Applying the Shari'ah in Modern Societies: Main Developments and Issues

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Applying the *Sharī'ah* in Modern Societies: Main Developments and Issues*

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Introduction

This paper deals with the place of the *sharī'ah* in modern Muslim societies and communities. It attempts to identify the main developments in the relationship between Islamic law and Muslim societies in modern times, the models of application of the *sharī'ah* that have been developed, and some of the issues relating to the calls for the implementation of the *sharī'ah* which were articulated during the last decades of the 20th century. Discussion of these issues is preceded by a clarification of the meaning of the key concepts relevant to the subject.

I

CONCEPTUAL CLARIFICATION

Sharī 'ah, Fiqh and Qānūn

In the Islamic parlance, the term *sharī'ah* refers to the totality of God's commands contained in the *Qur'ān* and the *Sunnah*.[1] For Muslims it is *the way* [which is the etymological meaning of the word] to conduct this worldly life. It governs every aspect of life from matters pertaining to ritual purity to questions related to international affairs. It is obvious that some aspects of the *sharī'ah* are unenforceable by any political authority and therefore constitute a code of conscience, such as the rules pertaining to *'ibādah*. Other aspects are, in principle, enforceable by state, such as the rules of civil transactions,

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[1] Mohammad Hashim Kamali, "*Fiqh* and Adaptation to Social Reality" in *The Muslim World*, 86:1 (1996), 62–63.

criminal punishments and the like and they constitute the legal norms in the technical meaning of the expression.[2]

The *sharī'ah* is interpreted by qualified Muslim scholars. The totality of their interpretations constitutes *fiqh*, which is defined as "knowledge of human rights and duties" (*ma'rifat al-nafs mā lahā wa mā 'alayhā*).[3] Being a result of the historical endeavours of Muslim scholars to understand, discover and interpret the *sharī'ah*, in its human dimension *fiqh* goes through a process of change.

In cases where the *sharī'ah* is silent, Muslim authorities have the right to pass legislation in accordance with the *sharī'ah* as the *grundnorm*.[4] This legislation, based upon the doctrine of *al-siyāsah al-shar'iyyah* (governance in accordance with the *sharī'ah*) and expressed in the form of *qānūn*s constitute a flexible part of Islamic law.[5] One out of the innumerable examples that can be cited for this kind of legislation is the traffic code made for regulation of traffic in modern times.

In pre-modern Muslim legal history, one of the most important issues was that of relationship between the *sharī'ah* and *qānūn*, or the Islamicity of the legislation of Muslim political authorities. In historical Muslim states, such as the Ottoman state, this issue was solved through the control of the legislative process by the supreme *muftī* of the state (*shaykh al-Islām*).[6]

In those contemporary Islamic states where the *sharī'ah* has been proclaimed as the source of law, this issue is under the jurisdiction of the supreme bodies constituted to safeguard the constitution (Constitutional Court in Egypt, Council of Guardians of the Constitution in Iran, etc.)

In the past, legislation in historical Muslim states, even though it was in accordance with the *sharī'ah*, was not named *sharī'ah* law; it was, instead, called *qānūn*. It had its separate existence in the legal systems of the Muslim states as well as in the consciousness of Muslims. In contemporary Islamic states this difference is fading and new terms such as *qānūn-i islāmī* ("Islamic law") are meant to overcome the dichotomy between the *sharī'ah* and the *qānūn*. For instance, the contemporary Pakistani scholar Imran Ahsan Khan

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[2] Gregory C. Kozlowski, "Islamic Law in Contemporary South Asia" in *The Muslim World*, 87: 3–4 (1997), 226.

[3] Muḥammad ibn 'Alī ibn Muḥammad al-Shawkānī, *Irshād al-Fuḥūl ilā Taḥqīq al-Ḥaqq min 'Ilm al-Uṣūl*, ed. Aḥmad 'Izzū 'Ināyah, 2 vols. (Beirut: Dār al-Kitāb al-'Arabī, 1999), 1: 18. This is the definition of Abū Ḥanīfah.

[4] Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamabad: The International Institute of Islamic Thought and Islamic Research Institute, 1994), 38.

[5] See Mohammad Hashim Kamali, "Siyāsah Shar'iyyah or the Policies of Islamic Government" in *The American Journal of Islamic Social Sciences*, 6 (1989), 63 and passim.

[6] Ahmet Akgunduz, *Osmanli Kanunnameleri ve Hukuki Tahylilleri* (Istanbul: FEY Vakfi, 1996), 1: 81–87.

Nyazee describes Islamic law as "the growing tree".[7] The roots of this tree are the *uṣūl* (sources) i.e. the Qur'ān and the *Sunnah;* its trunk is the fixed part which comprises norms derived by the *fuqahā'* from specific evidences; and its branches are flexible, and consists of the norms determined by the state from the general principles. Using the traditional Islamic vocabulary, one may say that the fixed part of the tree are the norms stated explicitly in the *sharīʿah* texts (the Qur'ān and the *Sunnah*) or are derived from them by using the strict analogy of *fiqh,* and the branches of the tree are the *qānūn*s.

Any discussion about the implementation of the *sharīʿah* at a particular time should take into account the nature of the *sharīʿah*, the issue of the enforceability of its set of norms as well as the nature of juristic interpretation and legislation of Muslim authorities.

Application of Norms

Application of norms has at least three meanings: (1) behaviour according to given norms; (2) application of a rule or a principle to a case or a fact; and (3) application of the prescribed sanctions as a consequence of non-adherence to the norms.

Discussion on the application of the *sharīʿah* should take into account these different levels of meaning of the concept of application. Thus, we may say that the application of the *sharīʿah* (*taṭbīq al-ḥukm al-sharʿī*) could mean: (1) behaviour according to the *sharīʿah* rules; (2) application of the *sharīʿah* rules or principles to a specific case or a fact; and (3) application of prescribed sanctions (*jazā', 'uqūbah*) as a consequence of non-adherence to the *sharīʿah* rules. Ultimately, the *sharīʿah* is applied through the behaviour of individuals. Compliance of their behaviour with the dispositions of the *sharīʿah* norms is an ideal situation. Being human, the addressees of the *sharīʿah* norms frequently contravene the norms of prescribed behaviour and thus sanctions come. If we say that human non-compliance with the *sharʿī* norms represents infringement of God's order, then sanctions are meant to return the order in place.

To follow the *sharīʿah* is religiously incumbent upon Muslims. However, there are different factors involved in the process of application with their specific responsibilities as well as prescribed mechanisms of application. [8]

As a matter of principle we may say that all segments of a Muslim society are involved in the application of the *sharīʿah*. The application of the *sharīʿah* is not just a matter of state or administrative authority; it is rather a matter of

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[7] Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* , 54.

[8] Jamāl al-Dīn 'Aṭiyyah, *al-Naẓariyyah al-'Āmmah li al-Sharīʿah al-Islāmiyyah* (Cairo [?]: Maṭbaʿat al-Madīnah, 1988), 239–51.

the collective responsibility of Muslims. This responsibility belongs to (1) individuals; (2) society (*mujtama'*) and (3) the state (*dawlah*).

The individual is the first addressee of the *shar'ī* norms. Ultimately, the *sharī'ah* is realized through the behaviour of individuals. Individuals are responsible in matters pertaining to themselves, to their families and to the society. These duties are known in Islamic terminology as *'ayn* duties.

The Muslim society is the second addressee of the *shar'ī* rules. In applying certain *sharī'ah* norms, it is the society at large that is involved to a greater extent than the state or government. The entire society is involved in the situations when a particular duty should be performed regardless of the fact who exactly performs it. These duties are known as *kifāyah* duties and they emphasize the social dimension of Islam. Some examples of *kifāyah* duties are *ṣalāt al-janāzah* (Funeral prayer), *'Īd* prayer, building mosques, acquiring knowledge in specialized areas, etc.

State is the third factor involved in the application of the *sharī'ah*. State is involved in this process through three branches namely jurisprudence (*fiqh; iftā'*), judiciary (*qaḍā'*) and executive administration (*idārah*).

The jurisprudencial branch is responsible for giving authoritative interpretation of the *sharī'ah* rules and identification of the norm which applies to a case. This is done by responding to queries of individuals, social institutions, and the state. *Muftī*s, by interpreting the *sharī'ah,* serve as legal counsellors.[9] Today their duty is also connected with *da'wah* (mission) and *irshād* (guidance) and not only with stating the permissibility or impermissibility of certain actions. In this sense, the earlier practice of issuing laconic *fatāwā* containing only a yes or no answer (*yajūz, lā yajūz; olur 'olmaz)* has given way to a a more lengthy elaboration on the matters asked. [10]

By giving *fatwā*s, the *muftī*s help Muslims to behave according to the disposition of the *sharī'ah* rules. It is up to one's personal conscience whether to comply with a *fatwā* or not. By its nature, however, this function is a key function for the application of the *sharī'ah*. Its importance is especially emphasized in secular societies where the Islamic rules are not applied by the state.

The judiciary (*qaḍā'*) is responsible for adjudication of disputes between interested parties, registration of legal deeds, issuing judgements in trials, and determining sanctions in cases involving infraction of the norms of the *sharī'ah.* In situations where Islamic rules are sanctioned by the state, the

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[9] Muhammad Khalid Masud, et al., "Muftis, Fatwas, and Islamic Legal Interpretation" in Muhammad Khalid Masud, et al., eds., *Islamic Legal Interpretation: Muftis and Their Fatwas* (Cambridge, MA and London: Harvard University Press, 1996), 3–32.

[10] See Chibli Mallat, "Tantawi on Banking Operations in Egypt" in *Islamic Legal Interpretation,* 286–96.

courts are responsible for the function of *qaḍā'*. In contemporary Muslim countries there are two types of courts responsible for the administration of the *sharīʿah*: (1) state courts of general jurisdiction (for instance in Egypt) and (2) special *sharīʿah* courts (for instance in Jordan). The nature and organization of the *sharīʿah* courts in modern Muslim countries reflects the nature of national legal system to which they belong.

In a situation wherein the Islamic norms are not sanctioned by the state, Muslim communities do not have any formal bodies to perform the function of *qaḍā'* comparable with the ecclesiastic courts of the Christian churches or rabbinical courts of the Jewish communities in diaspora. There are just some attempts at the institutionalization of peaceful settlement of disputes and counselling functions among Muslim communities in some Western countries.

