

## [Home](#) The Basis of Legislation in an Islamic State

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### INTRODUCTORY

Wherever he be, man likes to act as he pleases and have full freedom of action. Were he by himself, he could do so with equanimity. In society, however, individual freedom has to be circumscribed to avoid conflict with the freedom of action of others. Individuals have, therefore, to abide by certain voluntarily accepted restrictions, the formulation of which pertains to the sphere of legislative action.

*Two questions arise at once, namely,*

- Who should formulate these restrictions ? and
- Whether the restrictions once formulated will apply for all time to come, or they will be susceptible to change from age to age?

*The first question falls within the domain of*

*"Constitution making" and is outside the scope of the present discussion. We are here concerned with the second question of law-making in a Constitutional State.*

The foremost essential which a people must determine and define in law-making is the concept of life. As is the concept of life of a people so will be its law. Broadly speaking, two concepts of life, which have come down to us through history, are prevalent today, and have a direct bearing on the point under discussion.

One concept sees man only as a physical body, endowed somehow with consciousness, living according to certain chemico-physico-biological laws and then dying under the operation of these very laws. With his physical death man, like other animals, ceases to exist. This concept is known as the materialistic concept of life. Laws or rules of conduct framed under this concept of life are based on expediency and admit of no permanent or unchangeable values. Changes, abrogations, or amendments in the laws are also governed exclusively by expediency. Governmental machinery set up by people subscribing to the materialistic concept of life is called the "Secular" form of government, whether its pattern is democratic or dictatorial.

There is another concept of life which is propounded by the Holy Quran. Man, according to the Quranic concept, is a combination of a physical body, which is changing, changeable and liable to death, and a Personality which does not change, but develops and is capable of self-integration and becoming immortal. The aim of life, according to the Holy Quran, is the development of Personality. Human Personality is not static but is potentially capable of developing and expanding. Its development can, however, take place only in a social order called the Islamic State. The Islamic State provides the ways and means for the proper development and progress both of Body and Personality. Since man is according to this concept of life, an integrated composition of permanence and change, laws governing the social order wherein his development takes place, should also be a combination of permanence and change. This point has been elaborated beautifully by Iqbal in his sixth lecture in the series on the Reconstruction of Religious Thought in Islam. He says:

"The ultimate spiritual basis of all life, as conceived by Islam, is eternal and reveals itself in variety and change. A society based on such a conception of Reality must reconcile, in its life, the categories of permanence and change. It must possess eternal principles to regulate its collective life; for the eternal gives us a foothold in the world of perpetual change. But eternal principles when they are understood to exclude all possibilities of change, which, according to the Quran, is one of the greatest "signs" of God, tend to immobilise what is essentially mobile in its nature".

Man has been endowed with "*Intellect*" which gives him superiority to other animals. Human intellect functions, however, within the limits of Time and Space and is, consequently, capable of handling only that aspect of man's life which is subject to "change", i.e. the physical aspect of human life. It cannot peep over the boundaries of "change" into the supra-physical, or the realm of "permanence" to which human Personality belongs. In that realm, things *reveal* themselves to human intellect (to Messengers of God) and are not *discovered* by it. Revelation is Divine, and Divine Guidance alone provides permanent values or unalterable fundamental principles, otherwise known as "Divine Precepts," or the "way or Practice of Allah". Law or rules devised by human intellect need change with the change in time and space; but permanent values admit of no such change. In the words of the Holy Quran, "There is no changing in the Words of Allah" (10/64) and "you will find no change in the way of Allah" (33/62)

Body and Personality cannot, however, be divided into two mutually exclusive compartments, nor also can the laws pertaining to the realms of permanence and change. A combination of permanence and change. A combination of "permanence and change" can be achieved if in framing laws, human intellect keeps itself within the boundaries of eternal values revealed by God. The laws so framed will be applicable to man as a whole and satisfy the requirement of both Personality and the physical body of man.

