SOURCES OF ISLAMIC LAW – A NEW APPROACH

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I shall sum up first my conclusions and then I shall state my arguments: The habitual division of the sources of Islamic Law into four canonical roots' (usul), viz: the Qur'an, the Hadith, the Consensus, and the analogical deduction, was nothing but the first attempt on the part of the pioneers in the field to classify them; otherwise these very authors, the most orthodox of the Muslim jurists of classical times, have always accepted and in fact utilized at least a dozen more sources as fully canonical, for the-laws regulating the life of the faithful in all its different aspects. I am not speaking here of the anti-Qur'anic local customs, which have from time to time prevailed among groups, newly converted to Islam, and dating from pre-conversion days, particularly with regard to inheritance and other personal laws. I am concerned here only with the laws considered as 'Islamic' by the doctors of Fiqh.

JURISPRUDENCE

Law in the human society is almost as old as society itself. Nevertheless it is curious enough to remark that the ancients rarely thought of the Jurisprudence, of the science of law, as distinct from laws themselves. The Romans have a just claim in antiquity to a place of honour in the history of law, on account of their legislation and their judicial institutions.

The oldest work on jurisprudence in Islam is the famous ar-Risalah by the Imam al-Pafi'i, an Arab author, born in the year H.150 (767 of the Christian era). Several eminent jurists are known before him among the Muslims, who have left works on the Islamic law, such as Zaid ibn 'Ali, Abu-Hanifah, al-Awza' i, Malik, Abu-Yusuf, al-Paibani, etc.; some vague references are made (e.g. Ibn Khallikan, S Abu-Yusuf) that they had produced works on Usul al-Fiqh (Islamic jurisprudence), yet neither have these works come down to us, nor do we know whether they treated the subject under consideration or dealt really with the canonical proofs to support the opinions of their masters, that is the traditions of the Prophet, to

supplement the Ray (opinion) and personal preference. The first extant systematic monograph on the science of law in Islam is this Risalah, which we owe to al-Shafi' i.

In this work he recognizes clearly the division of the sources of Islamic law into four. So, speaking of the lawfulness of the analogical deduction as the sources of law, he writes: 'If they ask me, how can you say that in the absence of precision in the Qur'an, the Sunnah of the Prophet or the Consensus one should have recourse to qiyas (deduction)?' (cf. Risalah, chapter Ijma'). A few pages afterwards he elaborates the use of the deduction and subdividesit, recognizing for instance the validity of Ittihad—which he uses as a technical term for a particular kind of analogical deduction_and rejecting Istihsan (which resembles somewhat equity in English law), which his teachers and adversaries of the Hanafite school employeed very much (cf. the same work, chapters Ijtihad and Istihsan).

This brief allusion suffices to show that al-Pafi' i was not the first Muslim jurist to have discovered and recognized that the Islamic laws originate from four canonical sources. Certainly his teachers, like Abu-Yusuf and al-Paibani and even Abu-Hanifah, and perhaps also the older jurists, such as Hammad, have had a clear idea of this state of affairs; yet if they have thought of it, it is our author who provided it with a scientific basis and created a new science which is called Usul al-Fiqh (literally, the roots of law; an expressive term by which the science of law is known among the Muslim).

Since then hundreds of works have been written on the Usul al-Fiqh in all the important Muslim languages) _Arabic, Persian, Urdu, Turkish, etc_and so many authors have ceaselessly discussed the topic of the canonical sources of law, yet no school of Muslim Jurisprudence, Sunni or Shi 'ite has ever found it justified to transgress this number 'four' for the sources of the Islamic law. Yet in reading the works of these same authors, the student who wants to determine the recognized sources of law is continuously astonished to find that rules are extracted by these authors not only from the Qur'an, the Hadith, the Ijma' (consensus), and the qiyas (analogical deductin), but also from a variety of other sources. It is precisely this point which is to be discussed here.