The executive branch, starting from the head of the state and ending with *shurṭaḥ* or *ḥisbah* (local law enforcement officers), is responsible for law enforcement. In modern times, the organs of the Muslim nation states have taken over this function. In the case of the Muslim communities in secular states, this function does not exist.

Having in mind the diversified meaning of the concept of application of the *sharīʿah* norms and the different levels of responsibility for this duty, we may say that the application of the *sharīʿah* cannot be reduced to the application of the sanctions only and the state cannot be made solely responsibile for the application of the *sharīʿah* norms.

The procedure of applying the norms of the *Sharīʿah* follows the general pattern of the application of norms. This procedure includes:

(1) Study of fact/reality in which the *sharīʿah* norms are going to be applied;

(2) finding an applicable norm;

(3) determining the meaning of a norm; and

(4) applying norms on facts.

All subjects which are involved in the application of the *sharīʿah* norms should follow this procedure. In performing the first three steps they are assisted or guided by *muftī*s. In performing the fourth step the addressees of the norms act accordingly.

An extensive clarification of the meaning of the *sharīʿah* and related terms as well as the concept of the application of norms was needed in order to provide adequate methodological framework for dealing with the issue of the application of the *sharīʿah* in modern societies.

II

MODERNITY AND THE APPLICATION OF THE *SHARĪʿAH*

European/ Western modernity, understood as a new worldview, social organization and lifestyle, found its way into Muslim societies during the 19th century. This phenomenon brought radical changes into the way of life and thinking of Muslim nations. The "five pillars of modernity" — sovereign nation states, science-based technology, bureaucratic rationalization, the quest for profit maximization, and secularization — deeply affected the societies based upon the worldview of *tawḥīd*.[11] An indicator of this impact was the changed role of the *sharīʿah* in the structure and function of Muslim societies.

Basically, Western modernity spread into the Muslim world by means of the modernization projects of the Muslim elite, such as *tanẓīmāt* in the Ottoman state, and via the military conquest of Muslim territories by European colonial powers, such as the French occupation of Algeria. In some cases both these were combined. For instance, Bosnia and Herzegovina experienced the Ottoman project of *tanẓīmāt* during the period between 1839–1878 and the Austro-Hungarian project of military conquest between 1878–1918.[12]

The spread of Western modernity in the Muslim world brought several important changes in the relations between the *sharīʿah* and the Muslim societies. These changes were:

(i) The Scope of the Qānūn was enlarged

The list of laws passed in the Ottoman state during the *tanzīmāt* shows the tendency of enlarging the domain of *qānūn* from areas in which the *sharīʿah* was silent (such as modern banking system,[13] maritime trade) to areas in which the solutions of classical *fiqh* were not quite extensive (for instance,

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[11] See Louay M. Safi, *The Challenge of Modernity: The Quest for Authenticity in the Arab World* (Lanham, New York and London: University Press of America, 1994), 12.

[12] See Fikret Karcic, *The Bosniaks and the Challenges of Modernity: Late Ottoman and Hapsburg Times* (Sarajevo: El-Kalem, 1999).

[13] The point made by the learned writer is well taken except for the fact that "modern banking system" is not quite apt by way of example for the obvious reason that it involves transactions which are subject to many *sharʿī* objections, most of all because these transactions are based on *ribā*. Ed.

constitutional and administrative law).[14] The duality of the *sharīʿah* and the *qānūn* existed from pre-modern times, but *qānūn* was always, at least theoretically, subject to the *sharīʿah*. The modernizing reforms recognized the area of *qānūn* as one somewhat independent of Islamic law because it covered matters which had not been extensively dealt with in Islamic law and its contents did not conflict with the norms of the *sharīʿah.* This attitude led to a gradual enlargement of the scope of *qānūn*. Eventually, *qānūn* became dominant in the sphere of public law and the *sharīʿah* was relegated to the realm of private law.

(ii) Qānūns *of Muslim Rulers were replaced by* Qānūns *of non-Muslim Rulers*

In Muslim legal history *qānūn* was accepted as the legislation of Muslim rulers in matters where there are no specific *sharīʿah* norms. However, during the modern times the content of *qānūn* legislation changed. The modernizing Muslim elite began to adopt European laws in the form of *qānūn* legislation, thus replacing the Muslim historical experience, customs and values with the foreign ones. On the other hand, the non-Muslim colonial authorities in the Muslim world took over the prerogatives of the Muslim rulers in legislation and imposed European laws in virtually all legal branches except personal status and administration of Islamic religious affairs.

In this way the European colonial powers brought their respective legal systems into the Muslim world, which in this matter became divided into countries under the influence of European continental law (for instance, in North and West Africa) and Anglo-Saxon law (for instance, in South and South East Asia).

(iii) Changes were introduced in the confined Domain of the Sharīʿah

The *sharīʿah* was mainly confined to the area of personal status (*al-aḥwāl al-shakhṣiyyah*) . This very term was a translation of the French *statut personnel,* something which had no parallel or equivalent in the classical *fiqh* terminology. In the Ottoman and Middle Eastern practice "personal status" included the affairs pertaining to the legal capacity of persons, marriage and family relations, inheritance and endowment.[15]

The confinement of the *sharīʿah* to personal status was an outcome of the increasing process of secularization and reduction of religion to a "private

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[14] See Niyazi Berkes, *The Development of Secularism in Turkey* (Montreal: McGill University Press, 1964), 168 and passim.

[15] See Tahir Mahmood, *Personal Law in Islamic Countries* (New Delhi: Academy of Law and Religion, 1987), 1–14.

affair". On the other hand, the formulation of the concept of personal status and insistence on the application of the *sharī'ah* in it was considered by Muslim scholars as the "last bastion" for the preservation of Islamic identity.

The *sharī'ah* rules pertaining to personal status were further subjected to two kinds of changes: change of the form and change of the content. As far as the former is concerned, a new form — codification — was introduced into the area of Islamic personal law. Being a reflection of the 19th century codification movement in Europe, this form found its way into the Muslim world. During the 20th century most of the Muslim countries opted for an official codification of the *sharī'ah* norms in the domain left to Islamic law. The first in this series was the codification of the Ottoman family law (*Hukuk-i Aile Nizamnamesi*) of 1917, followed by Egypt in 1920 and 1929, by Syria in 1953, by Tunisia in 1956, by Iraq in 1959, by Pakistan in 1961 and by several other Muslim countries.

Codified laws therefore became the sole frame of reference or the addressees of the *sharī'ah* norms. Written in modern national languages they were easily accessible for lawyers who were not specialized in classical *fiqh*, for interested individuals, and the public in general.

The second kind of change — change in the material and procedural *sharī'ah* norms — was introduced by means of codification in Muslim countries under the influence of the European continental law or *stare decisis* doctrine in countries under the influence of Anglo-Saxon tradition. In this way, certain institutes and provisions of Islamic personal law as administered in the pre-modern times, were changed. For instance, polygamy was restricted, husband's right to unilateral repudiation of marriage was limited, mother's right to the custody of children after divorce was extended, and the notion of "obligatory testament" was introduced in the law of inheritance. [16]

The methods applied in introducing these changes were different: selecting the teachings of schools of law (*madhāhib*) other than the school (*madhhab*) prevalent in a given country; *takhayyur*, that is, eclecticism or combination of different interpretations in constructing a single provision (*talfiq*) or new *ijtihād*. Sometimes changes were introduced by referring to the legal theory and practice of non-Muslim laws, such as in the case of "Anglo-Muhammadan law" in India.

Different methods used for introduction of changes into applied Islamic law in modern Muslim countries determined their religious validity. Codified laws and laws administrated by the state courts were evaluated and labelled as "Islamic" or "quasi-Islamic" by religious scholars, Muslim public and experts

[16] Ibid.

by the criteria of their conformity to the principles of the *sharīʿah* or classical *fiqh*.[17]

III

ISLAMIC REVIVAL AND THE RETURN OF THE *SHARĪʿAH*

The 1970s saw the emergence of a new phenomenon in the Muslim world — the reassertion of Islamic identity and the reversal of secularization — variously designated as "Islamic revival", "Islamic resurgence", "Islamic renaissance", "Islamic fundamentalism" and the like.[18] These terms encompassed different manifestations ranging from the call for the introduction of the *sharīʿah* into the national legal systems of Muslim countries to increased personal religiosity. In terms of the relative importance of the particular elements of this phenomenon, we may differentiate the manifestations of Islamic revival in Muslim majority countries and in the Muslim minority situation(s).

(i) Islamic Revival and the Sharīʿah *in Muslim-majority Countries*

Islamic revival was largely caused by the failure of modernization projects in the Muslim countries. Muslim modernist reformers mistakenly identified Europe/ West with modernity and thus believed that every society that intended to become modern must become European/Western.[19] In addition, they were preoccupied with normative and not with infrastructural change in society. Modernists of the *tanẓīmāt* and the other projects which followed it were mainly dealing with institutions, laws and social ethics. They failed to realize that norms and institutions cannot function properly without adequate social substrate. Thus, a wholesale adoption of European laws by Muslim countries failed to produce the legal security which exists in European states. This was because the modernized Muslim countries did not adopt the philosophical foundations, values and attitudes which enable European laws to play their role in society. Modernization was in many cases reduced to the despotic rule of military or political elite detached from its own people, institutionalized corruption, legalized exploitation of the poor, abuse of human rights, and so on. Naturally, when reaction began to set in the only

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[17] For an expert evaluation of these changes see Aharon Layish, "The Contribution of the Modernists to the Secularization of Islamic Law" in *Middle Eastern Studies*, 14 (1978), 263–277.

[18] Ali E. Hillal Dessouki, ed., *Islamic Resurgence in the Arab World* (New York: Preager, 1982), 10–13.

[19] J. Voll, "Mistaken Identification of 'the West' with 'Modernity' " in *The American Journal of Islamic Social Sciences*, 13:1 (1996), 1–12.

rallying point for the disillusioned masses was the ideal norm of the *sharīʿah*, which had succeded in the past in the building of "the golden age" of Muslims.

Islamic revival in Muslim majority countries has taken the form of radical demand for changes in the social reality. The keyword of Islamic revival was the *sharīʿah*.[20] "Return to the *sharīʿah*" was one of its main slogans. This appeal had two main functions: political and ideological. Politically, return to the *sharīʿah* was used by the revivalist groups as a basis for the delegitimization of the ruling elite. It was also used by the ruling elite as a basis for the legitimization of its authority against the claims of revivalists.