### THE PRINCIPLE OF DIVINE GUIDANCE.

Man has been the recipient of the Divine Guidance ever since he began living a corporate life. In earliest stages the guidance concerned itself not only with permanent values but also with matters which could be determined by human intellect alone. For instance, about Noah the Holy Quran says. "Then we guided him, saying: Make the ship under our supervision and Guidance". (23/27). This shows that in the age when Noah lived man depended on Revelation for learning processes like those of boat-making. As human intellect began to grow in maturity, the need for the Divine Guidance in respect of the changeable details diminished. The divine Guidance in its final and complete form has now been preserved for all time to come in the Holy Quran. It has been made clear that henceforth the subsidiary laws will be devised by men by mutual consultation among themselves in the light of the given permanent values. *Rasoolullah* (PBUH) was directed, "to consult the people in the conduct of affairs" (3/159) and after him the believers were also to determine their affairs by mutual consultation (42/38)

This brings out clearly the co-mingling of permanence with change in life and stresses the need for rules of conduct providing both for its permanent aspect as well as for its changeable subsidiary aspect. The basic problem in the matter of legislation in an Islamic State is the demarcation of the sphere of permanent provisions as distinct from the sphere of provisions liable to change according to changes in requirements. Before stating the Quranic position as I understand it, I feel I should explain briefly the views which various schools of thought in Pakistan hold.

One view is that all the laws that an Islamic State requires are already laid down in the corpus of Islamic "*Fiqh*" which is permanent and unalterable. It is, therefore, unnecessary to embark upon fresh legislation. When ever a fresh situation arises, all that the State has to do is to ascertain from the "Ulema-e-Fiqh" the conclusions already reached on the point at issue and then to enforce it. A representative of this school of thought offered this very view before the Punjab Disturbances Enquiry Commission, whose report (P.211) on the point reads as follow:-

"Since Islam is a perfect religion containing laws, express or derivable by *Ijma* or *Ijtihad*, governing the whole field of human activity, there is in it no sanction for what may, in the modern sense, be called legislation. Questioned on this point, Maulana Abul Hasanat, President, Jami'at- ul-Ulema-i-Pakistan, says:-

**Q.** Is the institution of legislature as distinguished from the institution of a person or body of persons entrusted with the interpretation of law, an integral part of an Islamic State?

**A.** No. Our law is complete and merely requires interpretation by those who are experts in it. According to my belief, no question can arise the law relating to which cannot be discovered from the Quran or the *Hadith*.

**Q.** Who were Sahib-ul-hall-i-wal-aqd? Who were Sahib-ul-hall-i-wal-aqd?

**A.** They were the distinguished *Ulema* of the time. These persons attained their status by reason of the knowledge of the law. They were not in any way analogous or similar to the legislature in modern democracy. They were the distinguished *Ulema* of the time. These persons attained their status by reason of the knowledge of the law. They were not in any way analogous or similar to the legislature in modern democracy.

"The same view was expressed by Amir-i-Shari'at, Sayyed Ata Ullah Shah Bukhari, in one of his speeches reported in the *Azad* of 22nd April, 1947, in the course of which he said that our *din* is complete and perfect and that it amounts to *Kufr* to make more laws".

This view is, however, not shared by all those who belong to the "*Fiqh*" school of thought, and an exponent has characterised it as "soulless religiosity" whereby "the Islamic jurisprudence has been reduced to a fossilised mass of 'Shastras'. For centuries the door of *Ijtihad* has been securely shut, with the result that Islam, instead of being a live movement, has been relegated to the limbo of a movement in ancient history only".

In regard to *Ijtihad*, his criticism is that "however erudite a *mujtahid* may be, he cannot transcend the time-spatial limitations, nor can he have the breadth of vision encompassing the broad canvas of all time and experience. Therefore, his *Ijtihad* cannot hold good for all ages and circumstances" (Abul Ala Maudoodi).

Iqbal has also commented at length in his sixth Lecture already referred to, on the view that "*Fiqh*" is unchangeable. Says he: "The theoretical possibility of this degree of *Ijtihad* is admitted by the Sunnis, but in practice it has always been denied ever since the establishment of the schools, inasmuch as the idea of complete *Ijtihad* is hedged round by conditions which are well-nigh impossible of realisation in a single individual. Such an attitude seems exceedingly strange in a system of law based mainly on the ground work provided by the Quran which embodies an essentially dynamic outlook on life". He goes on to say: "Turning now to the ground work of legal principles in the Quran, it is perfectly clear that far from leaving no scope for human thought and legislative activity the intensive breadth of these principles virtually acts as an awakened of human thought. Our early doctors of law taking their clue mainly from this ground work evolved a number of legal systems: and the student of Muhammadan history knows very well that nearly half the triumphs of Islam as a social and political power were due to the legal acuteness of these doctors. 'Next to the Roman', says Von Kremer, 'there is no other nation besides the Arabs which could call its own a system of law so carefully worked out'. But with all their comprehensiveness, these systems are after all individual interpretations, and as such cannot claim any finality. I know the *Ulema* of Islam claim finality for the popular schools of Muhammadan Law, though they never found it possible to deny the theoretical possibility of a complete *Ijtihad*. I have tried to explain the causes which in my opinion, determined this attitude of the *Ulema*: But since things have changed and the world of Islam is today confronted and affected by new forces set free by the extraordinary development of human thought in all its directions, I see no reason why this attitude should be maintained any longer. Did the founders of our schools ever claim finality for their reasoning and interpretations? Never. The claim of the present generation of Muslim liberals to reinterpret the foundational legal principles, in the light of their own experience and altered conditions of modern life is, in my opinion, perfectly justified. The teaching of the Quran that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems".