RECOGNIZED YET UNNOTICED SOURCES

1. Let us begin first with the time of the Prophet himself. There is no need to point out that Islam began in fact as protest against the religious notions prevalent at the epoch of Muhammad, and there was no question of conceding equality to adherents of these other ' religions' with the Muslims: Before Islam the city of Madinah had known no State organization of any kind. It was the Prophet who gave it its first State-form; and, what is more, a written constitution: Its text has fortunately been preserved in tow. Now, in this constitution — of a rather federal type_ the Prophet organized not only
the Muslims of the region (Meccan refugees and Madinite Arabs) but also the Jews and such Arabs as had not yet embraced Islam. Article 25 of this constitution says; 'And the Jews of Banu-'Awf shall be considered as one political community along with the Believers (ummat ma'a almu'minin); for the Jews their religion, and for the Muslims theirs…..' This is the version transmitted by Ibn-Ishaq (Ibn-Hishsham), which one tries to render as ' a separate community yet allied to the Muslims'; this in order to avoid embarrassment. Yet the text of this clause transmitted by Abu-'Ubaid (in his Kitab al-Amwal, - 517) does not give even this much of latitude, the term employed there being ummat min al-mu'minin (a community forming part of the Believers, i.e. Muslims). This is a political document, conserving an international bilateral treaty. It does not concern religious affairs, but only wordly ones. Let us wait a bit before concluding anything from this clause of the constitution of the City-State of Madinah.

It is evident that a Muslim cannot behave in a manner endangering the life of another Muslim. Yet let us refer to the famous armistice of al-Hudaibiyah of the time of the Prophet, in which it was stipulated: 'Whoever from among the Quraishites will come to Muhammad without the permission of the chief of his family (waliy),— i.e: of course a Muslim refugee,_he [i:e: Muhammad] shall send him [i.e. the refugee] back to them [i.e. the Quraishites]; yet whoever from among the companions of Muhammad comes to the Quraishites, they shall not return him'. (For the text and sources see my al-Watha' iq as-Siyasiyah, No.11)

The only conclusion permissible in both the cases cited above, viz. the clause in the constitution and the clause in the armistice, is that 'Necessity knoweth no law', but demands concessions: To avoid a greater evil one

chooses the lesser of the two. It is thus that one accepts an unfavourable treaty; and the treaties must be faithfully executed. Not only in the time of the Prophet, but also in all epochs, international treaties have been concluded by Muslim States, and such an important jurist as al-Paibani devotes scores of pages on the point in his al-Siyar al-Kabir, and declares the validity of treaties and their pre-eminence over normal law.

2. It is well known how the Caliph 'Umar 1st had ordered his lieutenants to conserve almost the entire legal system of the conquered countries with regard at least to land revenue, in Iraq for instance. The Sassanid revenue law became, by a stroke of the pen, Muslim law on the subject, atleast in one part of the realm. Of course there was nothing in the Sassanid law which would have been against the Islamic law (the Qur'an and the Sunnah), and the Muslim government had complete liberty to handle the situation as it judged best. What I want to emphasize, however, is the point that the Caliphal, Orthodox government of 'Umar 1st did not hesitate to be inspired by foreign, non-Muslim laws. The word 'source' means nothing else in this connexion than the place wherefrom one gets the first idea of a rule, of a law. Our authors go much farther, and they are unanimous in laying down that 'all that is not forbidden by law the Qur'an and the Sunnah_is permissible' (al-Asl al-Ibahah). One sees how great a facility this doctrine does give to the perpetual infiltration of foreign influences and customs, judged by Muslim judicial and legislative authorities as good.

3. I shall cite another instance of the time of the same great Caliph, 'Umar 1st. In fact, according to the Kitab al-Kharaj of Abu-Yusuf, Caliph 'Umar was asked for instructions by customs officials of a frontier region as how to treat the foreign merchants coming with commercial goods in the Islamic territory. The reply sent to the customs official at Manbij (on the Byzantine frontier in Asia Minor) has been preserved, and it reads: 'Behave in the like manner as the government of these foreigners behaves with regard to Muslim merchants going to their country; levy on these merchants the same customs duty as their government levies on our countrymen; and if you do not know the same, then levy 10 per cent. ad valorem.' In other words, reciprocity is a perfectly valid source of Islamic law, at least in certain matters, even if it were at the expense of the uniformity of a law in the Islamic territory, at a given epoch.