Ideologically, the appeal to the *sharīʿah* was used as a means for the mobilization of the masses as well as an Islamic evaluation of the existing political and legal institutions, social values, and norms of Muslim societies. Successful revivalist attempts were later translated into the sphere of positive law, such as in the case of Iran. In some other cases, changes in positive law were introduced under the influence of the revivalist current (constitutional clauses of the *sharīʿah* as a source of law in many Middle Eastern countries, the inclusion of the *sharīʿah* prohibitions in the national legislation, etc.)

In any case, Islamic revival concentrated on Islamic public law, especially constitutional law, criminal law and law related to modern economics. [21] Other branches of law, such as *ʿibādāt*, civil law, torts, international law, have generally been left out of focus. Law of personal status, after the previous codification efforts, almost remained intact, except in some cases where the modernizing reforms were reversed (for example, Iran, Pakistan). Out of the strict legal sphere, Islamic renewal emphasized social symbols of Islamic identity such as attire (*ḥijāb*), appearance (beard for men), and social ethics (greetings, etiquette, etc).

Emphasis on Islamic public law could be seen in the preoccupation of the proponents of Islamic revival with topics such as Islamic law and constitution,[22] Islamic criminal law,[23] and Islamic economics.[24]

Attempts at Islamizing public law in some cases were comprehensive (Iran, Pakistan) and in some cases limited to the introduction of certain *sharīʿah* institutes into the domain of public law (Malaysia).

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[20] Chibli Mallat, *The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and the Shi'i International* (Cambridge: Cambridge University Press, 1993), 2–3.

[21] Ibid., 4.

[22] For a recent edition see Syed Abul Ala Maududi, *Islamic Law and Constitution* (Lahore: Islamic Publications, 1997).

[23] For an English translation see ʿAbd al-Qādir ʿAwdah, *Criminal Law of Islam* (Karachi: International Islamic Publishers, 1987).

[24] For an English translation see Muhammad Baqer as-Sadr, *Our Economics* (Tehran: World Organization for Islamic Services, 1984).

In Pakistan, for instance, the Council of Islamic Ideology prepared in 1978 a programme for the "Establishment of an Islamic society" whereby six spheres were identified as crucial for the realization of this project.[25] These spheres were: religious tenets and worship (*ʿaqīdah* and *ʿibādah*), educational system, economic system, legal system, broadcasting and publishing and culture. Law has been seen as one of the spheres which should be Islamized. Islamization of the existing laws has been suggested together with legislation of new Islamic laws in public as well as private legal domain.[26] Introduction of the *sharīʿah* laws under Ziaul Haq fell short of this proposal presumably due to the general nature of the regime and its move towards the application of the provisions of penal law before attempting to establish a just social order.

In Malaysia, Islam is the religion of the Federation (article 3 of the Constitution) but Islamic law has been historically confined to the personal law of Muslims. When the current of Islamic revival swept across Malaysia in the 1980s there were some demands to give to the *sharīʿah* the status of law of the land in private as well as in public domain.[27] These views, however, were generally not accepted. In several cases the Malaysian Supreme Court took the position that Islamic law is not public law and that the status of Islam as the religion of the Federation does not mean that Islamic law acts as a general clog or fetter on the legislative power of the state. Historically confined to the personal law of Muslims, Islamic law is not imposed on non-Muslims.[28]

However, without changing the status of Islamic law in Malaysia certain *sharīʿah* institutes were introduced into the public domain such as Islamic banking scheme (1982), Islamic insurance (*Takāful*) (1985), Islamic Accepted Bills (equivalent to Bankers Acceptance) and Islamic Expert Refinancing scheme (1990). Interest-free banking system was also made available to the conventional banks (1993). These *sharīʿah* modes of transactions were not imposed upon the citizens. Rather, they were offered as an alternative. In such a situation the non-Muslim owned financial institutions are allowed to trade under the *sharīʿah* principles and they do that.

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[25] Abdul Ghafur Muslim, "Islamization of Laws in Pakistan: Problems and Prospects" in *Islamic Studies*, 26:3 (1987), 272–75.

[26] An example for project of Islamization of existing laws in this country could be found in Tanzilur Rahman's *Islamization of Pakistan Law* (Karachi: Hamdard Academy, 1978), where the author has surveyed sixty eight acts and ordinances and suggested necessary amendments to bring them into conformity with the *sharīʿah*.

[27] Norhashimah Mohd Yasin, *Islamisation/Malaynisation*: *A Study on the Role of Islamic Law in the Economic Development of Malaysia, 1969–1993* (Kuala Lumpur: A. S. Noordeen, 1996), 220–226.

[28] Andrew J. Harding, "Islam and Public Law in Malaysia: Some Reflections in the Aftermath of *Susie Teoh*'s Case" in Chibli Mallat, ed., *Islam and Public Law: Classical and Contemporary Studies* (London: Graham & Trotman, 1993), 203.

Following this approach — in focusing on economy as a vehicle of development, and acknowledging the multi-religious reality of the country — the Malaysian leadership was not in favour of the application of the *sharī'ah* in the domain of criminal law. Consequently, when the opposition Islamic party, PAS, took over power in the northern state of Kelantan in 1990 and in November 1993 it passed an Enactment on *Hudud* which sought to apply Islamic criminal law on Muslims in this state, the Federal government prevented it.[29]

(ii) Islamic Revival and the Sharī'ah *in Muslim Minority Situations*

Islamic revival in the Muslim minority situations has focused on the preservation of Muslim identity against advancing secularization and assimilation. In the case of minorities which had a tradition of applying the *sharī'ah* in personal matters there were demands for the improvement of the status of the *sharī'ah* courts and codification of laws (for instance in Singapore and Philippines).[30] In the case of the Muslim minorities in the Balkans where the application of the *sharī'ah* was discontinued after World War Two, there were no demands for the reintroduction of Islamic law. Emphasis was on the preservation of Islamic identity through adherence to Islamic religio-ethical norms. Finally, in the case of the Muslim minorities in Western countries (Australia, Canada, Great Britain) there were some calls for the recognition of the *sharī'ah* as the personal law of the Muslims.[31] In this paper attention will be given to the last two cases.

Muslim communities in the Balkans have a centuries long tradition of the application of the *sharī'ah* within the Ottoman state as well as in the Balkan nation states in the post-Ottoman times. Application of the *sharī'ah* in these states in matters of Muslim personal status was guaranteed by the relevant international treaties (Congress of Berlin of 1875, Congress of Versailles of 1918, etc.). This practice, however, was discontinued in Albania in 1928 and in Yugoslavia after the World War Two to be preserved only in Greece for the Muslims of Western Thrace up to the present time.[32]

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[29] Ibid., 223.

[30] See S. Siddique, "The Administration of Islam in Singapore" in T. Abdullah and S. Siddique, eds., *Islam in Southeast Asian Studies* (Singapore: Institute of Southeast Asian Studies, 1986), 317 and passim; Hamid Aminoddin Barra, *The Code of Muslim Personal Law: A Study of Islamic Law in the Philippines* (Marawi City: Mindanao State University, 1988).

[31] See P. A. Buttar, "Muslim Personal Law in Western Countries: The Case of Australia" in *Journal of the Institute of Muslim Minority Affairs* (*JIMMA*), 6:2 (1985), 271–81; Syed Mumtaz Ali and Enab Whitehouse, "The Reconstruction of the Constitution and the Case for Muslim Personal Law in Canada" in *JIMMA*, 13:1 (1992), 156–72.

[32] See Fikret Karcic, *Serijaotski sudovi u Jugoslaviji1918–1941* [The *sharī'ah* Courts in Yugoslavia 1918–1941] (Sarajevo: Islamski Teoloski Fakultet, 1986), 49–53.

Since the abolition of the *sharīʿah* in the Balkan states there has been no demand for its reinstitution even during the Islamic revival in the Balkans (1970–1990). The primary demand of the Muslims was for larger civil and political rights and freedoms, citizenship according to European standards, and not for special personal status which is historically connected with the minority status.[33] In Bosnia and Herzegovina only in the autumn of 1998, during the discussion on the regulation of relations between the state and religious communities, there were some indications that the Islamic Community might ask for the civil recognition of marriages (*nikāḥ*) solemnized by Muslim parties before an *imām*. Under the present conditions, Muslims are required first to solemnize marriage before the civil authorities and after that, if they wish, to go to some *imām* and have *ʿaqd al-nikāḥ*. News about this was interpreted in the media as the introduction of the *sharīʿah*, even though the recognition of civil consequences of the religious form of marriage is found in many Western countries. The public reaction of prominent Bosniak intellectuals toward any kind of recognition or application of the *sharīʿah* in the sphere of positive law was negative.[34] After that, the whole matter was put aside.

In such a situation, is the *sharīʿah* relevant for Muslims in the Balkans? The case of Muslims in Bosnia may be taken up as an example.

In Bosnia and Herzegovina, the *sharīʿah* courts were abolished in 1946 and with them the application of Islamic law in personal matters of the Muslims. Bosnian Muslims, historically known as Bosniaks (Bushn āq), in all legal matters came under the jurisdiction of secular legislation, mainly derived from Austrian jurisprudence and South-Slav historical experience in post-Ottoman times.

The Bosniaks have autonomous administration of Islamic affairs, known as The Islamic Community, separated from the state. The structure of The Islamic Community includes communal administration and learned hierarchy (*imām*s, chief *imām*s, *muftī*s and *raʾīs al-ʿulamāʾ* as a grand *muftī*). In this structure there are no courts for application of the *sharīʿah*, similar to the ecclesiastical courts of Catholic and Orthodox churches in the region. The constitutional court, introduced in 1997, is meant to oversee the legality of the work of the organs and institutions of the Community, rather than to implement the *sharīʿah*.[35]

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[33] Fikret Karcic, "Islamic Revival in the Balkans, 1970–1992" in *Islamic Studies*, 36: 2,3 (1997), 565-81.

[34] See Sarajevo daily *Oslobodjenje*, 30 October 1998, 4; weekly magazine *Dani*, 24 October 1998.

[35] Fikret Karcic, "Administration of Islamic Affairs in Bosnia and Hercegovina" in *Islamic Studies*, 38:4 (1999), 535–61.