## TRADITIONALISTS

As against "Ahl-e-Fiqh", there is another school of thought, commonly called the Traditionalists (Ahl-el-Hadith). They maintain that it is not "*Fiqh*" but the sayings of *Rasoolullah (PBUH)* which should be enforced as they are, since they contain fundamental and unchangeable law. The school holds that "after due scrutiny *Hadith* occupies the same position and authority as the Holy Quran does, and a denial of *Hadith* would affect one's faith and honesty in the same manner as the denial of the Holy Quran itself will do. Notwithstanding differences in interpretation, the Holy Quran is the Word of *Allah* and an undisputed authority in *Shara (Law)*. Likewise, *Hadith*,

even though it is open to scrutiny, is Revelation from *Allah* and, next to the Holy Quran, of like authority in religion". (Muhammad Ismail Al-Salafi).

The above excerpt acknowledges that the authority ascribed to *Hadith* is secondary to that of the Holy Quran, but what follows will show that the acceptances of the postulate is in principle only, since in practical application of the principle and in making deductions therefrom, it is held: in our view *Hadith* is revealed and whatever it says was conveyed to *Rasoolullah (PBUH)* in the same way as was the Holy Quran.....the angel Gabriel came with the Holy Quran as well as the *Sunnah* and conveyed *Sunnah* to *Rasoolullah(PBUH)* in the manner he conveyed to him the Holy Quran. We do not approve of discrimination in Revelations and hold both the Holy Quran and *Sunnah* as concurrent authority" (Ibid).

In regard to the two anthologies of *Hadith*, namely *Bukhari* and *Muslim*, the school holds that:-

"By consensus of opinion, Muslims acknowledge that the agreed *Ahadith* in the two anthologies are valid and that their veracity is absolute". (Ibid).

This view also is not shared by all those who consider *Hadith* as the basis of Shari at Law, as would appear from the following comment:-

"*Ahadith* have come down through a chain of narrators, one person passing the information verbally to another. In its very nature the process can at best be viewed as conveying probability and not certainty. It is unthinkable that Allah would leave believers in the matter of faith in a position in which they should determine their course of action on the basis of material passed on by word of mouth". (Maudoodi)

He goes on to say:-

"The material may be useful as a help in ascertaining the practice of *Rasoolullah(PBUH)* and the doings of his Companions (God may be pleased with them) but it is not a thing which could claim complete reliance".

Further on he says:-

"The claim that the text of all the *Ahadith* in *Bukhari* should be accepted as correct without critical appreciation is untenable".

He adds:-

"Regarding Mandatory Laws, the Holy Quran generally mentions the basic principles only and in most matters leaves out the details. *Rasoolullah (PBUH)* applied the Quranic Laws to the practical affairs of life and provided the requisite details both by word and deed. Some of these details are too definite to admit of fresh interpretation and they must be accepted as they are, as for instance the commands pertaining to worship (*Ibadat*). There are other details the principles underlying which help in making further deductions, e.g. Civil Laws of the time of *Rasoolullah (PBUH)*".

In accordance with the above excerpt, the doctrine propounded by the Traditionalist school of thought concedes to the present generation the right to determine subsidiary Civil Laws by *Ijtihad* in accordance with the principles deducible from the Civil Laws promulgated by *Rasoolullah (PBUH)*.

