LAW AND SOCIETY

The social structure of ancient Arabia was founded upon blood kinship. A group of men descending, or claiming descent, from a common ancestor, associated together for the sake of mutual defence; they were united by common worship and by common habits, but first and foremost by a blood tie, whether genuine or fictitious, which produced an effective brotherhood: the Arab tribe, in fact, was a great family.

As in all primitive societies, the original social unit in Arabia was not the individual, but the group. The individual counted for little by himself, but only through the family or aggregate to which he belonged. The family summed up the life of all its members under its social and legal aspects; it claimed their rights, it avenged their injuries, it answered for their crimes, and inherited their property after death, pursuant to a custom (sunnah) which derived all its authority, which was considerable, from immemorial practice.

Islam preserved this organism in all its essential features; one element only it changed; for the blood tie, which was the political and social foundation of the Arab tribe, it substituted the community of faith.

In the primitive Semitic tribe, worship was already the centre of tribal life. God and the worshipping tribe were one. The god was a friend to the friends of the tribe, an enemy to its enemies; he impersonated and embodied the continuity of tribe and kin. To change one’s god was to the primitive Semite what a change of nationality would be to us.

Thus Muhammad only recalled Arab society to its primitive beginnings and built up a social structure on the base which appealed to its deepest instincts, a fact which has not escaped the keen eye of Ibn Khaldun. The traditional frame of tribe and family was pulled down. There was no longer any question of

genres, of clientship, of tribal confederations. He who adopted Islam had to forget all connexions, even his own kith and kin, unless they were his companions in the faith. Like Abraham, he must say to his own people, so long as they adhere to the old faith: ‘Between you and me there is nothing in common.’ Such was the aspect of the new social order inaugurated by Muhammad.

Out of the anonymity of collective life, we see personal life emerging. Henceforward man is reckoned as an individual, and the individual in his turn derives what claims and duties he may have, not from his connexion with the community, but from his faith. The body of these believers make up the ‘Islamic community’.

Those who profess belief in the Only God (Allah), in the mission of Muhammad, and adhere to the few precepts he taught, belong by right to the ‘people’ or ‘community’ (umma) of Muhammad, which now supersedes the ancient umma, or tribe founded upon kinship. This community is different from any other: it is the chosen, the holy people, to whom is entrusted the furtherance of good and the repression of evil; it is the only seat of justice and faith upon earth, the sole witness for God among the nations, just as the Prophet had been God’s witness among the Arabs.

All these ideas are already set forth in the oldest historical document of Islam, the charter promulgated at Medina in the year One of the Hijrah.

The people of Muhammad were a large family, pitted against every other group not worshipping the same God, ‘one hand against all others’. ‘Brethren in the faith, partners in the sharing of booty, allies against the common foe’, as Abu Bakr said, addressing the people of Medina. Hence the ethically religious character of the whole system, in which mutual help is considered as a legal duty, according to the precept that every Muslim should be the helper and protector of every other
Muslim in case of need. 'The Muslim', says a hadith, 'are a single hand, like a compact wall whose bricks support each other.' These ideas are to be found in every part of the law, both public and private. A corollary of brotherhood is equality. Equal before God, the Muslims are equal among themselves. Among the believers superiority is marked only by priority in the faith or by a stricter observance of its precepts. 'O Quraysh, God has suppressed among you the pride of nobility and the arrogance of the times of ignorance. All men are descended from Adam, and Adam was built up from clay.' Equality before the law is a fundamental basis of the whole system, political as well as civil. 'Let them all be equal before thee', say the celebrated instructions of the Caliph 'Umar to Abū Musā al-Ash'arī, 'in respect of thy justice and tribunal, lest the powerful put their hope in thy partiality, and the weak despair of thy justice.' Whether authentic or not, these rules are to be found in every legal manual, and are the basis of procedure and of civil law.

At the head of this community of equals, brethren in the faith as in Israel of old, is God himself. The rule of Allāh over his people is immediate and direct. The gods of the ancient Arab tribes had been the patrons and protectors of their worshippers. Allāh, patron and defender of his chosen people, now takes the place of the ancient gods, and rules the Muslim community. When the chief of a tribe that had adopted Islam said to the Prophet, 'Thou art our prince', the Prophet answered quickly: 'The prince is God, not I.'

Islam is the direct government of Allāh, the rule of God, whose eyes are upon his people. The principle of unity and order which in other societies is called civitas, polis, State, in Islam is personified by Allāh: Allāh is the name of the supreme power, acting in the common interest. Thus the public treasury is 'the treasury of Allāh', the army is the 'army of Allāh', even the public functionaries are 'the employees of Allāh'.

No less direct is the relation between Allāh and the individual believers; for between Allāh and the believer there is no mediator; Islam has no church, no priests, no sacraments. What is the good of mediators between man and his Maker, who has known him before his birth and is 'nearer to him than his jugular vein'? After the Prophet who has transmitted to mankind the final word of Allāh, Allāh can have no other interpreter and no other agent of his will. Man is alone in the presence of God, in life and in death; he may always address him directly, without introduction and without ceremony, as he would address an Arab Sayyid. From birth to death man is alone under the eye of God, Whom nothing escapes, to Whom is present every action, every word, even the most hidden thought; alone he will answer for his deeds, and alone will he face the judgement of God, before Whom neither intercessions nor mediators will be of any avail, in that dies irae when every creature will be summoned to receive the requital of his deeds. The most rigid protestanism is almost a sacerdotal religion, compared with this personal monotheism, unbounded, and intolerant of any interference between man and his Creator.