The main theoretical position of the Bosnian *'ulamā'*, exemplified in the personality of Husein Efendi Djozo (1912–1982), *fetva-i emin* of the Community for decades, was that for Muslims in Bosnia the *sharī'ah* norms continue to be relevant as religious and ethical rules even though they ceased to be enforceable by positive law.[36] This position was mainly based on the distinction of the Ḥanafī scholars between the religious aspect of the *sharī'ah* norms (*diyānatan*) and their positive legal effects (*qaḍā'an*).[37]

This theoretical position can be identified in the present Constitution of the Islamic Community adopted in 1997. It has few references to Islamic norms and their sources, which is synonymous with the *sharī'ah* in its original meaning.[38] Generally speaking, it has been stated that "the organization of the organs and institutions of the Islamic Community in Bosnia-Herzegovina and its activity are derived from the Holy Qur'ān and the *Sunnah* (Practice) of the Prophet Muḥammad (peace be on him), on the Islamic traditions of the Bosniaks, and on the requirements of the time" (article IV). The article VII proclaims that "the aim (of the Islamic Community) is being achieved by promoting good and preventing evil". Article VII describes the duty of the Islamic Community to "protect authenticity of Islamic ethical norms and assures their interpretation and application. In the interpretation and performance of the Islamic religious rituals in the Islamic Community, the Hanafi madhhab (the law school) is to be applied". Explicit reference to the *sharī'ah* law is to be found only in article XXXI which stipulates a right of each person to establish *waqf* (property) in accordance with the law of the *sharī'ah.*

A glance through the basic document of the Islamic Community in Bosnia and Herzegovina shows that for Muslims in Bosnia the *sharī'ah* has a significance of religio-ethical code enforced by the conscience of the individuals. For the Islamic Community it is a source of reference for organizational forms and conduct of affairs and not a law enforceable by state authorities.

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[36] On the contribution of this scholar to the contemporary development of Islamic legal thought see Velid Draganovic, "Murā'āt Maṣāliḥ al-Muslimīn fī Fatāwā al-Shaykh Ḥusayn Jūzū al-Būsnawī", unpublished Master's thesis, International Islamic University Malaysia, 1999.

[37] This distinction could be found in Muḥammad Amīn ibn 'Umar b. 'Abd al-'Azīz 'Ābidīn al-Dimishqī, *Radd al-Mukhtār 'alā al-Durr al-Mukhtār al-ma'rūf bi Ḥāshiyat Ibn 'Ābidīn* (Beirut: Dār al-Iḥyā al-Turāth al-'Arabī, 1419/1998), 9: 213-259; al-Shaykh Aḥmad ibn al-Shaykh Muḥammad al-Zarqā', *Sharḥ Qawā'id al-fiqhiyyah* (Damascus: Dār al-Qalam, 1414/1993), 464.

[38] *Constitution of the Islamic Community in Bosnia and Herzegovina* (Sarajevo: Riyasat of the Islamic Community in Bosnia and Herzegovina, 1997).

In the case of Muslims in Bosnia, the application of the *sharīʿah* means practical behaviour according to the *sharīʿah* norms. Its application is the responsibility of the individuals and the society without the involvement of state authorities.

To take another case, the Muslims of Great Britain in the 1970s pleaded for the application of the *sharīʿah* as their personal law. During this period the Union of the Muslim Organizations of UK and Eire (UMO) asked for a separate system of Islamic family law applicable to all British Muslims.[39] The plea was justified by highlighting the importance of family relations for the preservation of Islamic identity and the inadequacy of current English law for Muslims. Additionally, a historical precedent was quoted — that the British Empire allowed legal pluralism in its colonies and thus it was expected also to allow it in the United Kingdom.

The Muslim claim was rejected outright by the British government as inappropriate. Sebastian Poulter has identified three possible reasons for the rejection. They are: (1) the Muslim claim for a separate family law goes against the unified system of family law in the country; (2) it is difficult to work out a standardized system of Islamic law acceptable to different Muslim groups living in the United Kingdom; (3) it is difficult to identify the organs that would apply Islamic family law: English civil courts or special Muslim courts. If the first solution is accepted there would be many differences in interpretation between English judges and Muslim scholars. If the second solution is accepted there would be practical problems in stuffing religious courts since the Muslims in the United Kingdom do not have a unified religious administration.

It has been shown in the relevant literature on the subject that the first reason was not accurate since the English law had already given privileges to Quakers and Jews with regard to the marriage formalities. The other two reasons refer to the state of affairs of the Muslim community in the United Kingdom and not to legal principles. The most substantial difficulty with this claim, as it has been mentioned in the literature, was the conflict between certain provisions of Islamic law and international conventions on human rights to which the United Kingdom is a party.[40]

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[39] See Sebastian Poulter, "The Claim to a Separate Islamic System of Personal Law for British Muslims" in Chibli Mallat and Jane Connors, eds., *Islamic Family Law* (London: Graham & Trotman, 1990), 147–65.

[40] Sebastian Poulter, "The Claim to a separate Islamic System of Personal Law", 159–64.

Thus, these reasons as well as the general trend of negative portrayal of Islam and the Muslims in the 1970s and 1980s excluded any possibility for the Muslims in the United Kingdom to have legal autonomy. Options which are left to the Muslims are: to use the flexibility of the existing English law in order to secure their own values and objectives, to have their family disputes settled outside the courts (in which case Muslim families and community should act as mediators), and to seek changes in the existing English law in order to reflect the Muslim presence in the religious mosaic of the United Kingdom. In this sense, privileges given to Quakers, Jews and Sikhs should be given to the Muslims as well, or else differential legal treatment will inevitably undermine the respect for the lawmakers in the eyes of the Muslim community in Britain.

Available studies show that a large number of Muslims in Britain consider the *sharī'ah* norms as binding rules of behaviour and refer their matters to the organisations of their community instead of having recourse to the official legal system. For instance, the Muslim Law (Sharī'ah) Council in London deals with more than 350 cases of matrimonial disputes every year. [41] In this way, the *sharī'ah* plays the role of unofficial law for Muslims, with all consequences that this kind of normative system implies for the treatment of rights and interests of citizens as well as to the government in a particular country.

The options left to the Muslims of the United Kingdom are in fact the same as available to other Muslims living in the West, or in secular societies in general. For them the *sharī'ah* could only be a religio-ethical code of behaviour resting upon the conscience of individuals, and the family and the community can play an effective role in persuading people to follow that code. The *sharī'ah* norms will have legal force in secular societies to the extent that they are incorporated into their respective legal systems either in the form of positive laws which reflect religious pluralism or the free-chosen option provided by positive laws. An example for the letter is the working of Islamic banks and other financial institutions which operate according to the *sharī'ah* rules and have their branches not only in the Muslim majority countries but also in countries where Muslims are living as minorities. These banks are allowed by the positive laws of these countries to operate according to the rules of the *sharī'ah* in the environment of a non-Islamic legal system. In such a case, the *sharī'ah* is applied as a free-chosen option available to Muslims as well as non-Muslims living in non-Muslim states. [42]

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[41] Ihsan Yilmaz, "Muslim Law in Britain: Reflections in the Socio-legal Sphere and Differential Legal Treatment" in *JIMMA*, 20:2 (2000), 357–360.

[42] Samir Abid Shaikh, "Islamic Banks and Institutions" in *JIMMA*, 17:1 (1997), 117–27.

IV

THE FORM OF ISLAMIC LAW AND THE METHODOLOGY OF ITS APPLICATION

Renewed calls for the application of the *sharīʿah* have raised two important questions: what is the most appropriate form in which the *sharīʿah* norms should be expressed, and how should they be applied in modern times? Answers to these questions were determined by the prevailing legal traditions in different countries and according to the ideological orientations of the groups that pleaded for the application of the *sharīʿah*.

The contemporary Muslim states mostly favour codified Islamic law because of all the known advantages of codification — uniformity, systematization and accessibility. Codification is also an adequate means for the introduction of changes in Islamic laws, both substantive and procedural. However, in the practice of modern Muslim countries codification was not necessarily connected with change in the norms subject to this procedure. In some cases codification was confined to giving the form of modern code to norms developed within the classical *fiqh*. In other cases, change was introduced in contravention of the accepted methodology of Islamic jurisprudence which made the Islamicity of codified laws questionable in the eyes of many Muslim scholars. Codification was rarely accompanied with the genuine process of *ijtihād*.

Muslim countries which attempt to execute the comprehensive project of Islamization regularly use codification as an adequate means. In the case of Pakistan, for instance, the renowned scholar Tanzilur Rahman suggested "codification and re-statement of Islamic law" giving three main reasons for the preference of this form over the books of *fiqh*.[43] These reasons were: (1) the law as embodied in the classical books of *fiqh* does not contain all the provisions of law relevant to the needs of our present-day society which are full of complexities of diverse nature; (2) exclusive recourse to classical literature accompanied with literal adherence to a particular school of *fiqh* will cast the whole body of law into a rigid mould with no further growth; and (3) Pakistani courts have been trained to interpret and enforce the "positive law" on the Western pattern and thus codification and state-legislation will meet the practical needs of judges who will continue to refer to classical literature as well while interpreting the codified laws. [44]

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[43] Tanzilur Rahman, *Islamization of Pakistan Law* (Karachi: Hamdard Academy, 1978), 7.
[44] Ibid.

On the other hand, there were circles that opposed the idea of codification, holding that the classical texts were sufficient for the application of the *sharī'ah* in modern times. This view was especially held by the traditional '*ulamā'* who, not only criticize codification, but also subjected the content of codified laws to minute scrutiny. A majority of the *'ulamā'* of Pakistan, for instance, criticized certain provisions of the codified criminal law adopted during the Ziaul Haq regime as contrary to the traditional *fiqh*, such as the stipulation on the *ḥadd* of 100 lashes for adultery instead of stoning.[45]

In the Muslim countries which did not encounter challenges of Western modernity until recently, Islamic law in non-codified form is applied. This is the case with Saudi Arabia. However, even in countries like this, new areas of modern life (labour law, industrial law etc) are regulated by state legislation (*niẓām; marsūm*) issued upon the doctrine of *al-siyāsah al-shar'iyyah.*

Proponents of Islamic revival linked the application of the *sharī'ah* with the renewal of Islamic legal thought (*tajdīd*) and the establishment of the Islamic social system. Since the term "Islamic revival" is applied to the whole spectrum of different positions and strategies in achieving the renaissance of Muslim civilization, it is very difficult to reduce this position to a single representative. In any case, the revivalists see law as a means for social change in the Muslim world. They are critical of the existing legal practice of the courts in charge of administering Islamic laws, as well as interpretation of the *sharī'ah* by the traditional *fuqahā'*. They advocate the building of a system of renewed Islamic law. So far, the proponents of this orientation have been concerned mainly with the identification of permanent and changeable parts of the Islamic law, its objectives (*maqāṣid*) and their role in legislation. They have also been concerned with the modes of *ijtihād*, with the development of concepts and institutes of the neglected parts of Islamic law (constitution, citizenship, human rights, representative bodies, law-making process etc.), and with the necessary groundwork and steps needed for the implementation of such a project. A prototype of the system of renewed Islamic law is still far from completion.[46]

The second question was addressed by a number of Muslim scholars who are critical of the practice of applying the *sharī'ah* in modern times. In the opinion of these scholars, such as Fathi Osman, the application of the *sharī'ah* is seen as a dynamic process based upon the conscience of individuals and the society and is achieved through using the proper methods aimed at realizing a set of goals and priorities.[47]

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[45] Gregory C. Kozlowski, "Islamic Law in Contemporary South Asia", 225.

