THE CONCEPT OF LAW IN ISLAM1

S. A. Rehman

Law in Islam is a complex concept. It includes the divine ordinances contained in the Quran, the reported decisions of the Holy Prophet (peace be on him) on issues or concrete cases that arose for decision in his lifetime and such other laws were derived, in the course of our history, by juristic deduction from the corpus of revealed law or the general regulatory principles of life enunciated in the book of God. The Quran, at places, leaves the Muslims to adjust their mutual relations according to Urf (Custom or Usage) such as prevailed in the Arab society of those days and which was not incongruent to the ethical spirit of the Quran In other words, Islamic Law is either God-given law or such juristic Law as has the general sanction of the, Quran behind it. The evolutionary legal process was aided by the principle that what is not expressly or impliedly forbidden by the Quran is lawful-the principle of lbahat or permissibility. There is a significant verse in the Quran which enjoins the faithful to refrain from putting too many questions to the Prophet lest a revealed command might add to their existing obligations and restrict their freedom of action. For God, according to another verse, in His infinite mercy, desires facility for them rather than hardship.

The various components of Islamic law, however, do not occupy the same position in respect of priority and prestige. Islamic society is God-oriented and God alone is the supreme sovereign and law giver in such a society. The Divine Ordinances, therefore, are not only the fundamental basis of the legal system, but they are also unalterable and eternal. The Quran occupies a uniqe position in the religious literature of the world for no religious scripture other than the Quran can claim to be intact today in its

[1] Iqbal Memorial Talks 1977.

pristine purity. The Quranic texts are not amenable to amendment or variation according to human whims, though in their practical application to changing socio-political environment, they may receive a fresh interpretation demanded by the exigencies of time and place. Of course, such a fresh interpretation must not do violence to the Quranic norms of human conduct. It may be clarified that the Islamic system of values (the Shariah) makes no cut and dried distinction between positive law and morality. For the Quran is not merely a legal code. Its principal objective is to awaken in man the higher consciousness of his true relation to God and the universe. Islam is a way of life rather than a mere ritualistic religion. The Quran provides guidance in all departments of human behaviour and its legal realm, both in theory and practice, is permeated through and through by its ethical spirit. Even a so-called secular act acquires a sacred character when performed under inspiration from the Quranic text. The Quran occupies a more exalted status in the legal hierarchy of Islam than a basic constitutional instrument in a modern democracy. It is the touchstone for deciding the legitimacy of any man-made law and thus provides the Muslim community with the sheet-anchor of stability in a changing world.

The positive legal rules in the Quran are limited in number and they are confined either to the family sector which is the basis of any social organization or the stability of the social order. They provide specific punishments for transgressions against what are described as the limits of Allah (Hudud) i.e. invasions on the domains of faith, life, property, reason and paternity or honour. Imam Shatibi has said in his Al-Muwafiqat: "These pre-determined punishments are themselves termed Hudud (Limits) in Muslim Fiqah". For offences like murder or bodily injury, the principle of Qisas or requital by like retaliation is laid down in the Quran. An alternative of retaliation is monetary compensation. Contravention of other Quranic precepts, which are more in the nature of ritual or general principles regulating social behaviour, is left to be dealt with in the discretion of the

community itself, through its chosen representatives (Ulul-Amr), by the process of Shura (mutual consultation in this sphere).

Those in authority can prescribe such punishments as they deem fit in a particular case or leave the matter to be regulated by moral persuasion and admonition. The undertermined punishments are known as Tazirat. As they are based on human opinion, they can be suitably varied from time to time by the same process by which they were originally prescribed. It is obvious that existing customary rules forming part of the corpus of Islamic civil law, may also be amended if the collective wisdom of the, community so requires, in view of changes in circumstances It will thus be appreciated that elements of stability and change are both embodied in the Quranic machinery for administration of human affairs so as to serve needs of a dynamic and progressive society.

The general principles enunciated in the Quran furnish ample guidance for Muslims in respect of all matters germane to the good life of the individual or to the creation of a well knit fraternity of Muslims, which could serve as the nucleus of a universal human brotherhood. Thus there are principles that may underly the constitutional structure of an Islamic state and regulate its relations with' its own subjects or with foreign states. There are others that provide us with norms for establishing a just social or economic order. The principles of equality before the law and equality of opportunity for every one can be easily spelt out of them but class-war and expropriation are not countenanced. Instead, the concept of the affluent being trustees of their surplus wealth for the benefit of the needy and the distressed, receives strong emphasis. The field of guidance in all essential matters is thus comprehensively covered.

Whereas the Quran is the primary source of Islamic law, the authentic traditions of the holy Prophet (peace be upon him) constitute an important secondary source. The reported words or actions of the Prophet, when duly established, may be described as a commentary or the summary or general

provisions of the Quran and would give us invaluable guidance in understanding their true import or scope. Difficulties are however, created by the fact that every school of Islamic Jurisprudence (I prefer to call them schools rather than sects) insists on the exclusive authenticity of their own compilations of traditions and no general consensus exists or any one collection being beyond cavil. Unfortunately, many spurious traditions were put into circulation by interested parties, after the Prophet had passed away. All honour to those experts in the science of Hadith who devoted their entire lives to the collection and scrutiny of traditions and tried to sift the true ones from the false. But despite their indefatigable researches, differences persist to the present day. The well-known collections in our hands date only from the Abbasid period and no earlier comprehensive collection has come down to us. This may partly be due to the fact that, at one stage, the Holy Prophet is himself reported to have forbidden the taking down of his sayings and the second Caliph, Umar al-Farooq had also discouraged the unnecessary narration of Ahadith for fear that confusion may arise between the/word of God and that of the Prophet. The traditions concerning religious ritual have been consistently and continuously transmitted from generation to generation and there are no essential differences among the Muslims with regard to them. A serious effort is called for on the part of our scholars to reassess our most valuable heritage of legal traditions in order to eliminate all suspect matter. Several tests have been laid down by competent scholars for judging their genuineness. For one thing no true tradition can contradict an explicit Quranic text Nass or the general spirit of Quranic teachings, and, among other criteria, Ibn Taimiyyah mentions that traditions contrary to sound reason should also be rejected. Perhaps, in due course, this process may result in a generally acceptable collection.