Alone and defenceless in the presence of the All-seeing Judge, what can man do in order to shelter himself from the power of God, but surrender himself to His mercy, 'from Him to Him', according to the Muslim formula? This surrender of man to God, a surrender full of humility and hope, is true faith, and that is why Islam (i.e. the abandonment of oneself to God) is the only true religion, because it is the only disposition of a religious soul in the presence of God. Man realizes who God is and man's lowly estate in His eyes. This total surrender, which is often a characteristic of Semitism, is the en��n of Islam, its badge among the nations, and it was perhaps an obscure consciousness of the affinity of this teaching with the religious instinct of his own people that led Muḥammad to proclaim himself

---

1 Many Muslims, however, believe in the effective intercession of Muḥammad.
the Restorer of the genuine and undefiled faith of Abraham, and the last of the Prophets.

Foundations of the Islamic Community

The Divine Law (shari'ah). The nature of this brotherhood grouped round the symbol of faith, and governed by God, determines the conception of law. Law, according to the ancients and ourselves, is the legal norm approved by the people, directly or through the organs that represent them, and derives its authority from the reason and will of man, and his moral nature. The Muslim conception is quite different. If it be true that the chief and ruler of the Islamic community is God himself, law is taught to save the will of God. It is the rule according to which Allah, the legislator to the people whom He has chosen, will try it.

Submission to this law is at the same time a social duty and a precept of faith; whoever violates it, not only infringes the legal order, but commits a sin, because there is no right in which God has not a share. Juridical order and religion, law and morals, are the two aspects of that same will, from which the Muslim community derives its existence and its direction; every legal question is in itself a case of conscience, and jurisprudence points to theology as its ultimate base.

What is the nature and proper function of this law? The Quranic revelation styles itself a law of liberty, an act of mercy vouchsafed by God to mankind, in order to soften the rigidity of the preceding revelations. Islam is a reversion to natural law, to the primitive faith of the patriarchs (Noah or Abraham) which had been corrupted and adulterated by Jews and Christians. The new law suppresses the austerities and the numerous inculcations imposed upon the Jews by the Mosaic law, abolishes the macerations of Christianity, and declares its willingness to comply with the weakness and frailty of man, and the practical necessities of life. ‘Ease the way, do not make it rougher’: such were the instructions usually imparted by the Prophet to his missi dominici. ‘Allah lays upon each man only what he can fulfil.’ Islam has a tendency towards mysticism, but not towards asceticism. It formally disapproves of the exaggeration of austerity, which weakens the body and suppresses the natural instincts of man. It exorts the believer to enjoy the ‘good things’ granted by God, provided he observes due measure and obeys the precepts, not numerous in themselves nor very strict, of the Quranic revelation.

Islamic law favours every practical activity, and holds in great esteem agriculture, commerce, and every kind of work; it censures all those who burden others with their maintenance, requires every man to keep himself by the produce of his own labour, and does not despise any sort of work whereby man may make himself independent of others. ‘L'islam est une religion d'hommes’, says Renan. Considering its spirit, therefore, we see that the tendency of Islamic law is to allow human action the widest limits, and we may agree with the Muslim jurists, when they teach that the fundamental rule of law is liberty.

But this liberty (takhrir) cannot be unlimited. Man is by his very nature greedy and ungrateful, covetous of other men's goods, niggardly of his own, disposed to sloth, ungrateful for the blessings that God has bestowed upon him. Human society would not have been possible, and the individual himself would not have been able to subsist, had God allowed free scope to the appetites of every individual as well as to the injustice and violence of all. God has therefore set a bound to human activity, and this bound (bad'ah) is precisely what we call law (hukum), which restrains human action within certain limits, forbidding some acts and enjoining others, and thus restraining the primitive liberty of man, so as to make it as beneficial as possible either to the individual or to society.

Naturally, law cannot deal with every detail, but only with a restricted number of cases having legal significance. The Roman
jurists had said: *Legis virtus haec est, imperare, cotare, permittere, punire.*

Islamic law, true to its religious character, adds to these two fresh provinces of legal interference, namely ‘things admissible’ and ‘things reprehensible’. Leaving aside for the moment the penal section, we thus obtain five categories representing the whole body of positive law. Whatever their form, these rules tend to the same end and have the same purpose, that is the public weal (*ma'ālība*). Accordingly, law, divine in its origin, human in its subject-matter, has no other end but the welfare of man, even if this end be not at first sight apparent: for God can do nothing which does not express the wisdom and mercy of which He is the supreme source.