[46] See Nyazee, *Theories of Islamic Law*, 293–301

[47] Fathi Osman, *Sharī'ah in Contemporary Society* (Los Angeles: Multimedia Vera International, 1994), 18–33; 53–60.

The application of the *sharīʿah* is considered a major manifestation of one's obedience to God which is deeply rooted in the conscience of the individuals and has a wide acceptance of the public in the Muslim society. It need not be simply the outcome of imposition by force. Consequently, the application of the *sharīʿah* by autocratic regimes and police states betrays the whole *raison d'etre* of the *sharīʿah* and adversely affects its acceptance, at least among a section of people. The application of the *sharīʿah* is meant to guard the moral values of Islam and, in turn, the *sharīʿah* is guarded by faith and morality. This application is indeed a dynamic process in the sense that all parts of the *sharīʿah* are not required to be implemented at once. There is a hierarchy of goals and priorities.[48] Priorities must be set according to the *sharīʿah* and the circumstances facing a particular society.

However, the implementation of the *sharīʿah* in modern Muslim societies has raised the concerns of some scholars. Fathi Osman is one of them. He remarks:

> Disputes and troubles about women's code of dress in Iran, or among the women personnel of the international agencies that work among the refugees of Afghanistan, or about political alliances in Malaysia, or about allowing the production and distribution of liquor in certain Muslim countries, or about allowing interest, banking, insurance and mortgage in many countries — all such disputes and troubles not only show a weakness in understanding contemporary problems and responding to them according to the principles of the *sharīʿah* and matters of *ijtihād*, but also expose our failure in establishing priorities for a productive Islamic reform in contemporary Muslim societies.[49]

V

CONCLUSION

The position of the *sharīʿah* in Muslim societies and the attitude of Muslims toward it is a main indicator of the depth of their religious commitment. This position, however, also shows changes through which Muslim societies and communities pass in history.

Two radically opposite developments have taken place in modern Muslim societies. The first was the spread of European/Western modernity from the beginning of the 19th century up to the middle of the 20th century which resulted in the confinement of the *sharīʿah* to the personal matters of the

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[48] This topic has been discussed by a number of contemporary Muslim scholars who have even coined a new term for this type of intellectual enterprise. See Yūsuf al-Qaraḍāwi, *Fiqh al-Awlawiyyāt: Dirāsah Jadīdah fi Ḍaw' al-Qur'ān wa al-Sunnah* (Cairo: Maktabat Wahbah, 1995).

[49] Fathi Osman, *Sharīʿah in Contemporary Society*, 60.

Muslims. The second development consisted of the reversal of the process of modernization since the 1970s which found its expression in the return of the *sharī'ah* to the public domain of the Muslim societies.

Renewed calls for the application of the *sharī'ah* have raised two major questions: which law to apply and how to apply it? Muslim responses to these questions have varied from the identification of the *sharī'ah* with its classical interpretation in the books of *fiqh* to modernist codifications to calls for the reconstruction of Islamic law and implementation of such a renewed ensemble of Islamic laws. As for the second question, the application of the *sharī'ah* was usually reduced to the application of the *sharī'ah* norms by the state authorities or, sometimes to the application of little else than penal sanction. The present paper emphasizes the position that the application of the *sharī'ah* should be based primarily upon faith, morality and public acceptance. In the highly changed conditions of life to-day, it is our considered view that it would be essential to take this approach. Too much relieance on state acting as the enforcer of Islamic legal provisions and an exaggerated emphasis on penal laws, as though they constitute the core of Islamic law, neither seem sound and healtty nor pregmatically wise. All this looks even more unwholesome when the Islamic emphasis on social and economic justice and its concern for the have-nots and the downtrodden are disregarded or de-prioritized. The impression that is thus created is that Islam is not seriously interested in the betterment of the lot of human beings, that its overriding concern is to mechanically carry out its enterprise of enforcing a set of penalties. It would be worth asking ourselves: is this an accurate image of Islam? The state, in our view, should step in where its interference is really needed, and its interference should be limited to the extent needed. As for penal provisions, their enforcement should be the last in applying the *sharī'ah* rather than its starting-point.

Public Finance in Islam

MUHAMMAD AKRAM KHAN

Introduction

The study of public finance goes back to the early period of Islam. We find some fifteen books dealing with public finance written by the early Muslim scholars, although presumably only a few of them are now extant. [1] Abū Yūsuf (d. 182/798) wrote his *Kitāb al-Kharāj* during the second half of the second century the last years of the eighth century as a manual of governance for caliph Hārūn al-Rashīd (d. 193/809). This is the best known of the available books on public finance and was written by a Muslim scholar of the highest stature. The other three available books are *Kitāb al-Amwāl* by Abū 'Ubayd al-Qāsim ibn Sallām (d. 224/839), and *Kitāb al-Kharāj* by Qudāmah ibn Ja'afar (d. 336/948), and *al-Aḥkām al-Sulṭāniyyah* by Abū'l Ḥasan 'Alī ibn Muḥammad b. Ḥabīb al-Māwardī (d. 450/1058). These books deal with questions of taxation, public expenditure, and the role of the government.

The present paper deals with public finance in the light of Islamic principles. The paper, apart from highlighting these principles, also attempts to extend and apply them to our own times. Put differently, we have attempted to formulate the guidelines for the operationalisation of Islamic principles of public finance in the context of the conditions obtaining in our times.

Public finance has a close relationship with the functions of the government. Since it needs finances to perform those functions, decisions are required to be made at the governmental level regarding the following important questions: (i) What are the important heads of expenditure pertaining to its functions of the government and what are the guiding criteria for the legitimacy of the expenditure that needs to be made? (ii) How will money be raised to meet that expenditure?

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[1] M.N. Ṣiddīqī, in his 'introduction' of *Islām kā Niẓām-i Maḥāṣil* [an Urdu translation of Abū Yūsuf al-Qāḍī, *Kitāb al-Kharāj*] (Karachi: Maktabah-'i Chirāgh-i Rāh, 1966), 57–60. Cited hereafter as Abū Yūsuf, *Kitāb al-Kharāj*, Urdu tr.

This paper, which attempts to address these questions from an Islamic perspective is divided into four parts. Part one of this paper deals with public expenditure. Part two deals with tax revenues, and part three with the non-tax revenues of the Islamic state. Part four attempts to wrap up the discussion by highlighting some basic features characterizing public finance in Islam.

I

PUBLIC EXPENDITURE

The Theory of Public Expenditure in Islam

The theory of public expenditure in Islam is related to the notion of *maṣlaḥah* (public interest). It is the *maṣlaḥah* of Islam and of God's creatures that governs all decisions regarding expenditure. The general principles of public expenditure in an Islamic economy can be summed up as follows: [2]

- All expenditure should follow the criteria of the *maṣlaḥah* of the *ummah*.
- Removal of hardship should take precedence over provision of ease.
- The interest of the majority should take precedence over the interest of the minority.
- If there is a conflict between a private interest and public interest, public interest should prevail.
- If there is an option, greater loss or sacrifice should be avoided by preferring a smaller loss or sacrifice.
- Whoever receives a benefit should also pay for the costs.
- Something without which an obligation cannot be fulfilled is itself on obligation.

To these general principles we shall add the following:

- Public expenditure will follow the hierarchy of needs, giving top priority to *ḍarūriyyāt* (essentials), followed by *ḥājiyyāt* (complementaries) and *taḥsīniyyāt* (desirables).[3]

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[2] Based on the juridical maxims embodied in the Ottoman government's *Majallat al-Aḥkām al-'Adliyyah* (Hyderabad: Matba'at al-'Azīz n.d.).

[3] This is based on the Islamic concept of *maṣlaḥah*. The concept of *maṣlaḥah* remained in its rudimentary form in the writings of early jurists until Abū Ḥāmid al-Ghazālī (d.505/1111) developed it into a mature concept. Al-Ghazālī stated that the ultimate purpose of the *Sharī'ah* was to further the *maṣlaḥah* of the *ummah*. In its most basic form it meant protection of five things: life (*nafs*), religion (*dīn*), progeny (*nasl*), reason ('*aql*), and property (*māl).* Since his time it is generally agreed that the protection of these five things is the major purpose of the *Sharī'ah*. The concept of *maṣlaḥah* was further developed by Abū Isḥāq al-Shāṷibī (d.790/1388). Both Ghazālī and Shāṷibī divided the *maṣāliḥ* into three categories of essentials (*ḍarūriyyāt),* complementaries (*ḥājīyyāt*) and desirables (*taḥsīniyyāt*). Essentials refer to the following five

- There should be no waste or extravagance in the public expenditure.[4] The public expenditure should not lead to the creation of assets and facilities which remain un-utilised or under-utilised for long periods.[5] The government should avoid all unnecessary expenditure, especially expenditure on display of grandeur and pageantry. Conspicuous consumption is not only deplorable for an individual but is also undesirable for the government.[6]
- The government should not indulge in nepotism, favouritism and discrimination on grounds of ethnicity, sex, caste or creed in matters relating to public expenditure.[7]
- The government should show due regard for inter-regional[8] and inter-generational[9] equity in its public expenditure.
- In matters of income transfers, the government should act speedily and avoid red tape.[10]
- The government should remain accountable to the people and to God for each penny spent or withheld by it.

