 'Aṭā' of Mecca.

120/738. Death of Ḥammād ibn Abī Sulaymān of Kufa.

122/740. Death of Zayd ibn 'Alī, alleged author of a compilation of legal traditions.

124/742. Death of Zuhrī of Hijaz.

132/750. Overthrow of the Umayyads, beginning of the dynasty of the 'Abbāsids.

138/756. Foundation of an Umayyad principality (later caliphate) in Spain.

139/756. Murder of Ibn al-Muḳaffa', a Secretary of State.

148/765. Death of Ibn Abī Laylā, *ḳāḍī* of Kufa.

150/767. Death of Abū Ḥanīfa of Kufa.

157/774. Death of Awzā'ī of Syria.

161/778. Death of Sufyān Thawrī of Kufa.

170/786–193/809. The 'Abbāsid caliph Hārūn al-Rashīd.

179/795. Death of Mālik of Medina.

182/798. Death of Abū Yūsuf, Chief *Ḳāḍi*, Iraqian.

189/805. Death of Shaybānī, Iraqian; the Ḥanafī school established.

204/820. Death of Shāfi'ī.

240/854. Death of Saḥnūn, a follower of Mālik; the Mālikī school established.

240/854. Death of Abū Thawr, founder of a school of law.

241/855. Death of Ibn Ḥanbal, Traditionist; beginnings of the Ḥanbalī school.

264/878. Death of Muzanī, a disciple of Shāfi'ī; the Shāfi'ī school established.

270/884. Death of Dāwūd ibn Khalaf, founder of the Ẓāhirī school.

297/910. Foundation of the Fāṭimid caliphate.

310/923. Death of Ṭabarī, founder of a school of law. Gradual 'Closing of the Gate of *Ijtihād*'.

321/933. Death of Ṭaḥāwī, a Ḥanafī scholar.

c. 447/1055–541/1146. The movement of the Almoravids in north-west Africa and Spain.

456/1065. Death of Ibn Ḥazm, a Ẓāhirī scholar.

524/1130. Death of Ibn Tūmart, founder of the movement of the Almohads.

558/1163–580/1186. The Almohad ruler Abū Ya'ḳūb Yūsuf.

620/1223. Death of Muwaffaḳ al-Dīn Ibn Ḳudāma, author of an authoritative Ḥanbalī handbook.

c. 700/1300. Survival of the four remaining 'orthodox' schools of law.

728/1328. Death of Ibn Taymiyya, a Ḥanbalī scholar.

751/1350. Death of Ibn Ḳayyim al-Jawziyya, a disciple of Ibn Taymiyya.

767/1365. Death of Khalīl ibn Isḥāḳ, author of an authoritative Mālikī handbook.

1451–81. The Ottoman sultan Meḥemmed II.

1481–1512. The Ottoman sultan Bāyezīd II.

1512–20. The Ottoman sultan Selīm I.

1520–60. The Ottoman sultan Süleymān I.

952/1545–982/1574. Abul-Su'ūd, Grand Mufti (*Shaykh al-Islām*).

956/1549. Death of Ibrāhīm al-Ḥalabī, author of an authoritative Ḥanafī handbook.

975/1567. Death of Ibn Ḥajar, author of an authoritative Shāfi'ī handbook.

1006/1596. Death of Ramlī, author of an authoritative Shāfi'ī handbook.

1685–1707. The Mogul emperor Awrangzīb 'Ālamgīr; compilation of the *Fatāwā al-'Ālamgīriyya* (Ḥanafī).

1772. The East India Company assumes sovereign rights; starting-point of Anglo-Muhammadan law.

1200/1786. Beginning of the agitation of 'Uthmān ibn Fūdī (Fodio), founder of the Fulānī movement.

1201/1787. Death of Muḥammad ibn 'Abd al-Wahhāb, religious founder of the Wahhābī movement.

1808–39. The Ottoman sultan Maḥmūd II; start of the reform movement in the Ottoman Empire.