Man, being both soul and body, has a twofold life, moral and physical. Among the rules or limits laid down by God for the discipline of mankind, some have reference to the life of the soul, some to the life of the body. Religion and law are two distinct orders, but complementary to each other, being strictly connected through their common end, which is the welfare of man. The principles of faith (‘beliefs’) regulate the spiritual life and determine what man should believe in order to attain eternal life. Positive law (‘*ḥarī‘ah*, the straight way) is the discipline of human activity as directed to earthly purposes, and is the necessary complement, the body of that organism of which faith is the soul. The proper sphere of faith is the heart, that is to say the inner life of man. Positive law cannot take this into account. Faith is a personal affair, of which God is the sole judge, because He alone knows the heart of man. The proper sphere of positive law is the actions of man as far as their external manifestations are concerned. Some of these refer to the observance of the fundamental precepts of Islam, i.e. the profession of the Divine Unity, prayer, fasting, the payment of tithe or poor-tax, and pilgrimage. Here there is no question of faith (‘the actions of the heart’), for the heart escapes the competence of the lawyers; but rather of the actions of the body, namely, those external acts of piety or worship made binding upon the believer by the precepts of Muslim law. These precepts (as well as those duties of public law which will be mentioned presently) are called ‘God’s rights’, their subject-matter being the duties of man towards his Creator, which do not depend on personal choice.

But man is not only a soul, he is also a body, and as such has to provide for his earthly existence. Hence the supremely important fact of social life. It is said in the *Durr-al-mukhtar*: ‘Man is by nature a political animal, because he cannot live by himself as other animals do, but requires the help and society of fellow-creatures.’ But the aptitudes of individuals are different, their needs numerous, the faculties of each, as well as their forces, very limited. Man is obliged to seek the help of his fellows, and hence the complicated and manifold interests, relations, and exchanges, which are the origin and mainspring of society, and of which money is the instrument. From the preceding quotation we may perceive how deep and far-reaching is the influence of Hellenic ideas. Amongst others, we may trace this influence in the functions of money, as they are developed in Dimashqī, in a way parallel to that of *Digest*, Book XX.

The relations arising from social life are the origin and proper matter of positive law. The necessity of reproduction gives rise to sexual union, as well as to the constitution of the family. Hence the legal connexion arising from matrimony. The division of labour and the various needs of the individual give rise to that net of relations and exchanges to which jurists refer under the general name of legal transactions, corresponding to our civil and commercial law, which are not separated into different branches in the Muslim legal system, any more than they were in Roman law. The death of the individual gives rise to succession, which is governed by the rules concerning devolution and division of inheritance. Finally, the protection
of the social order gives rise to a penal system, of which more will be said later.

Law is a social fact; one section refers to society, and another to the individual. Whatever does not concern private interests is termed God's right, because God is substituted in the Muslim concept for the old idea of civitas. Among God's rights are the rules relating to freedom, to patronage, to matrimony, to kinship, to the prohibition of usury, to penal law. These rules cannot be disregarded, for they appertain to the general welfare, or, as we should say, to public order, and are independent of the individual will. The other class of relations refer to the private concerns of individuals, and are called the rights of man.

Starting from liberty as the fundamental basis of law, Islamic jurists have reached a twofold conclusion:

1. Liberty finds its limit in its very nature, because liberty unlimited would mean self-destruction—and that limit or boundary is the legal norm, or Law.

2. No limit is arbitrary, because it is determined by its utility or the greatest good of the individual or of society. Utility is the foundation of law, traces also its boundary and extent.

A cursory review of the various legal institutions may be of some help towards realizing the practical bearing of these principles. As God's vicar upon earth, man is endowed with a personality making him susceptible both of rights and duties; chief amongst these is the right of man as an individual to personal safety and freedom. Freedom is the inborn right of every man, slavery being only an exception to the rule: 'Adam and Eve were free', a proposition from which jurists have drawn various inferences: (a) the foundling whose status is unknown is presumed to be free; (b) the freeman claimed as a slave is not bound *prima facie* to prove his freedom, until the reverse has been legally shown against him; (c) in case of doubt, the presumption is for liberty.

---

Law and Society

Liberty means the power of self-disposal. The freeman has no master but God, the supreme Lord of all human existence, to whom alone subservience is due. Hence liberty cannot be disposed of at pleasure, and even a spontaneous admission of slavery is not recognized by law as valid. In the same spirit law forbids and religion deprecates suicide.

The same principles and the same methods apply to the doctrine of proprietary rights. Potentially any man is entitled to any thing because all the world's goods have been created for the use of man. By instituting property God has set a limit to this right; thus enabling every man to know the lot assigned to him by God in the general stock of wealth, and securing social order. But it would be erroneous to suppose that property as a right is unlimited—it finds a limit in its very nature and the end to which it may be subservient. Earthly goods are bestowed upon man in order that he may provide for his existence, that is to say, in order to employ them usefully, not to squander them without a purpose or according to his whim. Following the precepts of the Qur'an and tradition, Muslim law ignores the *jus utendi et abutendi* of Roman law, brands as a form of squandering any consumption of wealth not required by real use, considers every useless consumption a sin. In its eyes prodigality is a form of mental disease, which ought to be legally restrained. It insists on moderation, following the middle way in the use of riches, as most consonant with the nature of law and with the purpose for which God has bestowed His goods upon mankind.