To quote their own words:-

"It is an incontrovertible truth that for the observance of his directions the law-giver has, with infinite wisdom and knowledge, laid down mostly such conditions as would achieve the purpose in view in all times, all places and all circumstances. In spite of this there are numerous details in which changed circumstances demand corresponding

changes. It is not necessary that conditions in every age and country should be what they were in Arabia and the Muslim world during the time of *Rasoolullah(PBUH)* and his Companions. Therefore, the enforcement, in all ages and in all situations, of the particular forms of observance of Islamic injunctions exactly as they were at their inception, that is, without modification, will be a sort of conventionalism which is completely alien to the spirit of Islam. It will be incorrect, therefore to follow strictly the very words of the original text without weighing them in the present context, much less their deductions or inferences. The rational method of tackling a problem is that one should keep before the mind's eye the aim of the law-giver and affect changes to accord with changes in circumstances with due regard to his practice and the principles of his jurisprudence (Ibid).

The position advocated in the preceding extract is not an innovation. Imam Abu Hanifa and Shah Waliullah Muhaddith of Delhi held the same view. In the words of Iqbal:-

"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(PBUH). 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 (PBUH), were intended to be universal in their application. Shah Wali Ullah has a very illuminating discussion on the point. I reproduce here the substance of his view. The prophetic method of teaching, according to Shah Wali Ullah, is that, generally speaking, the law revealed by a prophet takes especial notice of the habits, ways, and peculiarities of the people to whom he is specifically sent. The prophet who aims at all-embracing principles, however, can neither reveal different principles for different peoples, nor leaves them to work out their own rules of conduct. His method is to train one particular people, and to use them as a nucleus for the building up of a universal Shari'at. In doing so he accentuates the principles underlying the social life of all mankind, and applies them to concrete cases in the light of the specific habits of the people immediately before him. The Shari'at values (Ahkam) resulting from this application (e.g. rules relating to penalties for crimes) are in a sense specific to that people; and since their observance is not an end in itself they cannot be strictly enforced in the case of future generations. It was perhaps in view of this that Abu Hanifa, who had a keen insight into the universal character of Islam, made practically no use of these traditions. The fact that he introduced the principle of *Istihsan*, i.e. juristic preference, which necessitates a careful study of actual conditions in legal thinking, throws further light on the motives which determined his attitude towards this source of Muhammadan Law. It is said that Abu Hanifa made no use of traditions because there were no regular collections in his days. In the first place, it is not true to say that there were no collections in his days, as the collections of Abdul Malik and Zuhri were made no less than thirty years before the death of Abu Hanifa. But even if we suppose that these collections never reached him, or that they did not contain traditions of a legal import, Abu Hanifa, like Malik and Ahmed Ibn-e-Hambal after him, could have easily made his own collection if he had deemed such a thing necessary. On the whole, then, the attitude of Abu Hanifa towards the traditions of a 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 Muhammadan Law in Sunni Islam".

The foregoing will show that while there is a school of thought in Pakistan which holds that whatever has come down to us in the name of *Fiqh* or the Traditions, is unalterable and should be enforced as such, there is another school of thought also which considers that for meeting the requirements of the present time, we can formulate our own laws in the light of the permanent and the unalterable principles given by the Quran.

## QURANIC ARGUMENTS

This view is supported abundantly by the Holy Quran. The Quranic arguments may be summarised below:-

1. In Islam obedience is essentially and basically due only to the Laws of Allah as embodied in the Holy Quran. "Shall I (*Rasoolullah, PBUH*) look for a judge other than Allah. He who has revealed to you a book defining things clearly"? (6/115).

2. He who does not adjudicate in accordance with the Holy Quran is not a Muslim (5/44).

3. Obedience to Divine Laws is not a thing belonging to the individual plane in the sense that one might, of his own, consult the Holy Quran, interpret it for himself and act according to his individual interpretation. The obedience has to be disciplined and ordered under an organised system (called State in the present day terminology) controlled by a central authority, the first central authority having been *Allah's Rasool*. Obedience to the central authority is obedience to Allah. Says the Holy Quran: "One who obeys the Rasool obeys Allah" (4/80), the Rasool adjudging everything according to the Holy Book (5/48).

4. Barring a few exceptions, the Holy Quran enunciates generally *fundamental* principles without touching subsidiary law. About these principles or the basic provisions, the Holy Quran says: "The *Kalema* (basic principle) revealed by the Nourisher has been made complete in truth and justice. There is none who can change His principles (6/116).