1830. French conquest of Algeria; starting-point of the *Droit musulman algérien*.

1839–61. The Ottoman sultan 'Abdülmejīd; the *Khaṭṭ-i sherīf* of Gülhane (1839); legislation of the *Ṭanẓīmāt*.

1875. Codification of the Ḥanafī law of family and inheritance by Ḳadrī Pasha in Egypt.

1877. The *Mejelle* (Ottoman Civil Code) promulgated.

1899. *Avant-projet* of a Civil and Commercial Code (*Code Santillana*) in Tunisia.

1916. *Avant-projet de code du droit musulman algérien* (*Code Morand*) in Algeria.

1917. Ottoman Law of Family Rights.

1920. Beginning of the modernist legislative movement in Egypt; numerous acts until 1955.

1926. Abolition of Islamic law in Turkey.

1926–38. Modernist legislation in Iran.

1937. Shariat Act in British India.

1939. Dissolution of Muslim Marriages Act in British India.
1951. Jordanian Law of Family Rights.
1953. Syrian Law of Personal Status.
1956. Modernist Legislation in Tunisia; Tunisian Code of *statut personnel* and inheritance.
1957–8. The *Mudawwana* (Code of *statut personnel* and inheritance) in Morocco.
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R. RUBINACCI, in *A.I.U.O.N.*, N.S. v (1954), 106–21 (translation of a letter addressed by 'Abd Allāh ibn Ibāḍ to the Umayyad caliph 'Abd al-Malik about 76/695, on the administration of Abū Bakr, 'Umar and 'Uthmān; from BARRĀDĪ, *K. al-Jawāhir*, Cairo 1302, 156–67).

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A. F. L. BEESTON, 'The so-called Harlots of Ḥaḍramaut', *Oriens*, v (1952), 16–22 (cutting off the hands of women who had incited to revolt, ordered by Abū Bakr; from MUḤAMMAD IBN ḤABĪB, *K. al Muḥabbar*, Hyderabad 1942, 184–9).

I. GOLDZIHER, in *Z.D.M.G.* xlvi (1892), 17–20, 28 (punishment of the authors of satirical poems by 'Umar and 'Uthmān).

TH. NÖLDEKE and F. SCHWALLY, *Geschichte des Qorāns*, 2nd ed., i, Leipzig 1909, 248–51 (stoning to death for unlawful intercourse); cf. L. CAETANI, *Annali*, iii, 1910, year 17, §§ 84, 86.

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2 J. SCHACHT, *Origins*, 260–8.

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3 *I. GOLDZIHER, *Muhammedanische Studien*, i, Halle 1889, 10 f., 41; ii, 1890, 11–16 (transl. L. BERCHER, *Études sur la tradition islamique*, Paris 1952, 12–17).

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4 On the treatise of Ḥasan al-Baṣrī: H. RITTER, *Der Islam*, xx (1932), 67–83 (text); J. OBERMANN, 'Political Theology in Early Islam', *J.A.O.S.* lv (1935), 138–62; J. Schacht, *Origins*, 74 (comment).

J. SCHACHT, *Origins*, 188, 191, 224–7.

5 *General:*

J. SCHACHT, 'Foreign Elements in Ancient Islamic Law', *J.C.L.* 1950, nos. 3–4, 9–16; also in *M.A.I.D.C.* iii/4 (Rome 1955), 127–41.

—— 'Remarques sur la transmission de la pensée grecque aux Arabes', *Histoire de la médecine*, ii/5, Paris 1952, 11–19.

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J. SCHACHT, in *Orientalia*, xvii (1948), 519 (on the *kātib*); *Origins*, 95, and in *M.A.I.D.C.* iii/4, 140 (on codification), against S. D. GOITEIN, in *I.C.* xxiii (1949), 128.

6 J. SCHACHT, 'Vom babylonischen zum islamischen Recht', *O.L.Z.*, 1927, 664–9 (statement of the problem); cf. M. San Nicolò, *Beiträge zur Rechtsgeschichte*, &c., Oslo 1931, 159 f.