The doctrine of contractual capacity presents similar features. Every man is able to enter into an obligation and impose obligations towards himself upon others, inasmuch as, by his very existence, he is endowed with legal capacity. But this abstract faculty also has a limit, which is determined by the interest or utility of the subject; it is expressed by the various restrictions imposed on the contracts of infants, and of persons afflicted with mental disease, or prodigality, or sickness, or bankrupt. These
limitations of capacity are generally called bonds or fetters, and are grounded on the intention of law to protect the estate of the incapable against the consequences of his own incompetence. Likewise, every man is entitled to make use of his right without caring whether, in so doing, he may inconvenience others, the object of every right being essentially to procure the advantage of its holder. But this faculty of procuring one’s own advantage has a limit, expressed by a twofold rule: (a) no one is entitled to exercise his right with the sole object of injuring others without any profit to himself; (b) neither is one entitled to exercise his right, when this use entails an injury to others out of proportion to his own benefit. This rule applies to every part of the system. Hence the limits set to paternal authority over daughters, to the rights of the master over his slave, of the husband over his wife, and the rules concerning neighbourly relations. The logical process followed in all these cases is always the same: once the principle is laid down, the lawgiver is careful to set a limit, without which law, instead of helping, might become the enemy of mankind.

This system of rules comprising every part of a Muslim’s life, from the humblest details up to the principles of his moral and social existence, is termed ‘the straight way’ ‘ṣāhid ab’ and must be followed by every believer.

Hence the importance assumed by the science of law (al-fiqh), which is linked up with theology, as an essentially religious science, conferring great merit on those who cultivate it, as may be inferred from the Ḥanafi definition: ‘the science of Law is the knowledge of the rights and duties whereby man is enabled to observe right conduct in the world, and prepare himself for the future life’. Truly one may apply here with more truth what Roman lawyers said of their own pursuit: ‘Rerum humanarum atque divinarum scientia’.

The leader of the Community

The sovereign is an integral part of law: he is as necessary as law itself. Law is a social fact, based, as we have seen, on human society and the social nature of man. Unfortunately man, although social by nature, is not a good animal. ‘Men are the enemies of each other’ (Qur’ān, xx. 121). Were they left to their instincts of violence and greed, they would utterly lay waste the earth. Law is a permanent struggle against the wicked instincts of man. Law would be an empty word had it not a defender and sustainer.

The same reasons which make it necessary for the welfare of men that their activity should have a limit, which is law, make it imperative that they should have a ruler to lead, and when necessary to compel them to obedience. God has therefore perfected the edifice of law by establishing a ruler (imām, or khālifah), and prescribing obedience to his behests. Supreme power can be conferred by God alone, because no man, as such, is entitled to rule over his fellow beings. Every form of authority among men, the relation of father and children, of guardian and pupil, of master and slave, of ruler and subject, has no other foundation than the will of God, to whom alone power belongs, and Who confers it in different measure on some men for the benefit of others: ‘God establishes princes and God deprives them of power’.

The establishment of the chief and obedience to his directions are both a religious duty and a necessity of existence for the Muslim community, as they would be for any other, because, if there were not a firmly established power, there would be no human society, no religion, only a rabble, lawless or misguided, wherein all that makes life worth living would be lost, including the supreme interest of faith, whose foundation rests upon order and security for each and all. ‘The Prince is the main pillar of the pavilion of the State.’ Hence the establishment of such a
chief is a religious duty; every Muslim possessing the necessary requisites must concern himself with it. To shirk such a duty is to desert the community of believers. ‘He who dies without an imám dies the death of a pagan.’

On the same grounds the headship can only be held by one head at a time: (a) because the unity of the divine law requires the unity of the sovereign who has to enforce it; (b) because social order cannot be secured if the sovereign authority be shared between more than one —‘were there more than one God, the universe would go to ruin’, says the Qur’án (xxi. 22).

This one chief must be endowed with the moral and physical qualities necessary to fulfill his office, viz.: freedom—the caliph cannot be a slave, because he who cannot freely dispose of himself cannot have the authority necessary to be a chief; masculine line, because, as the hadith expresses it, ‘a people whose chief is a woman cannot prosper’; legal capacity, i.e. puberty and moral sanity; physical integrity, i.e. immunity from physical imperfections which might hinder him in the fulfillment of his duty; knowledge of divine law—although it is controverted how far this must extend—wisdom and courage in order to maintain in peace and war the interests entrusted to his care; a moral life, in conformity with the precepts of the divine law and of Muslim ethics; last, but not least, Descent, viz. the fact of belonging to the Quraysh. The Quraysh are the tribe to which the Prophet belonged. Their pre-eminence amongst Arab families seems to have been acknowledged from ancient times and to have gradually grown into a maxim. This does not mean that supreme power should be vested in a special branch of that tribe: the original purport of this strange restriction is essentially that the caliph should belong by blood to the Arab race. It is therefore contrary to principle that the caliphate should belong to an alien, and this is one of the reasons of the illegitimacy of the modern caliphate.

Given these requisites, it is evident that the choice of a chief for the Islamic community cannot be left to chance or violence, but must be founded on the ripe reflection of those best qualified to appreciate whether the candidate is a fit subject for choice. The elective body cannot therefore be the whole of the Muslim people, but only those who by their culture, their social rank, their experience of worldly affairs, and their morality, are suited to be judges. The electorate will be entrusted to the ‘men of the pen and the sword’, in other words, to the civil and military notables; to them is given power ‘both to bind and to loose’, that is to say, to stipulate in the name of the whole community the bond on which rests the power of the prince and the obedience due from his subjects. Election is in law the act by which the people, or the notables on their behalf, confer the supreme power on the object of their choice; it is an offer of contract (‘iqdā) which, if accepted by the person chosen, becomes a binding contract (‘aqd).

In the first century of the Hijrah, another way of instituting the caliphate was introduced by custom—viz. the appointment of a successor or heir by the reigning caliph. Such an appointment is equivalent to an offer of contract, which, if accepted, becomes a contract.