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which must be safeguarded at every cost; they are life, religion, progeny, intellect and property. It is the primary duty of the government to do so. The complementaries and desirables vary with social and economic conditions. They are to be protected after the primary duty of protecting the essentials has been accomplished. In case of trade-off, the three categories of interests will be fulfilled in the order mentioned above. All the three categories of *maṣlaḥah* pertain to human needs and the jurists are generally agreed that the government should strive to protect them. These categories are interrelated and complement each other. Therefore, all the three categories should be protected. For the purpose of *maṣlaḥah* of the Hereafter, we must take into account the *maṣāliḥ* of this world. See M.K. Masud, *Islamic Legal Philosophy* (Islamabad: Islamic Research Institute, 1984), 225, 236 and 282.

[4] See the Qur'ānic injunctions regarding *isrāf* (extravagance) and *tabdhīr* (squander): 6:141; 7:31; 17:26–27; 25:67.

[5] This is based on the practice of the early caliphs who used to seize the lands which had been granted to people by the state for cultivation if they were not cultivated for three consecutive years. See Abū Yūsuf, *Kitāb al-Kharāj*, Urdu tr., 256.

[6] This is based on the Qur'ānic condemnation of earlier people who used to carve out dwellings from mountains to make a show of their affluence (see, e.g., Qur'ān 7: 74) or the Qur'ānic condemnation of Qārūn (Korah) (Qur'ān 28: 79).

[7] This is a general Qur'ānic teaching stressing justice and fairplay (Qur'ān 5: 8) and also the teachings which negate claims to deferential treatment, stressing that the only known basis for deference being piety (see the Qur'ān 49:13).

[8] This is based on the general instructions of the Prophet (peace be on him) to distribute *zakāh* in the locality from where it has been collected. See Abū Yūsuf, *Kitāb al-Kharāj*, Urdu tr., 293.

[9] This is based on the well-known decision of Caliph 'Umar not to distribute the conquered lands of southern Iraq and Syria among the soldiers but to declare them to be the common property of Muslims so that the future generations might also benefit from them. See Abū Yūsuf, *Kitāb al-Khorāj*, Urdu tr., 58–62.

[10] See M.N. Siddiqi, "Public Expenditure in an Islamic State", a paper presented at the International Seminar on Fiscal Policy and Development Planning held in Islamabad, July 1986.

The Rationale of Public Expenditure

The rationale of public expenditure in an Islamic economy arises when the an expenditure is found to be required on either of the following grounds: (i) being mandatory; (ii) being *farḍ kifāyah*; (iii) being a specifically assigned task; or (iv) being necessary for the stabilization of economy.

Mandatory Expenditure

A present-day Islamic state will have to perform certain mandatory functions such as the following:

- Defence;
- Maintenance of law and order;
- Dispensation of Justice;
- Need fulfilment;[11]
- Communicating the message of God;
- Enjoining right and forbidding wrong (*al-amr bi'l-ma'rūf wa al-nahy 'an al-munkar*); and
- Civil administration.

Furūḍ Kifāyah

Furūḍ kifāyah (singular *farḍ kifāyah*) are the duties that are mandatory upon the Muslim community as a whole so that if some individuals perform them, the rest are exempt. But the point is that the task must somehow be carried out, irrespective of the fact who carries it out. There is no final list of such tasks but the jurists have been defining them from time to time according to their perceptions of the social needs. The examples of *furūḍ kifāyah* are: building mosques, setting up schools, providing food and clothing to the poor, establishing industries, etc. *Furūḍ kifāyah* can be carried out by individuals as well as groups of individuals and organisations.

In the present age, non-government organisations (NGOs) can also carry out those tasks. Examples of the NGOs operating schools, hospitals, orphanages are too common to need any detailed mention. Government should engage in certain activities to fulfil *farḍ kifāyah* when it is found that individuals and voluntary organisations have failed to perform tasks of vital significance from the vantage point of collective interest. One such case can be to set up certain industries which are critically important, but which people

[11] It is important to note that the state's responsibility towards need fulfilment is only of a residual nature. The primary responsibility in this regard lies on a person himself, then on his family and relatives, and only if there is no one to look after that person that the state will be required to play its role.

have failed to establish. It could also be to meet a social need such as setting up orphanages or hospitals. It could also be to provide the services when people are not forthcoming due to the potential free rider effect, such as environmental protection or provision of roads or other utilities. The government initiative could embrace such praiseworthy works of religious and moral merit as building mosques, providing grants for marriage, or arranging the burial of those who have no legal heirs. [12]

Specifically Assigned Tasks

It is possible that some specific tasks may be assigned to the government. The government, in such cases, would receive the mandate to collect taxes for such an expenditure and with the help of these taxes it is supposed to carry out these tasks. This is an open-ended category and depends on the larger concept of the *maṣlaḥah* of the *ummah*.

Stabilisation Programme

Some public expenditure may also be necessary for stabilizing the economy. In times of low effective demand, the government may undertake an expansionary fiscal policy in order to stimulate demand.

Criteria for Public Expenditure

One of the important questions about public expenditure is: how do we decide about the expenditure that should be undertaken in preference to others, since the resources are never going to be enough to satisfy all demands? A capitalist economy is guided in its decision-making by the cost-benefit analysis. This analysis is based on the concept of time value of money. The government ranks different projects according to their net present values by discounting their costs and benefits over the estimated lives of the projects. The projects with higher net present values or higher internal rates of return (IRR) are selected in preference to others. The cash flows are discounted at a certain rate of interest.

In view of the above, the question arises: how will an Islamic government rank its capital projects since it does not accept interest as a valid tool for analysis? Some Muslim economists have argued that discounting is an analytical tool, which uses interest as a measuring rod. Using it to analyse projects should be acceptable, bearing in mind that this is simply a technical, evaluative exercise which does not entail, in actual practice, any giving or

[12] See M.N. Siddiqi, "Public Expenditure in Islam", paper presented to the International Seminar on Islamic Economics, International Islamic University, Kuala Lumpur, 1987.

taking of interest. However, some scholars have been a bit more cautious. They are of the view that we should not use interest even as an analytical tool. Instead, in their view, we should search for some other basis. There has been a great deal of controversy on the question and two views are quite commonly expressed:

1. The Islamic government can adopt the expected rate of return from equity capital as a discounting factor. Anas Zarqā' has expressed this view.[13]
2. The Islamic government can adopt the average rates of return on investment deposits in Islamic banks as a rate of discount. Fahim Khan has propounded this view.[14]

Both methods suffer from the limitation that they can be applied to projects which have monetary costs and benefits. They do not distinguish between individual and social costs and benefits. Individual costs and benefits may be easily quantifiable and may have a positive time preference. In the case of the society, however, the costs and benefits cannot be easily quantified. Moreover, the time preference for the society as a whole may be negative rather than positive. The society may – taking into account the time span of this world as well as the Hereafter -- consider certain costs as benefits and certain benefits as costs. If a society values the life in the Hereafter more than the life of this world – and the Islamic society is in fact a society prone to do so – then the projects that bring a higher reward in the Hereafter will have a negative time preference. In that case, the discounting becomes an inverse exercise. The fact is that the Muslim economists have not explored the whole question of discounting and time value of money fully. Even before analysing the full implications of discounting as a technique, they started searching for an appropriate discount rate.

We would, on our part, like to explore this question further. The thrust of our finding is that the ranking of projects by the discounting of cash flows, whatever the discount rate and howsoever the cash flows might be estimated, is not in harmony with the Islamic concept of resource allocation. Hence, we need to develop some other criteria for resource allocation. Therefore, after discussing the question of time value of money on which the whole question of discounting and project evaluation hinges, we shall propose another basis

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[13] A. Zarqa, "An Islamic Perspective on the Economics of Discounting in Project Evaluation" in Ziauddin Ahmad, Munawar Iqbal and Fahim Khan, eds., *Fiscal Policy and Resource Allocation in Islam* (Islamabad: Institute of Policy Studies, 1983), 203–34.

[14] M. Fahim Khan, "Time Value of Money and Discounting in Islamic Perspective" in *Review of Islamic Economics*, 1: 2 (1991), 35–46.

for project evaluation which, in our view, is more in keeping with the teachings of Islam.

Time Value of Money

The discounted cash flow technique is based on the concept of time value of money. It says that the utility of money in the present is greater than the utility of the same money in the future. One of the popular justifications of interest on loan capital is also the same. According to this concept, since the utility of the loan money for the lender is greater in the present than the utility of the same money in the future, therefore, while repaying the loan the borrower should add interest to it so that the utility of the future money becomes equal to its present value. Conceptually, it is a faulty assumption. It is true that in some cases the utility of money in the present can be greater than its utility in the future. In fact, this is so in the case of all poor people. No sooner than they get some money, they would like to consume it in the present since their need and utility of money in the present is greater than its value in the future. All consumption signifies that the present value of money (or other resources being consumed) is higher in the present or else the consumer would have set it aside for the future. But any penny being saved anywhere in the world is an irrefutable testimony to the fact that the saver perceives the value of the money being saved higher in the future than in the present. Had that not been the case, he would have consumed it and thus obtained the higher value in the present. Hence, to the extent of the capital saved and invested, the future value of money is higher. There is no rational justification, therefore, to add interest to it to equalise its future value to its present value.

It can be argued that there is an undeniable desire on the part of human beings to acquire resources sooner in time than later. Therefore, the asset which generates cash flows earlier in the future, should be more valuable than the one which generates cash flows later. This common sense observation is quite valid but it does not require discounting of cash flows by a discount factor. One can compare the accounting rates of return of two investment proposals and if the two are equal, then the one which generates cash flows sooner in time can be preferred. But if the rates of return are unequal, then generally a proposal with a higher average rate of return over the life of the project will be adopted unless one accepts that in the case of lower rate of return the cash flows received earlier in time will be available for re-investment and thus its cumulative rate of return will be higher. But again it does not need any discounting.