5. The reason for leaving out subsidiary laws from the Holy Quran has been explained thus: "Ask not for things which if revealed would inconvenience you, and if you ask for them while the Quran is being revealed, they will be disclosed to you....Before you a people (the Israelites) did ask for them and then disbelieved (and defied) them". (5/101-2). In elucidation of the above verses, a *Hadith* is cited which says: "Allah has placed on you certain obligations, do not violate them. Some things have been forbidden, do not go near them. Some limitations have been imposed, do not transgress them. Some things have been left unspoken of without being overlooked, do not probe into them".

6. The question as to how details, which have deliberately been left undetermined in the Holy Quran, will be formulated in the light of the Quranic principles, is answered by the direction given in the Holy Quran to *Rasoolullah (PBUH)* to "consult them (the believers) in the affairs (of the Society)" (3/158).

There are numerous instances recorded in Traditions showing how *Rasoolullah (PBUH)* consulted his Companions in the day-today affairs. This process of consultation was not confined to any particular sphere but covered all matters in which details were not given in the Holy Quran. For instance the Holy Quran mentions the "Call for *Salaat-ul-jum'a*" (62/9), but does not prescribe the manner for making the call. The way this was decided upon has been recorded in *Mishkat*, as follows, in the chapter on *Azaan*:-

"Abdulleh b. Zaid b. Abd Rabb states that when *Rasoolullah (PBUH)* gave the orders for blowing the conch for calling the faithful to *Salat* I saw a man in a dream who had a conch in his hand. In my dream I enquired from this man whether he would sell the conch. He asked me what I would do with the conch. I answered that we would use it for calling people to *Salat*. He said, may I not tell you something which is even better? On my replying in the affirmative, he asked me to repeat *Allah-o-Akbar, Allah-o-Akbar* etc. and likewise he taught me *Takbir*. With the dawning of the morn I hastened to *Rasoolullah (PBUH)* and narrated my dream. *Rasoolullah (PBUH)* said, 'Verily this dream is true and indicative of Divine'. There upon he ordered me to stand along-side Bilal and repeat to him what I had been told in my dream so that he (Bilal) may make the call(*Azaan*) since he is 'loud-throated'. I did as commanded and Bilal called the *Azaan*. Abdullah further states that when Umar b. Khattab heard the *Azaan* at his place, he hurried out, dragging his covering, and said to *Rasoolullah* I swear by Him who has sent you with Truth, that I also have seen a dream similar to that of Abdullah'. *Rasoolullah* thereupon said, 'All praise is for *Allah*'. (Abu Dawud, Darmi, Ibn-e-Maja).

7. While he lived, *Rasoolullah* determined subsidiary laws in consultation with the Ummat. The question is as to what was to be done after his demise. The Holy Quran answers the question by saying, "Muhammad is but a *Rasool*. there have been several *Rasool* before him. Will you turn back on your heels if he dies or is slain?" (3/143). It follows that the process of framing laws within the frame-work of the Quranic principles was not to discontinue after the death of *Rasoolullah* but was to go on as before. Therefore, after his demise, the first thing the Companions did was to elect a Successor so that he could carry on the process of determining subsidiary laws and enforcing Divine Principles as did *Rasoolullah* himself. "One who obeys the *Rasool* obeys *Allah*" now took the form of "One who obeys the *Rasool's successor* obeys *Allah*". *Rasoolullah* himself is reported to have

said: "You have to follow my practice and the practice of my mature and rightly guided Successors", (*Mishkat* chapter on adherence to Book and Sunnah). The Holy Quran directed *Rasoolullah* to "consult the believers in determining the affairs of the people" (3/158); it guided his successors by saying "and they determine their affairs by mutual consultation" (42/38). "Mutual consultation" within the ambit of the eternal and inviolable Laws given in the Holy Quran is the "way of the believers" (4/115) which should never be given up.

**8.** There is material available in the record of traditions of *Rasoolullah* and the doings of his Companions to show how subsidiary laws were formulated under the *Khilafat-e-Rashida*. The procedure followed was:

**a)** Where subsidiary law had not already been framed it was formulated by mutual consultation. For example no punishment was prescribed for drunkenness in the time of *Rasoolullah*. *Hazrat Abu Bakr* prescribed for it forty stripes, which *Hazrat Umar* later increased to eighty.

**b)** If a subsidiary law once enacted needed no amendment or change it was retained intact, just as any constitutional government would continue to enforce the laws of its predecessors until the need for a change arose.