Allama Iqbal has approached this subject from a bolder angle in his lecture on "The Principle of Movement in the Structure of Islam". He says:

"For our present purposes, however, we must distinguish traditions of a purely legal import from those which are of a non legal character. With

regard to the former, there arises a very important question as to how far they embody the pre-Islamic usages of Arabia, which were in some cases left intact, and in others modified by the Prophet. It is difficult to make this discovery, for our early writers do not always refer to pre-Islamic usages. Nor is it possible to discover that the usages left intact by express or tacit approval of the Prophet, were intended to be universal in their application"[2].

The Allama then refers to the views of the great scholar, Shah Wali Allah, in respect of the nature and antecedents of a prophetic mission to people who are its first recipients and highlights the fact Imam Abu Hanifa made very little use of tradition in his juristic formulations. He proceeds to say further:

"On the whole, then, the attitude of Abu Hanifa towards the traditions of purely legal import is to my mind perfectly sound; and if modern liberalism considers it safer not to make any indiscriminate use of them as a source of law, it will be only following one of the greatest exponents of Muhammedan Law in Sunni Islam."[3]

He however, advocated a further intelligent study of the Hadith literature to imbibe the spirit in which the Prophet himself interpreted his revelation That would, in his opinion, help us greatly in understanding the life-value of the legal principles enunciated in the Quran He thus favours the introduction of Darait (rational criticism of content) with Rivayat (Tradition). As I mentioned in the beginning of my talk, a considerable portion of the corpus of Islamic Law has been the result of juristic Ijtihad. The principles of analogy (Qiyas) and equity (Istihsan, Masaleh Mursalah, lstislah and Istishab; have played their part in this process. Where no specific provision of the Quran or Sunnah was found to cover a case, the scholars drew upon their own experience of men and matters and their own understanding of the

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[2] The Reconstruction of Religious Thought in Islam (Lahore Sh. Muhammad Ashraf, 1964), p. 171.
[3] The Reconstruction, pp. 172.73.

spirit of the Divine dispensation. The rules thus evolved by the labours of individual scholars have in some cases been elevated to the status of consensus of the learned of a particular era (Ijma), if a majority of them had accepted the views involved. Historically speaking, this process has never been formally institutionalized but it has that potentiality. Allama Iqbal has approved of the Ijtihad of the Turks that the power of ljma can be vested in a representative Legislative Assembly., elected by the people.

To claim that the door of Ittihad is now barred, on the supposition that the law has been finally settled by the existing Fiqh schools, as a section of the orthodox 'ulema' suggest, would amount to flying in the face of the very process by which these schools were born. The heads of these schools never claimed finality for their views and left possibilities of revision open on discovery of a better opinion at any time. After-all their compendiums embody only human interpretation or opinion regarding the effect of fundamental Quranic or Sunnah texts and there is no rational reason why later generations of Muslims should be debarred from solving their own legal problems, in the changed circumstances of their time, afresh, within the framework of the fundamental source of law, if the need for such a course is felt. The well-known hadith reporting the Prophet's conversation with Muaz b. Jabal on the eve of his departure for Yemen as Qadi, is ample authority for this view. This one method of breaking the enervating circle of stagnation that has restricted the intellectual horizon of the community to its past achievements. Even a previous Ijam decision should not be sacrosanct, as Allama Iqbal has pointed out, on the authority of Karkhi.

The spirit of the Islamic law is egalitarian, liberal and progressive under its auspices, there can be no privileged persons above the law. Even the head of the Islamic state is emendable to the ordinary legal process, for any remedy, whether civil or criminal, against his person or property. The doctrine of immunity of the sovereign from legal process, embodied in the maxim of Western jurisprudence: "The King can do no wrong," is foreign to Islamic law which functions under the august sign of the unity of God and

the equality of man. The solicitude of Islamic law for the independent personality of an individual is reflected in the principle of Fiqh that the state cannot grant pardon in respect of offences that affect individual human interests (Huquq al Ibad) though such power exists in respect of offences within the domain of "Huquq Allah", God's rights, which in effect means the collective interests of the community.

I have concerned myself with the general concept and the spirit of Islamic law in this short talk without going into explanatory details.I would like to wind up this talk with a quotation from the "Ilam-al Muaqqien" of Ibn-al Qayyim wherein he has summed up the spirit of the Islamic law in a nutshell:

"The ground and foundation of the Shariah is wholly justice, beneficence and wisdom, so whatever deviates from justice to wards tyranny, from beneficence towards its opposite from social welfare towards disruption and from wisdom towards futility, is not part of the Shariah although it may have entered its circle through the process of interpretation".

This seems to me to be an apt commentary on the Quranic dictum that Islam is the Din al-Fitrat (the religion of Nature).