The form in which the contract is perfected is called bay’ab, a word which was formerly used to express the consummation of a bargain, and is symbolized by the traditional handshake which, since the time of Abū Bakr, has been the token of acceptance on the part of the person elected.

Let us now consider the effects of the bay’ab or homage: (a) with regard to the caliph himself; and (b) with regard to the people under his rule.

(a) By accepting the investiture, the caliph binds himself to exercise his power within the limits laid down by the divine law. This is the first and most essential of his duties, the end of man being not the interests of this world, a thing in itself vain and
futile, ending in corruption and death, but faith which leads man to eternal life.

(2) The caliph undertakes to provide for the temporal interests of Islam, such as the protection of the frontiers, the conduct of war against the unbelievers, internal security, management of public property, and the administration of justice.

In the performance of this twofold duty the chief of the Muslim community effectively acts as the vicar or locum tenens of the Prophet (khalifat). The successors of the Prophet were not the heirs of his spiritual mission. They were in fact, and claimed to be, nothing more than substitutes or vicars, who carried on his work by furthering the religious and temporal interests of the community. Abu Bakr declined the title of Vicar of God (khalifat Allâh), and was content to be called ‘the Vicar of God’s Apostle’. Later on, under ‘Umar, the title of Amir al-mu’minin, ‘Commander of the Faithful’, came into use and defined still better the representative of supreme power who was not a sovereign (malik) but a prince, in the original sense of the word, namely primus inter pares.

The name imâm, signifying properly anistis, director of prayer, remains through all time to designate one of the highest prerogatives of the sovereign, viz. his religious office, the source of all others, which are, according to the canon law of Islam, justice, holy war, and censorship of customs. When writers mention the imâm without further explanation they mean thereby the ruler of the state, the supreme source of power, in whose name all public functions are performed. None of these functions confers on the caliph a sacerdotal or holy character, as has been assumed by certain authorities.

The truth is that the caliph in his capacity as religious chief is not a pontiff: he has no priestly character whatsoever, because Islam has no hierarchy nor apostolic succession. Neither is he a master (rabb) in his political capacity. The caliphate is not an office instituted by the divine law in order to provide for the general welfare; it is a public trust having as its object the service, the protection, and the enforcement of the holy law. The caliph is often compared to a shepherd, and embodies in his person the unity of the flock that is gathered round him. As the shepherd watches over his flock, and the guardian assists his pupil, so the prince is established to further the interests of Muslims who are unable, as a body, to take care of them. He is the trustee (wakil) of the community of believers—his actions derive their legitimacy and their limitation from the principle that a prince must seek the welfare of the community, ‘for to this end are Princes set over the people’. The trustee is bound to give his master a truthful account of what he has done. The caliph is bound likewise to reckon with God. ‘I advise thee’, writes Abu Yusuf to the Caliph Harûn al-Rashîd, ‘to watch over the flock entrusted to thy care . . . since the shepherd must answer for the flock committed to him, and the master may call thee to account for it.’

Jumâ’âb, smâm—Congregation, leader—these two simple terms sum up the whole political system of Islam, as well as its conception of the state.

The representative and executive power of the state is centred in the caliph, whose function is to apply it, when the law is explicit and formal. In this case he has no authority to alter it in the least, and must apply it such as it is; for instance, when the law does not allow the judge to grant a reprieve. In the cases for which no positive rule is laid down his freedom is practically unlimited: for he is not an ordinary agent but a trustee, and the execution of the law is left to his discretion. Besides this judicial discretion, he possesses discretionary powers in many other matters of public concern, such as the conduct of war, the division of booty, and the assessment of the land-tax, the employment of the public revenue, the appointment of public officials.
As regards the people, the acceptance of the *bay'ah* signifies an engagement to follow and obey their chief: 'whosoever rebels against the imam rebels against God'; 'obey, though your chief be a black slave'. The duty of assistance or help (*nusrât*) is connected with the duty of obedience, and binds the person who has done homage to respond to any call made by the prince for help against an enemy challenging his authority or threatening the safety of Muslims.

The only limit to these duties is the sheer impossibility of giving help, be it physical or moral. When a command exceeds men's powers or is clearly contrary to the divine law, for instance if the prince commands any one to commit murder or adultery, to drink wine, or to omit a ritual prayer, the prince's authority is in abeyance. 'No obedience in sin', says the tradition. The mutual engagement between caliph and people is inviolable, so long as the caliph is fit to fulfil his duty of protecting the Muslim community. When he is no longer able to give the people what they have a right to expect, his authority lapses, and the contract is legally cancelled. This change may happen through physical incapacity, or through loss of liberty, such as captivity among infidels.

The caliphate thus outlined embodies the political programme of the orthodox school of jurists, the 'prophetic Caliphate', as it is termed—the only legitimate form of sovereignty. To them it seemed to coincide with the golden age of Islam under the first four successors of the Prophet, the 'well-directed', as they are called. After that time jurists point to a progressive decline, growing more rapid in proportion as Islam departs from its origins. The true caliphate is succeeded by the kingship, viz. power pure and simple, 'the rule of the sword', which has nothing to do with religious law. A tradition referred to the Prophet, in different versions, says: 'After me there will be amirs (commanders) and after these kings and after these tyrants.' These traditions give an outline of the history of the caliphate from the orthodox point of view, and are on the whole confirmed by history.