**c)** Subsidiary enactments, which needed amendment in consequence of a change in circumstances, were duly modified. Since they were not prescribed initially by Revelation, it was not necessary that they should undergo changes through Revelation. Here are a few instances:

**i)** *Rasoolullah* had fixed the amount of ransom for prisoners of war at one *Deenar* per head. *Hazrat Umar* fixed different amounts for different parts of the State.

**ii)** *Rasoolullah (PBUH)* did not prescribe rates of *Zakat* for different varieties of produce of land. *Hazrat Umar* did so.

**iii)** For *Taleef-i-Quloob*, *Rasoolullah* used to give financial assistance from the State Exchequer. *Hazrat Umar* discontinued the practice.

**iv)** *Rasoolullah* distributed among the fighters the land acquired in certain conquered areas. *Hazrat Umar* abrogated this system.

**v)** *Rasoolullah* allowed maintenance allowance at uniform rate. *Hazrat Abu Bakr* continued the practice. But *Hazrat Umar* re-fixed the rates in proportion to the services rendered by recipients.

**vi)** *Rasoolullah* did not realise *Zakat* on tradable horses and the produce of the sea. *Hazrat Umar* did it.

**vii)** *Hazrat Umar* decided that the scheduled punishment for offences should be made light for belligerents and that the punishment of manusection for theft should not be inflicted on the famine-stricken.

Instances of this kind can be multiplied if those measures are taken into account which *Hazrat Umar* introduced initially. Their number, according to historians, ranges between forty and fifty. This number, however, is not the issue. The real issue is that the rightly guided Successors of *Rasoolullah* accepted and worked according to the principle that the decisions taken during the time of *Rasoolullah* could be modified, if the changed circumstances so demanded. They extended the principle to the decisions taken among themselves, and a Successor felt no hesitation in amending the decisions of his predecessor.

IMAM ABU HANIFA

The verses of the Holy Quran coupled with the evidence provided by traditions and history, reproduced above, support fully the view that it is the fundamental law of the holy Quran which is unchangeable. In the case of subsidiary laws formulated under it, the Islamic state constituted on the pattern of that of *Rasoolullah*, can affect changes to suit its current requirements. In the excerpt from his Lectures noted above, Iqbal has pointedly mentioned Imam Abu Hanifa and *Shah Waliullah, Muhaddith* of Delhi, who also supported the above view. In volume 13, page 390, of his book on history, Khatib Baghdadi states on the strength of Yusuf b. Isbat that Abu Hanifa used to say that "had I been a contemporary of *Rasoolullah*, I am sanguine that he would have adopted many of my views, since *Din* (Allah's way of Life) is, after all, but another name for good and sound reasoning". The historian goes on to say that Abu Awana stated that "One day I was sitting by Abu Hanifa when the Sultan's messenger called on him and said that his master would like to know how the case of a man who has stolen a honey-comb should be adjudged. Abu Hanifa replied promptly 'if the value of the honey-comb be ten *dirhams* sever his hand'. After the messenger had departed I said to Abu Hanifa: "Are you not afraid of Allah? It has been reported to me by Yahya b. Said through Muhammad b. Haban and Rafi b. Khudaij, that *Rasoolullah* had said that for the theft of trifles like fruit and flowers, there can be no manusection. Hasten to help the man lest his hand be severed". Abu Hanifa reiterated calmly that "the view then taken has since lost its force". The thief suffered manusection.

### SHAH WALI ULLAH

This incident illustrates the position of Imam-e-Azam. In his book *Hujat-ullah-il-Baligha*, chapter on types of Revealed Knowledge, Shah Waliullah has quoted a saying of *Rasoolullah*: "I am a human being. What I tell you about *DIN* adopt it; when I express my personal opinion, then, I am but a human being". Shah Waliullah says that the matters to which *Rasoolullah* referred were those unconnected with the propagation of the revealed message, and adds that akin to this type of "matters" were those subsidiary directions which, though related to the Quranic principles, conformed directly to the conditions then prevailing and ceased to operate as and when those conditions changed. The *Ummat* was not bound to observe them as permanent injunctions. In the same category are included those decisions of *Rasoolullah* regarding home and social economics, politics, etc., which were couched in general terms and omitted to specify practical details.