It is interesting to note that recent research on this subject tends to support our conclusion. We shall quote from the *Economist*, London, as below:

> Economists have long accepted that people value a dollar today more highly than a dollar tomorrow. One reason is the risk that tomorrow's dollar may never arrive. Beyond this, however, economists have little to say about why people discount the future.
>
> In a new paper, ['On the Endogenous Determination of Time Preference', *University of Chicago Working Papers*, July 1994] Gary Becker and Casey Mulligan, argue that the answer lies in the difficulty of imagining what the future will be like. Tomorrow's dollar just doesn't seem as good as the one today. This may be mistaken; and if people recognise this weakness in them, they may try to remedy it. They do so by 'investing' in their ability to envisage the future — by, say, taking time to think about it, or by reflecting more carefully about different possibilities.
>
> When the two economists modelled this decision, they concluded that different people might make rational investment choices that on the face of it appeared irrational. For instance, it might make sense for people to think more carefully about good future experience than bad ones. This could explain why so many people die without a will, or fail to buy adequate life insurance – but do bet on horse races.
>
> The greater somebody's future well-being (economists would say 'utility'), the more he will invest in thinking about the future, and the less he will discount it. Thus, rich people will care about the future more than poor people. People who expect to go to heaven, where their well-being will presumably be infinite, may hardly discount the future at all. That is, they will care about the future as much as about the present. People who expect to go to hell, on the other hand, will discount the future very heavily. They will seek maximum pleasure today (thus, perhaps, sealing their fate). The devil, it seems, is an economist? [15]

Thus we can see that at least some capitalist economists have question begun to the concept of time value of money as well. Besides, there are numerous practical problems in applying this concept. We shall now turn to this question.

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[15] "Rational Economic Man" in *Economist*, London (24 December 1994 to 6 January 1995), 93.

Practical Difficulties in Applying the Concept

The concept of discounting as practised in conventional accounting and economics is replete with subjective value judgements and highly complex estimations. If we remove the apparently impressive veil of mathematical figures there remains little justification for pursuing this concept for any rational application. Some of the difficulties in its application are as follows:

(i) For this technique to work in practice, except for the first cash outflow that carries a negative sign, all subsequent (future) cash inflows must be positive. If this is not so there may be no unique rate that will discount the flows back to the original investment.[16] This is obviously an unrealistic assumption since in real life, cash flows can become positive and negative, depending upon market conditions.

(ii) The technique assumes that the discounting factor must always be positive. [17] This is also obviously an unrealistic assumption. At times of high inflation, the discount factor (i.e. interest rate) can be negative. Moreover, as discussed above, it is not true to assume that a dollar now is always greater in value than a dollar in the future. It all depends upon the person, his circumstances, the possibilities of future use, and the risks involved in the future.

(iii) It also assumes that there is an effective market for future cash flows. It means that whatever cash flows will be generated in the future will be invested profitably and there is an assured market for them. Obviously, it is merely based on wishful thinking.

(iv) The concept of time value of money assumes that "the enterprise is capable of infinite expansion in the future without invalidating the model. For example, a beggar selling matches in the street has a wonderful return on capital, but is still miserably poor. Why do not venture capitalists pour investments into these match-sellers? Clearly, many of them simply would not run a larger business, but even those who could are unlikely to be able to sell large number of matches and still earn their original return!"[18]

(v) There is no objective basis for "converting the expectations about future cash flows into single values or certainty equivalents without knowing risk preference of the users of information; the adjustment by including it in subjective discount rate is conceptually inappropriate". [19]

(vi) The method emphasises time factor and expected cash flows only. All other economic, technological, political and social factors are ignored. It is common knowledge that the profitability of an asset or a business venture depends on a

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[16] T. Gambling and R.A.A. Karim, *Business and Accounting Ethics in Islam* (London: Mansell, 1991), 96.
[17] Ibid.
[18] Ibid.
[19] E.S. Hendrickson, *Accounting Theory* (Homewood, IL: Richard D. Irwin, 1990), 148.

host of complex factors. Therefore, analyses based on these two factors only cannot be reliable.

(vii) The method is not suitable for accountability of management. It does not become clear that the expected income through this method is due to the efforts of the management or due to some other (external) factors.

(viii) While discounting into the future, it is often forgotten that the firm has a past and a present. The past events and present environment are totally ignored, although at times they may be more relevant.

(ix) The objective of this method is to estimate income of the firm that is the result of past activities. But it does not use the past data to estimate that, nor does it allow the user of information to use his predictions about the future. Also, it does not give any criteria to evaluate the predictions made by the management.[20]

(x) In real life, which is uncertain, the expectations reflect the mood of the people making estimates, which is closely influenced by the prevailing optimism or pessimism. For human beings, it is difficult to see realistically very far into the future.

(xi) The future expected cash flows are adjusted for uncertainty by using probabilities of their realisation. But these probabilities are subjective. There is usually no basis for them. Similar is the case of adjustments made in the discount rate for risk preferences. They are perceptions of managers or accountants and are quite subjective.

(xii) The productivity of assets often depends on their combinations with other assets or with human beings. In practice, it becomes very difficult to estimate the cash flow arising from any one particular asset. There is hardly any basis for allocating the cash flows to different assets in such a situation. Similarly, it is not possible to add all the cash flows from different assets, if at all they are estimated with some success, and get the value of the firm, since it often ignores intangible assets.

These are the practical difficulties in using this method. We are aware that the method of discounted cash flows is based on the concept of time value of money, which is often offered as a rationale for the legitimacy of interest. Even when we do not use the rate of interest as a discounting factor, acceptance of the concept of time value of money as a rational concept will provide some rational justification for interest. We are of the view that this concept has logical difficulties. It also violates the prohibition of interest by the *Sharī'ah*.

The Alternative Basis for Evaluation of Public Projects

Decision on public expenditure depends mainly on normative factors. It is a society's judgement on various activities and functions which determines the profile of its public expenditure. Therefore, project evaluation, according to

[20] Ibid., 149.

Islamic principles, should be based on a system of weights assigned to various variables by the decision-makers. As a practical guide, we can adopt a range of weights between minus 100 to plus 100. The variables will differ in each case. It is not possible to make an exhaustive list of the variables, but some of the variables that are likely to be considered are the following:

- *Monetary Costs and Benefits*: Besides absolute values, the spread of costs and benefits over time will also be considered. For example, a cost spread over a few years is preferable over a cost in lump sum. Similarly, benefits accruing sooner in time are preferable to the benefits spread over a longer period. The absolute costs and benefits figures can be adjusted to the weights assigned to them due to these considerations. In practice, we can divide the costs and benefits in segments of, say, 20%, and see consider the time when they will become due. The sum of the weighted cost or benefit will be taken as the monetary cost or benefit. The weights of the rest of the variables given below will be added up and further multiplied with the weighted costs or benefits calculated above.
- *Reward in the Hereafter*: The acts which carry a promise of higher reward in the Hereafter will carry higher weight over those with a lower reward or those which are beneficial in this world only.
- *Number of Beneficiaries*: Obviously the acts which are expected to benefit a larger number of persons will have a higher weight.
- *Prevention of Injury*: The acts which prevent injuries and dispel some social harm, will be preferable over those, which are intended to bring some benefit positively.
- *Environmental Impact*: The acts conducive to environmental protection will have a higher weight over those, which cause environmental damage.
- *Economic Efficiency and Economy*: The acts which are more economical and efficient and have a higher use-intensity will be preferable to others.
- *Inter-regional and Intergeneration Equity*: The acts which promote inter-regional and inter-generation equity will be preferred to others.
- *Fulfilment of Needs*: Fulfilment of 'needs' will have preference over provision of comforts, and 'comforts' will be accorded priority over luxuries.

These are only examples of the variables that will be considered while assigning weights and ranking to various projects. There is no doubt that the subjective element is bound to come into play, to one degree or the other, while assigning weights to different projects. But being subjective does not mean that they will not have any basis. Each project will be analysed for its costs, benefits, expected impact, both direct and indirect. Based on this analysis, committees of public representatives or technical experts can sit down and decide about the value of a project. This analysis can then be presented before the legislature for a final decision. The ranking so arrived at will represent the social value assigned to each project. The benefit of this methodology is that we do not have to adopt the dubious method of

discounting and making scores of unsubstantiated assumptions. It will also institutionalise the Islamic value of *shūrā* in the economic field.

Public Expenditure Productivity

As discussed above, Islam lays great emphasis on the productivity of public expenditure. It discourages waste, inefficiency and extravagance. But how do we make these concepts operational? How do we know that a particular expense is unproductive? What are the causes of unproductivity in public expenditure? What can we do to minimize waste in the public sector? These are important conceptual and policy issues which need to be addressed in the present-day context.

Productivity is a complex concept and eludes precise definition. But we can define it indirectly. It is generally understood that the private sector is at least as efficient as, if not more, than the public sector. Therefore, the government should refrain from performing all the functions that the private sector can perform, remaining within the parameters of the overall social objectives. So, we can say that the likelihood of expenditure being unproductive is higher in those cases where a function is being performed in the public sector even though it can be allocated to the private sector. Generally speaking, if there is no market failure and the national or political priorities also do not make it obligatory for the government to perform a certain function, intervention by the government should be kept to the minimum. This is not to argue that the private sector is always more productive than the public sector or that the public sector is always wasteful and inefficient. But, of course, exceptions are always there.

Elements of Productive Inefficiency

What are the sources of productive inefficiency? Productive inefficiency ensues from one or all of the following causes:

- *Inefficiency in Allocation of Resources*: It refers to a situation where the government, political representatives or technical experts decide to allocate funds to a public sector project that has a low priority in the social scale. This can be judged by looking into the ranking of the projects as discussed above. A project which ranks low can be selected either because of the pressure of the vested interests or the discretion of the bureaucrats. Such a situation is considered to cause inefficiency since the resources are being allocated to a project that the society does not value most or more valuable projects are being ignored. Such situations are quite common in real life.
- *Productive Inefficiency*: Productive inefficiency refers to a situation where the government provides a service at more than the least cost. This can happen due to

several reasons. It could be for a set of technical reasons such as inadequate investment appraisal, low levels of research, outdated technology, etc. But even these are symptoms of deeper malaise of the public sector. The public sector has built-in shortcomings leading to inefficient organisation, planning and implementation.

- *Inconsistency between Microeconomic and Macroeconomic Objectives*: Another source of inefficiency is the inconsistency between the microeconomics and macroeconomics objectives. Sometimes a project is justified on its own merit but creates macroeconomic problems, such as inflation, causes increase in income disparities, etc. The understanding of the macroeconomic implications of individual projects is often less than perfect because of real-life complexities. Therefore, allocation of resources to one project rather than the other can, sometimes, leads to loss of welfare. Of course, it can be the other way round as well.