In point of fact, the caliphate as it is fondly imagined by jurists never had a real existence. But in its beginnings, under the first two caliphs, it nearly attained that programme; and had circumstances been favourable, it might have developed the germs of good government. But hardly had the first Muslim generation died away when the practical needs of a great polity, and the unruly temper of the Arabs, combined to transform the caliphate first into a personal rule under the Umayyads; then, under the Abbasids, into a monarchy on the Persian pattern, whose apparent orthodoxy but ill concealed the despotism, the violence, and the administrative mismanagement which were pushing the empire to its ruin.

In the third century of the Hijrah the sultanate superseded the caliphate, which was reduced henceforth to a purely decorative function. The military chieftains who rose on the ruins of the empire imposed their rule as *de facto* authorities, and the Caliph of Baghdad had to be satisfied with investing them with a show of legitimacy.

The jurists had to accept the inevitable, and they tried to make the best of the actual situation, hard as it was. The schools began to teach that government, even if it were not in accordance with the requirements of the divine law, and even if it were based on violence pure and simple, was still deserving of homage as a protection against anarchy and a check to private violence, thus providing that social peace which is the essential aim of the *Shari'ah*. Jurists realize that the old programme is too lofty for practical use. It is admitted by many teachers that the imâm may not be the blameless man required by the *Shari'ah*, that descent from the Quraysh is not indispensable for the caliph, and even that there may be more than one imâm. The believer must obey him who holds power, either rightfully or *de facto*. The actual holder may be a tyrant, or lead a scandalous life.
What has a believer to do in such a case? 'Be patient, give to Caesar what is due unto Caesar and wait until justice be done.' Al-Ghazālī, towards the end of the fifth century, puts the problem with his customary frankness—'the concessions made by us', says Ghazālī, 'are not spontaneous, but necessity makes lawful what is forbidden. We know it is not allowed to feed on a dead animal: still, it would be worse to die of hunger. Of those that contend that the caliphate is dead for ever and irreplaceable, we should like to ask: which is to be preferred, anarchy and the stoppage of social life for lack of a properly constituted authority, or acknowledgement of the existing power, whatever it be? Of these two alternatives, the jurist cannot but choose the latter.'

In 656 A.H. (A.D. 1258) the Mongols stormed Baghdād, put the caliph to death, and destroyed the whole Abbāsid family. The caliphate, which had been long dead as a political power, was thus effectually brought to an end. After that epoch, history mentions only sultans, save in Egypt where an Abbāsid, either authentic or fictitious, perpetuated the title of caliph. This empty puppet was kept only for the convenience of the Mamlūk rulers. When the Turks took Cairo in 1517, they found the last remnant of this line. It has been maintained that there was a formal transfer of power from this last Abbāsid to the Turkish ruler; but this transfer, had it really happened, would have been legally null and void: for the caliphate is not a proprietary right transferable at will, but a trusteeship held on behalf of the Muslim community. The caliphate, therefore, has really been extinct since 1543 if not 1258. The real state of things is given by the Qāḍī Ibn Jāmā'ah of Damascus (about 700 A.H.): 'The sovereign has a right to govern until another and stronger one shall oust him from power and rule in his State. The latter will rule by the same title and will have to acknowledge on the same grounds; for a government, however objectionable, is better than none at all; and between two evils we must choose the lesser.' Jurists in Morocco have summed up the rule in the brief maxim: 'To him who holds power obedience is due.'

**Law and Society**

There is not much to say respecting the penal system. Based as it is, like the Hebrew law, on the principle of an eye for an eye and a tooth for a tooth, and the primitive conception of retaliation, it reproduces too literally, and without the least mitigation, the old legal ideas we find in the biblical text. Those conceptions have a historical and traditional value. The later generation of jurists, even in Arabia, dare not oppose the literal interpretation of the Qur'ān to the progress of ideas, and they try by interpretation and commentary to shirk the strict application of the text.

**The Legacy of Islam**

Is it allowable to speak, even in a very wide sense, of a legacy of Islam? According to a current opinion, it is useless to try and find a common meeting-ground for Eastern and Western Law. Enclosed within the rigid frame of dogma, the system of Islam cannot be reduced to our formulas; being, as it is, a religious law it is at variance with our ideas, quite incapable of development. A confusion is usually made in this respect between two distinct fields. Like Christianity and any other religion Islam has special dogmas pertaining to it, which of course cannot be exposed to discussion by its votaries. But it would be as unjust to tax it with rigidity as it would be to bring a similar charge against Christianity. Every great religious system has something more than mere dogma. It has been said by St. Thomas Aquinas with great truth: 'The common weal, which is the ultimate scope of law, has many different origins, according to persons, to circumstances, and epochs'. The thinkers of Islam have perceived this quite clearly. The political doctrine of Aristotle, combined with the principle of Revelation, has produced in Arab science a
system which offers some analogies to the political ideas of medieval Christianity which are both natural and striking. On these we should like to dwell briefly.

Society, as we have seen, is a necessary fact; it is not a confused rabble, but an aggregation held together by a common end and by ties of mutual help; hence the social and moral conception of the state: 'The object of Government is to lead men to prosperity in this world and to salvation in the next'. This purpose is effected by law: the structure of law is determined by the very structure of society, and from this in fact derives its legitimacy.