In elucidating Shah Sahib's view, Maulana Ubaidullah Sindhi, who is acknowledged as an authority on Waliullah, wrote as follows:-

"It should be understood that the enforcement of the basic law is preceded by the formulation of introductory subsidiary laws bearing directly on the prevailing conditions of the people concerned.

The basic law is unchangeable but introductory laws change with the change in attending circumstances. The introductory laws which *Rasoolullah* and his three immediate Successors formulated in consultation with the Central Council of advisers, are termed "Sunnah". The system whereby decisions were reached by consultation broke down, however, after *Hazrat Othman*. The "Sunnah" embraces, according to the Hanafi School of thought, the practice of both *Rasoolullah* and his rightly guided Successors, a view to which we also subscribe. But the practice of "Sunnah," which the current terminology will call Bye-Laws, must follow the Holy Quran. The basic law, is unchangeable; bye-laws change with the changing circumstances. The old bye-laws undergo changes to suit present requirements and new ones have to be deduced to satisfy fresh developments. This process is called *Fiqh*". (Al Furqan, Waliullah Number, page 264).

### IQBAL

Discussing the Traditionalist and the *Fiqh* schools of thought, Iqbal observes in his Lectures on the Reconstruction of Religious Thought in Islam, (page 169): "But contrary to the spirit of his own school the modern Hanafi legist has eternalised the interpretations of the founder or his immediate followers much in the same way as the early critics of Abu Hanifa eternalised the decisions given on concrete cases".



My own position in this respect is that I subscribe to the views of the school of Imam Azam, Shah Waliullah, Maulana Sindhi and Iqbal, since their views are in accordance with the principles of Law-making in an Islamic State as enunciated by the Holy Quran.

## OPPOSITION

Those who subscribe to views other than these are bound naturally to oppose these views. Iqbal anticipated this opposition and observed, on page 156 of his Lectures:

"And I have no doubt that a deeper study of the enormous legal literature of Islam is sure to rid the modern critic of the superficial opinion that the Law of Islam is stationary and incapable of development. Unfortunately, the conservative Muslim public of this country is not yet quite ready for a critical discussion of "Fiqh" which, if undertaken is likely to displease most people, and raise sectarian controversies; yet I venture to offer a few remarks on the point before us".

The opposition from the orthodox section is understandable. But the tragic part of it is that a difference of opinion is allowed to generate violence in expression and to condemn the opponent as an apostate. Even Imam-e-Azam was not spared. In Vol. XIII of his book on history Khatib Baghdadi gives following details:-

"Imam Malik b. Anas says that the peril of Abu Hanifa to the 'Ummah' is no less than that of Satan (*Iblees*) both with regard to his doctrine of revocability of divorce and the rejection of *Ahadith*. Abd-al-Rahman b. Mahdi says that the peril of Abu-Hanifa is more dangerous than the peril of Dajjal. Salman b. Hassan Halbi says that he has often heard Imam Auzai complain that Abu Hanifa has destroyed one by one all the wings of Islam. Fazari relates that both Sufian and Auzai say that a more inauspicious person than Abu Hanifa was never born in Islam. Imam Shafi calls him the worst among the despicable. Abu Ubaid says I was once sitting in the Jami Mosque of Rusafa with Aswad b. Salam. In discussing something I mentioned the view of Abu Hanifa. Aswad reprimanded me severely for mentioning even the name of Abu-Hanifa in the mosque and for this lapse on my part he was so annoyed with me that he never spoke to me thereafter till his death".

Similar intolerance in opposing views continues unfortunately to plague our society to this day.