4. In all times and climes subordinate officials have received instructins from superior authorities in administrative matters. The instructions issued by competent authorities are compulsorily followed by the State officials and constitute a valid source of the Islamic law, especially if there are no protestations and no ulterior abrogations. We have to distinguish this category from those mentioned above, viz. international treaties, reciprocity, etc., since these:instructions may not only answer the questions raised by the subordinates, but may also be based on original initiatives taken by the superior authorities themselves in order to ameliorate existing conditions. Such official instructions remain valid and in force, at least so long as the rule of the chief concerned continues.

5. For the Imam Malik the usage of the inhabitants of the holy city of Madinah (' urf ahl al-Madinah) possesses a high legal value: Although it was not inspired at all by, yet it reminds us of, the parallel Roman conception, the consuetudo populi romani, the custom of the inhabitants of Rome. According to the Malikite school, in the absence of precision in the Qur'an and in the Hadith, the usage of the inhabitants of Madinah has a priority over all the rest of the sources inclusive of analogical deduction.

The pious argument of Malik is that it must be admitted that the usage in question dates from the time of the Prophet and had his approval. (Needless to add that Malik means the usage of his own time, when even certain companions of the Prophet were still alive, and the generation of the so-called Followers of the Companions, the Tabi'un, was in full vigour.)

6. Needless to add that the schools of Islamic jurisprudence born outside Madinah, such as Hanafite, Shafi' ite, Hanbalite among the Sunnis, even theShi' ite and other schools, do no recognize this pre-eminence of the customs of the inhabitants of Madinah, in spite of the very high authority of the Prophet which Malik invokes and seeks to attribute to them. Nevertheless these schools, in their turn, do not hesitate to find in oidinary customs of any place a valid source of Islamic law, under certain restrictions of course. So, in their different nuances, the terms ' urf, 'adah, 'ta'amul etc., have been employed by the orthodox jurists to say that, in the absence of precision in the text (of the Qur'an, etc.), it is the custom which prevails and not the rigorous analogical deduction of a juridical nature. In the compedia of Islamic law one comes across almost in every page such expressions, to

wit, 'although the qiyas is this, yet the usage, the custom or the habitude of the people is that'. Evidently these customs and usages differ from place to place and from epoch to epoch; and one can easily glean a good number of cases where old customs were replaced by new ones when one compares the works of older authors such as al-Sarakhsi with later ones such as al-Haskafi and al-Pa' mi.

7. The theory of ' umum al-balawa' is entitled to a separate section, distinct from the foregoing one. This term signifies a bad habit in which everybody indulged, a reprehensible thing hardening in time into the general practice of an entire population. This kind of predominant usage is considered as tolerable, even if we do not attribute to it a greater validity. Even the most strictly orthodox jurists, especially of later epochs, refer to them and recognize them as a valid source of Islamic law. Such predominant customs bring into desuetude even the most formal texts of law, and thus acquire an authority which nobody would concede them ordinarily. Of course our authors do not recognize the source as valid except in matters of rather insignificant, worldly affairs of everyday life; yet this does not refute my thesis that there are many valid sources of the Islamic law other than the four principal sources 'recognize' by our respectable and respected precursors.

8. I may also refer to the procedure of legal fictions which scarcely conceal the real intentions. For instance, according to the Islamic notions, it is inadmissible to bar the hearing of a plaint on the sole ground of long delay. The notion was purely of Occidental origin, yet it was considered necessary to adopt it in Islamic countries for civil cases. So in the famous Turkish codification of the Islamic law, the Majallah al-Ahkam al 'Adliyah, it is expressly mentioned by the most orthodox and pious ulema of the epoch how they have succeeded in reconciling the irreconcilable and achieved the object. They premise that, according to the theory as also to the practice since all time, the head of the State is competent to determine the powers of different judges; therefore the Sultan has ordered that the ordinary courts and tribunals of the realm should refuse to hear time-barred plaints the hearing of which is reserved to the head of the State himself. Ostensibly the Sultan promised to hear such cases, yet practically he never entertained such

plaints. With such fictions the practical reasons prevailed over the theory, and the Islamic law was changed though not \ abrogated'.