Its beginnings are traced by Muslims much in the same way as in Christian theory. A moment existed at the dawn of history when mankind was one single flock. Ignorant of evil they lived in a state of peaceful anarchy, according to the precepts of natural law. The end of the golden age came with the crime of Cain. The passions of men gained the upper hand and brought about social disorder, the loss of the true faith, and the introduction of particular laws. The object of law is the prevention of evil, hence two main principles: equality and good faith.

1. Equality: 'The white man is not above the black nor the black above the yellow; all men are equal before their Maker', said the Prophet. Equal before God, members of a great family in which there is neither noble nor villein, but only believers, Muslims are equal before the civil law; and this equality was proclaimed at a time when it was practically unknown throughout Christian society.

2. This law, equal for all, rests essentially on good faith. Muslims must keep their pledges. No one may profit from what belongs to another Muslim, except with the owner's consent. 'Be honest towards those who have confidence in your honesty'; 'do not betray those who have betrayed you'—these traditions and a great many others referred to the Prophet are also among the general rules of Muslim law. This conception of good faith is essentially an ethical one, and is elevated to an abstract and universal notion. It strikes us as being more akin to our mind than the feudal and Germanic conception of good faith springing from personal fealty. The system thus allows a wide scope to the human will, and attaches importance to the spirit rather than to the letter. Human will, whatever its expression, is sufficient to create a legal bond. It is but seldom that the validity or nullity of an act does depend in Muslim law on the point of form. Contrast this with the unending formal minutiae of Germanic procedure. The rule 'consensus solus obligat' is fundamental in the eyes of the doctors of law.

Having as its scope social utility, Muslim law is essentially progressive, in much the same way as our own. Being a product of language and logic it is a science. It is not unchangeable and depending on mere tradition. The great schools of law agree on this point. 'The legal rule', say the Ḥanafites, 'is not unchangeable, it is not the same as the rules of grammar and logic. It expresses what generally happens and changes with the circumstances which have produced it.'

Law is also liable to change with regard to its application. Malikites and Ḥanafites agree on this point also. 'Utility is the rule of the lawyer.' The Arabs have perceived very clearly the reason of this flexibility. It is again usage. Societies are living organisms and undergo ceaseless change during their life. 'In the time of Adam the condition of men was weak and miserable. The sister was permitted to the brother and God extended his indulgence to many other matters. When society became wealthier and more numerous, precepts were multiplied.' This continuity of life may be seen in the course of Islamic history.

We can see that the Companions of the Prophet took different decisions on the ground of their utility, without being authorized by any precept. For instance they decided that the Qur'ān should be committed to writing, although they were not empowered to do so by any precedent. 'They set up offices for the different branches of govern-
ment, struck money, built prisons. It is for the same reason of utility that law submits the deposition of legal witnesses to strict conditions which are not found in tradition... so that, of necessity it has given certain contracts, e.g. loans, a wide interpretation...'

Such are the foundations of the great authority given by Muslim jurists to custom. It is a kind of unwritten rule which has the power of making law and even of modifying it. ‘What the Muslims approve, is approved of God.’ When it is uniform, enduring, and is not contra bonos mores, or against the general rules of law, usage has the same force as law itself; and becomes part and parcel of it.

‘Necessity’, say the Hanafites, ‘has opened the way to the re-admission of many things which would not be admissible according to strict rule.’ For instance, mortgage is admitted, in order to relieve the condition of debtors. Interest on loans, theoretically forbidden because, as in most primitive economies, it promptly degenerates into usury, finds a devious way back into the accepted practices. We might add emphyteusis, the hire of a labourer against part of the product, the contract made with a broker or with a town crier: all of which conventions, according to the letter of Muslim law, ought to be null and void on account of the uncertainty of their object and the element of risk which they entail, are nevertheless admitted by the two orthodox schools of law.

Not only does the law admit custom, but it follows it in its changes.

‘It is a general rule that every law based on use or custom changes with the custom itself... It might be said on one side: we must follow what is established, for we cannot make law, having neither the knowledge nor the authority required; we must solve questions which are submitted to us according to what is to be found in the books. But on the other hand, to apply laws which are founded on ancient usage, once that usage is changed, is to set oneself against general opinion, and to prove one’s ignorance of religion. The truth is that whenever a law is based upon the custom of a particular time, that law must change when the conditions which called it into being have changed.’

The mainspring of this development is the prince or ruler. He is a trustee: he cannot substitute his own authority for traditional law, but he may prefer one of the accepted systems of law before another. He may make a certain custom so prevalent that it ultimately becomes a law. Finally, in case of need, he may take the measures called for by the circumstances, as a good trustee must do on behalf of his beneficiary. Does this mean that the religious idea has had no share in the development of Muslim law? It would be a misapprehension of that powerful unity of thought which is the main strength of Islam. The science of law is only a part of theology. Even more perhaps than in Christianity, theocracy has superseded the classical notion of city-state. But we must not go astray in this interpretation. Looking more closely into the matter, we shall see that the meaning of the Muslim jurists is identical with our own. The distinction between the right of Allah and the rights of man has no more meaning than the distinction between public law and private law.