I. GOLDZIHER, in *R.S.O.* i (1907), 209 (on the meaning of *ījāb*).

CHAPTER 5

1 G. Levi Della Vida, art. 'Umayyads', in *E.I.*[1]

2 J. Schacht, *Origins*, 190–213.
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3 *On the transition from* ḥakam *to* ḳāḍī *:*

*É. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 2nd ed., Leiden 1960, 74–76.
J. Schacht, *Origins*, 228 f.

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C. H. Becker, in *Orientalische Studien Theodor Nöldeke . . . gewidmet*, i, Giessen 1906, 338–40, = *Islamstudien*, i, Leipzig 1924, 458–60.

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*M. Gaudefroy-Demombynes, 'Sur les origines de la justice musulmane', *Mélanges syriens offerts à M. René Dussaud*, ii, Paris 1939, 819–28.
*É. Tyan, *Histoire de l'organisation judiciaire*, 83–99.
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N. Edelby, 'L'Autonomie législative des Chrétiens en terre d'Islam', *A.H.D.O.* v (1950–1), 307–51.
A. Fattal, *Le Statut légal des non-Musulmans en pays d'Islam*, Beyrouth 1958.

4 J. Schacht, in *Revue africaine*, xcvi (1952), 322 f.
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and its Fall, Calcutta 1927, 264 f.); IBN SA'D (d. 230/845), *Kitāb al-Ṭabaḳāt al-Kabīr*, vii/i, Leiden 1915, 133–5.

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CHAPTER 6

1 J. SCHACHT, *Origins*, 6–10, 213–23.
†R. BRUNSCHVIG, 'Considérations sociologiques sur le droit musulman ancien', *S.I.* iii (1955), 61–73.
2 J. SCHACHT, *Origins*, 224–7.
3 †R. BRUNSCHVIG, 'Polémiques médiévales autour du rite de Mālik', *Al-Andalus*, xv (1950), 377–435.
J. SCHACHT, *Origins*, 58–97.
4 J. SCHACHT, *Origins*, 231–40, 243–8, 249–52.
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5 J. SCHACHT, *Origins*, 73 f., 76.
6 J. SCHACHT, *Origins*, 240–2, 248 f.
7 †I. GOLDZIHER, *Muhammedanische Studien*, ii, Halle 1890, 1–274 (transl. L. BERCHER, *Études sur la tradition islamique*, Paris 1952) (fundamental).
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†R. BRUNSCHVIG (see above, no. 3).
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—— artt. 'Ahl al-Ḥadīth' and 'Aṣḥāb al-Ra'y,' in *E.I.*²
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R. BRUNSCHVIG, 'Ibn 'Abdalh'akam et la conquête de l'Afrique du Nord par les Arabes', *A.I.E.O.* vi (1942–7), 108–55.
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—— *Origins*, 138–79.

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CHAPTER 7

1 †G. BERGSTRÄSSER, *Anfänge und Charakter des juristischen Denkens im Islam*, in *Der Islam*, xiv (1925), 76–81 (important, though partly dated).
*I. GOLDZIHER, *Die Ẓâhiriten*, Leipzig 1884, 3–20, 89–94 (still important).
J. SCHACHT, *Origins*, 98–119.

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3 J. SCHACHT, *Origins*, 269–87.

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—— *al-Jāmi' al-Kabīr*.
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4 J. SCHACHT, *Origins*, 288-314; artt. 'Abū Ḥanīfa al-Nu'mān', 'Abū Thawr', 'Abū Yūsuf', 'al-Awzā'ī', in *E.I.*²; 'Mālik b. Anas', in *Shorter E.I.*

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2 G. GABRIELI, *Il 'cadi' o giudice musulmano*, Rome 1913 (separately printed from *Rivista coloniale*, viii/2, fasc. 3 and 4).

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of Kadi', 'The Mazalim Jurisdiction', and 'The Hisba Jurisdiction in the Ahkam Sultaniyya of Mawardi', *J.R.A.S.* 1910, 761–96; 1911, 635–74; 1916, 77–101, 287–314.

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CHAPTER 10

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