9. I may make a passing reference to the different categories of opinion, deduction, equity, and others which our classical authors distinguish under the names istihsan, istishab, masalih mursalah, and ijtihad (in the particular sense in which al-Shafi'i uses it, and which signifies to him something different from what others understand thereby): In such cases, the jurists renounce the strict application of the logical conclusions, and prefer such rules as are based on salus populi or general well-being of the public and other reasonable considerations. Our authors speak of them under the chapter of qiyas even though they are in a way an abnegation of qiyas.

10.The same remark applies to certain pre Islamic laws, called sunan man lean qablakum. This refers to laws of the people possessing a Divine Book: According to Islam, laws enunciated by the prophets of yore, since Adam down to Jesus Christ, are as much valid for and applicable to Muslims; except in so far as they have been abrogated by succeeding prophets, particularly Muhammad. Eminent traditionists, such as al-Bukhari and al-Tirmidhi, relate words and practice of the Prophet of Islam to this effect; and the Qur'an itself is very express on the subject. If we read in the Hadith that in the absence of express revelation the Prophet used to prefer the practice of the Jews and Christians to that of the pagan Arabs, his compatriots; we read in the Qur'an where after citing fifteen prophets, God addresses these words to Muhammad and to his followers: 'So follow their guidance ' (fa-bihudahum 'ugtadih, Qur'an 6.90). However, there was the problem of ascertaining these laws of the ancient prophets, the Qur'an itself having formally declared that these older scriptures had been corrupted for one reason or another; and in fact the very raison-d'etre of the new religion, Islam, would cease to exist if the authenticity of the extant scriptures were admitted without demur. Islam came, according to its followers, to restore in its pristine purity the eternal law of God revealed to the successive prophets in the past, and renewed every time when the tragic and pathetic history of the fratricidal race of man caused the loss of these sacred books, through burning, oblivion, etc., without the possibility of recovering them intact. In these circumstances, the recognition of the laws of the older prophets is practically confined to those expressly mentioned in the Qur'an, or in the

Hadith or traditions attributed to Muhammad. To give an example, the lex talionis of Moses is referred to in the Qur'an (5:45); and as there was no other verse in the holy text declaring its abrogation—as is the case with certain other rules—this Mosaic law has passed into the Islamic jurisprudence with as much validity as rules expressly ordained for the Muslim in the holy writ possess.

UNRECOGNIZED SOURCES

Evidently I cannot include in the above list the customs of certain groups of Muslims, particularly with regard to the disposal of property through inheritance, wills, etc., which customs not only contravene the Qur'anic prescriptions, but also are not acted upon by the rest of the Muslims in the world: One comes across such usages among the Berbers of North Africa, among Indonesians, &c. As for the Sub-Himalayan continent, its inhabitants have not developed even uniform customs. So, in Haiderabad, for instance, Muslims had no non-Islamic or anti-Islamic customs, as far as personal law is concerned; on the contrary, in the Punjab the daughters and sisters did not inherit; in Malabar the nephew (sister's son) inherited to the exclusion of the son of the deceased; in Bombay no property of the deceased was distributed, but kept for the benefit of the heirs in common (the so-called joint-family system). Such customs have obviously no room in the fabric of the Islamic law, and cannot claim a place in the rightful sources of Muslim law.

CONCLUSION

Even excluding the non-Islamic customs of which I have just taken notice in the preceding paragraph, we have seen that, apart from the four 'canonized' sources of the Islamic law, viz. the Qur'an, the Hadith, the Ijma', and the Qiyas, there are about a dozen other sources which have been utilized by the jurists for extracting laws although they pass into silence over them in the chapter where they enumerate the lawful sources of the Islamic law. The Imam al-Shafi'i did the pioneer work, and Muslim law will ever remain grateful to him, even as the general law of the world to which he gave the new science of jurisprudence; yet it does not and should not mean that the sources of the Islamic law are only four in number.