The religious idea has had no doubt a very great influence, but it is not what one would suppose. That influence consists in the moral bent it has given to law, that is to say in the connexion, amounting often to a blending, between legal rules and moral precepts. Partnership, loan, the character of witnesses, the relations between master and servant, plaintiff and defendant, every convention and bargain forming the subject-matter of legal relationships takes a moral turn and is considered under an aspect superior to mere private interest. Deposit, for instance, is a form of assistance and of mutual help, because thereby one helps the proprietor to preserve his property; and this is recommended because God says: ‘Help each other in good works’, and the Prophet says: ‘God helps man so long as man helps his
brother'. The man who receives knowingly a payment which is not due to him incurs a twofold sort of obligation: he is guilty before God, and guilty towards the victim of his fraud. The debtor who has the means to pay his debt and postpones payment is guilty of a serious sin, and endangers his salvation. The Prophet uttered some charming words with regard to neighbourly relations: 'Be kind to your neighbour. Draw the veil over him. Avoid injury. Look upon him with an eye of kindness. If you see him doing evil, forgive him. If you see him doing good to you, proclaim your thankfulness.'

The consequence of this spirit is that the exercise of a right is actually regarded as the fulfilment of a duty: for if right is good, it is not possible 'to omit it without sin'. He who claims his property from an unrightful possessor fulfils also a moral obligation: for if he kept silence, he would allow the unjust possessor to continue in his sin. 'Help thy brother even if he is unjust', says the Prophet. 'Assistance in this case consists in preventing his being unjust.' But if everybody's right is not only his private interest, but is also his moral obligation, this right has certain limits which moral law and social interest determine. Conciliation and compromise are everywhere asserted to be most laudable. Reprisals are forbidden. Vexatious proceedings against a debtor are contrary to law, as well as abusive exercise of right. 'No one may make use of his right so as to cause another an evident damage.' The Muslim jurists have in these matters a more delicate feeling than we should suppose. It is forbidden, for instance, to give a power of attorney to the enemy of the party against whom it is proposed to proceed; to hire a beast of burden to a man known for his rough treatment of animals; to sell a young slave girl to a libertine who might persuade her to impyety or debauch her. Everywhere the limit of law and its measures is traced by morality.

Hence it has been rightly said: 'Man has no right in which God has not a share; God's share is His command to give every

one his due and not to encroach on what belongs to another'. We have thus reached a point of pure right which is common ground for all civilized communities.

Such is, in its essential features, the Muslim system of law. It may rightfully claim a high rank in the appreciation of experts. It stands out as immeasurably superior to the barbarous practices and crude formalism of early feudal law, with which its fornis was contemporaneous.

What was lacking in Muslim law is what has been wanting in every other respect, viz. a more synthetic spirit. A tendency to anarchy, and a fundamental incapacity for organization and discipline, the causes of the political incapacity of the Arabs, have been intellectually a source of weakness within their legal system. Another cause of weakness is that the Arabs have immoderately exaggerated the fundamental basis of their system. The idea that justice consists in reciprocity has been pushed to its extremest consequences by them, as well as by our canon lawyers. The philosophy of Aristotle contributed to this result at least as much as religious dogma: the prohibition of interest under every form, the dislike of every kind of risk, the exclusion of any uncertainty in contracts, all the peculiarities, in a word, of Muslim law, spring from that origin, and depend from the same general idea, which is that in all these cases the rule of equality is infringed, and with it justice; and the lawyer has only in view the readjustment of the balance, that is to say the suppression of every device which may trouble the strict application of the rule—ut aequalitas servetur, as our own doctors of canon law used to say.

The constant endeavour to attain this objective has led to an excess of regulation, an attention to minutiae that would have stifled every form of business, if precepts had not been eluded by means of a more or less plausible system of fictions, or had not remained for the most part purely theoretical.
Law and Society

Among our positive acquisitions from Arab law, there are legal institutions such as limited partnership (girâd), and certain technicalities of commercial law. But even omitting these, there is no doubt that the high ethical standard of certain parts of Arab law acted favourably on the development of our modern concepts; and herein lies its enduring merit.

D. de Santillana.

SCIENCE AND MEDICINE

§ 1. Early Period to A.D. 750

§ 2. Age of Translation from about 750 to about 900

§ 3. The Golden Age from about 900 to about 1100

§ 4. Age of Decline from about 1100

§ 5. The Legacy

The treasure-houses of Islamic science are just beginning to be opened. In Constantinople alone there are more than eighty mosque libraries containing tens of thousands of manuscripts. In Cairo, Damascus, Mosul, and Baghdad, as well as in Persia and India, there are other collections. Few have been listed, much less described or edited. Even the catalogue of the Escorial Library in Spain, which contains a large part of the wisdom of western Islam, is not yet complete. During the last few years the mass of material recovered has gone far to subvert our former conceptions and has thrown a flood of new light on the early history of scientific thought in the Islamic world. Thus at present even an outline of the medical and scientific achievement of Islam can, at best, be but tentative.

§ 1. Early Period to A.D. 750

When, in the seventh century, the Arabs first entered into the heritage of an ancient civilization, they brought with them apart from their religious and social ideals, no spiritual contribution save their music and their language. The rich and flexible tongue of Arabia was destined to become the scientific idiom of the Near East, just as Latin grew into a medium of scientific understanding in the West.

The Arabian pre-Islamic and early Islamic poetry shows that the Bedouins possessed a certain knowledge of the animals, plants, and stones of their vast peninsula. Their poets had a predilection for describing the qualities of their riding-camels and horses, and