## WHAT SHOULD BE DONE NOW?

Let us return to our main theme. Historically, the position during *Khilafat-Rashida* was that whenever a change in circumstances needed a change in subsidiary laws the change was affected by mutual consultation. Had the institution of *Khilafat* on the pattern set by *Rasoolullah* continued, the process of legislation evolved by it would have continued to develop normally, making the law of *Shariat* a happy blending of permanence and change. It is a pity that the processes came to a halt and with it ended the critical attitude with which subsidiary laws used to be formulated. It is true that for a time the various schools of *Fiqh* carried on the process, but theirs was an effort on the individual plane which very soon became rigid and fossilised. We need not go into the historical why and wherefore of the change, which Iqbal has already discussed at length in his Lectures. The all important question confronting us now is that since the *Khilafat* on the pattern of *Rasoolullah* has long ceased to exist, what lines an Islamic State should follow for legislation. The answer is fairly clear. Revive *Khilafat* on *Rasoolullah's* pattern and adopt the system which he and his associates had established. But, is such a revival possible? Some say, No, since personalities like *Hazrat Abu Bakr* and *Hazrat Umar* are no longer available to do the job. This No is cry of frustration and is based on a serious misconception. If the cry were listened to, it would be tantamount to admitting that the Holy Quran offered a code of life for a particular period of history only. This would be preposterous. The Holy Book has been preserved so as to provide mankind with a code for practical living from age to age and from place to place. On the basis of the Quranic principles an organisation (Islamic State) was set up once. A similar organisation can be set up again now. The way to do it is this: The State should first take firm decision that it shall remodel the society on the basis of the inviolable principles preserved in the Holy Quran. Then it should take stock of the literature dealing with Islamic laws with a view to (a) adopting, in its original form, what would with due regard to the Quranic Principles, meet present requirements; (b) amending what needs a change; and (c)

formulating new provisions to satisfy fresh situations, the whole thing being processed with the help of the representatives of the *Ummat* by mutual consultation. This is how an organisation based on the Quranic Fundamentals can be brought into being. But a change - over from the present to an ideal Islamic State cannot be brought about overnight. The organisation will, by stages, proceed towards its ultimate goal by the normal process of evolution, ridding itself of initial short comings at every step. This is the *Sabil-ul-Momineen*, the way of the Believers, which the Holy Quran has stressed. An important point to note is that until an Islamic State has been established, the *Ummat* should continue its present course without any change, since the right to introduce changes belongs to the social order (the Islamic State) and not to individuals whatever their mental development may be.

## ITS IMPORTANCE

The foregoing explains the broad principles and the basic way for the exercise of legislative effort in an Islamic State, the way to which Iqbal referred in his Lectures. He indicated the way in 1928, but the question had already swayed his imagination so much that in a letter written long before he said: "My conviction is that whoever undertakes a critical appreciation of modern jurisprudence in the light of the Quran and establishes the inviolability of its principles, will be the arch revivalist (*Mujadid*) in Islam, and the greatest benefactor of humanity....It is a pity that the contemporary doctors of Islamic jurisprudence should be either completely ignorant of modern trends or else be steeped in rack orthodoxy.....It seems to me that Islam is, as it were, being tested at the moment on the touchstone of Time, a situation which perhaps never before arose in the history of Islam". (Iqbalnama-volume I, page,50).

Referring to what had happened in Turkey, Iqbal said in his Lectures (on page 154): "The question which confronts him (the Turk) to-day, and which is likely to confront other Muslim countries in the near future, is whether the law of Islam is capable of evolution, a question which will require great intellectual effort, and is sure to be answered in the affirmative; provided the world of Islam approaches it in the spirit of Omar, the first critical and independent mind in Islam who, at the last moments of the Prophet , had the moral courage to utter these remarkable words; "The Book of God is sufficient for us". He concludes his Lectures with these words (pages 170):-

"In view of the basic idea of Islam that there can be no further revelation binding on man we ought to be spiritually one of the most emancipated peoples on earth. Early Muslims emerging out of the spiritual slavery of pre-Islamic Asia were not in a position to realise the true significance of this basic idea. Let the Muslim of to-day appreciate his position, reconstruct his social life in the light of ultimate principles, and evolve, out of the hitherto partially revealed purpose of Islam, that spiritual democracy which is the ultimate aim of Islam".

If the Islamic world succeeds in re-establishing the Universal Democracy of Islam by recasting Islamic jurisprudence on the basis of the Quranic Fundamentals, the leadership of the world of political thought will be theirs. If, however, they fail in the discharge of this delicate but vital duty, the other nations will regard their failure as the failure of Islam and on the evidence of that failure would declare that Islam was successful only in a particular period of history but that thereafter it exhausted its dynamism and is no longer capable of keeping pace with the growing needs of the times. It should then be extremely painful for them to be adjudged guilty at the bar of humanity of a crime of such immense magnitude and severity.

## CONCLUSION

It will follow from what has been said above that within the circumscribed limits of the permanent fundamental principles of the Holy Quran, the Islamic society is free to formulate its subsidiary laws in accordance with the need of times. While the subsidiary laws will be susceptible to change in accordance with the changing needs of times, the Quranic fundamentals shall remain unchangeable. This happy blending of permanence and change will enable the *Millat* to attain its ultimate destiny in life.