Identifying Unproductive Public Expenditure

How do we tell the productive expenditure from the unproductive one in the public sector? These are some of the indicators:

- *Prestige projects* such as second airports where the existing airport is under-utilised, multi-lane motorways with a capacity that far exceeds the traffic flow, and public buildings with facilities that are never going to be in demand are the most obvious examples of unproductive public expenditure.
- *Projects approved without considerations for future recurring costs* can be potentially wasteful, as the assets built in the present will deteriorate quickly due to lack of proper maintenance.
- *Providing free service* when the beneficiaries do not fall in the category of the poor. Such services are going to be potentially wasteful and over-used by the non-deserving. Proper pricing policy for user charges can be helpful to reduce waste in these projects.
- *Absence of performance criteria* can lead to expenditure imbalances. Technical experts should be able to lay down criteria and performance indicators for well-performing projects. For example, in a given situation, what is the appropriate teacher/student ratio or doctor/patient ratio or patient/bed ratio, etc? Technical experts can help in determining the performance standards. Performance audit of projects in the light of such performance criteria can reveal wasteful expenditure.

These are some of the indicators for identifying unproductive expenditure. The Islamic economy will need to develop systems and procedures to control the wasteful expenditure to comply with the injunctions of the *Sharī'ah* to cut down waste and ostentatious expenditure. Perhaps, it will need to strengthen its audit and the *ḥisbah* institutions, giving them

mandate to control and audit the performance of public sector projects and programmes along with the routine financial audit.

II

PUBLIC REVENUE: TAXES

Theory of Taxation in Islam

The theory of taxation in Islam is derived from the principles underlying the law of *zakāh*. The Qur'ān has made it obligatory for all Muslims, who have wealth and income beyond a certain level, to pay *zakāh* for meeting some defined purposes. Some people think that *zakāh* is not a tax; that it is rather a form of worship (*'ibādah*). They think so because tax, by its very connotation, smacks of something unfair and coercive. It is argued that *zakāh* is a means to purify one's wealth and to seek the pleasure of God. Therefore, we should not treat *zakāh* as a tax. This line of argument has an element of romanticism. *Zakāh* is an obligatory payment. The Islamic state can compel its Muslim citizens to pay it. In fact, this was done by the first caliph of Islam who even fought a battle against those who refused to pay it. Its rates are fixed. Its periodicity is fixed. Its heads of expenditure are laid down. All these characteristics make it a tax. This is notwithstanding the fact that people might like to pay it voluntarily in the hope of getting a reward in the Hereafter. We can say that divine sanction has made *zakāh* a special type of tax. But it is still a tax.

There is consensus in the Muslim *ummah* that the law of *zakāh*, as given by the Prophet (peace be on him), is binding. The rates, exemption limits and the properties on which it is to levied have been prescribed by the Prophet (peace be on him) and hence they cannot be changed. Incidentally, the range of such prescriptions is not very wide, considering a present-day Islamic economy. New forms of wealth have arisen. New methods of creating wealth have come into being. Therefore, we need some fresh thinking about the law of *zakāh*. The earlier jurists engaged in a lot of analogical reasoning to apply the law in their respective times. In our times we need to do the same.

The next question that arises is: are we bound by the *Sharī'ah* to follow only those principles of taxation which can be derived from the law of *zakāh*, or do we have the freedom to think of some other principles as well? The question becomes relevant when we think of taxes other than *zakāh* in an Islamic state. Although there is debate among Muslim scholars on the

permissibility of taxes other than *zakāh*,[21] yet Muslim scholars in our time have not discussed at length the question raised above. We can not say that the totality of *our* understanding of the principles of *zakāh* necessarily provides a better and more equitable basis for taxation in the Islamic society than some principles suggested by human beings who do not consider themselves to be bound by the principles of *zakāh*. But this statement has a caveat. What we call the principles of *zakāh* are, in fact, the notions about *zakāh* entertained by certain human beings; their varying notions based on religious texts. Therefore, the possibility of having recourse to one's intellect in examing a situation is always there. We shall, therefore, base our discussion on the principles of taxation which seem to flow from the law of *zakāh*, although we think that the Islamic state can also introduce some new principles if the *maṣlaḥah* of the *ummah* so requires. Even in the case of *zakāh*, there are several questions which need contemporary answers. Those answers can be deduced from the principles of *zakāh* and if no guidance from God and His Messenger is available, human intellect can still contrive some answers.

Tax Entity

Zakāh is levied on all Muslims if they have necessary wealth over and above the *niṣāb* (exemption limit). The non-Muslims are exempt from it presumably because the expenditure of *zakāh* involves, partly, propagation of Islam and struggle in the cause of Islam. But in this age, the non-Muslim citizens of an Islamic state will need some services which the state will provide from out of the *zakāh* funds, such as the funds needed to set up and run hospitals and schools for the non-Muslims who are poor. The non-Muslim poor will also need help from the state in the form of stipends to fulfil their basic needs. Therefore, a major Islamic thinker of our time, Yūsuf al-Qaraḍāwī thinks that the Islamic state can tax the wealthy non-Muslims to pay for these services. But a separate account of this income should be maintained. [22]

Zakāh is payable by individuals who are also accountable to God for the payment of *zakāh*. This implies that the present system of levying taxes on the income of corporations does not go hand-in-hand with the Islamic concept of *zakāh*. *Zakāh* is payable by living human beings and not by fictional corporate bodies. Thus, according to the Islamic system of taxation, corporate bodies or business firms are not required to pay any taxes. Their owners or shareholders should pay tax, if it becomes due against them. However, because of

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[21] See Yūsuf al-Qaraḍāwī, *Fiqh al-Zakāh*, 2 vols. 2nd ed. (Beirut: Mu'assassat al-Risālah, 1977), 2:961–992.

[22] Yūsuf al-Qaraḍāwī, *Fiqh al-Zakāh*, Abridged Urdu tr., Shams Pīrzādah (Lahore: al-Fayṣal Publishing Co., n.d.), 53. Cited hereafter as *Fiqh al-Zakāh*, Urdu tr.

administrative convenience, the *zakāh* of individual shareholders or owners should be collected at the corporate level. The individuals can then claim a rebate from their total tax liability. This explanation takes care of the controversy about taxing the share capital. The assets of a corporation or business belong to their owners. We can determine its *zakāh* by calculating their net worth and giving whatever other allowances (e.g., for fixed assets according to one school of thought). The *zakāh* thus calculated is payable by the individual shareholders in proportion to their equity holdings.

Exemption Limits

The exemption limits for gold, silver, cash, financial assets are available in the *Sharī'ah*. The only contentious issue is whether the basis of the exemption limit should be the price of gold or of silver. In the days of the Prophet (peace be on him), in all probability, the *niṣāb*s mentioned in terms of gold and silver had equivalent market values. After centuries, this equivalence does not exist any more. Whatever basis we adopt, the idea of the exemption limit is that the *zakāh* is payable on the net accretion to one's wealth over a year, after one's consumption. It means that the expenditure on consumption is exempt. It suggests that various proposals in the present age for consumption tax do not have a support in the *Sharī'ah*. The *Sharī'ah* proposes to tax the savings rather than consumption. This is the general implication. So far as *zakāh* is payable on net wealth, it meets the ideal conditions for an equitable tax. In practice, most of the income taxes now in existence in the world are far removed from this concept of equity.[23]

There is an important question: should we deduct the *niṣāb* from income or wealth to determine the *zakātable* income or wealth? In our opinion, the case of income from salary, wages or agricultural income, we should deduct the *niṣāb* limit for determining the *zakātable* income. This is because the very concept of *niṣāb* seems to suggest this. The purpose of *niṣāb* is to leave enough with people for their basic needs before any tax is paid on one's wealth. In case of wealth, the *niṣāb* limit should not be deducted from the wealth. The reason is that wealth is a stock that is left over as saving after one has met one's basic needs. In sum, in case of flows of income, the *niṣāb* limit will be deducted and in case of stocks, the *niṣāb* limit will not be deducted.

Rates of *Zakāh*

The Prophet (peace be on him) himself prescribed the rates of *zakāh* for financial assets, agricultural outputs and minerals. The rates for those types of

[23] Joseph A. Pechman, "Personal Income Taxes" in *International Encyclopaedia of the Social Sciences* (New York: The Macmillan & The Free Press, 1972), 15:530.

wealth, or output for which we do not find any basis in the *Ḥadīth*, we need to have recourse to *ijtihād*. Of course, there will remain some differences of opinion in such cases. But that should not deter us from using our intellect to solve our problems. The earlier Muslims too had recourse to *ijtihād* in their times while grappling with the problems they faced.

The rates of *zakāh* on financial wealth and agricultural produce are fairly uniform for the entire wealth or output. The rates of *zakāh* on agricultural output take into account the human input in terms of cost of irrigation. The rate of *zakāh* on agricultural output irrigated by artificial measures is half of the rate for those lands which are irrigated by rainfall. But do we give any allowance for other inputs such as pesticides, fertilisers, etc. or not? This is a controversial question. But looking at the general emphasis of the *Sharī'ah* on fairness to people, it seems that *zakāh* on agricultural output should be levied at 10% or 5%, whatever rate is applicable, after giving allowance for other inputs. The reduction in rate due to irrigation should remain as it is prescribed. Rebate for other expenses should, however, be given separately.

In the case of cattle, we find a progressive tariff of *zakāh*. The owners of larger herds of cattle are taxed at higher rates. Does this mean that the *Sharī'ah* wants to levy progressive taxation in one sector and not in others? Or does it mean that in the days of the Prophet (peace be on him) the market values of different slabs of taxes on the cattle wealth were approximately equal and now they have changed? We are not sure about it. It seems to me that Muslim scholars have not analysed this question in depth. What is the rationale for the different rates on cattle, and are they equitable among themselves? For example, will they be equitable between two persons having different number of cows? We have not come across any discussion on this issue.

The Question of Equity

It is generally held that the *zakāh* on financial assets and the net worth of business is payable at a uniform rate of 2.5%[24]. This rate conforms to the generally accepted criterion of horizontal equity. By horizontal equity we mean that everyone pays at the same rate, whatever its source or level of income. All individuals are treated equally. There is also another concept of equity: vertical equity. It means to treat different people differently according to the level and sources of their income. The vertical equity is the basis of progressive taxation in the present-day world. The intention is to use taxes for

[24] There is difference of opinion on this question as explained in "Some Accounting Issues relating to *Zakāh*," *Islamic Studies*, 39:1 (2000), 111. We think that the business income should also be liable to the payment of *zakāh* and the burden should be distributed among the owners or shareholders on a *pro rata* basis.

reducing inequalities of income. We are not sure if the *Sharī'ah* supports vertical equity as a general principle. In case the overall conditions of the economy so recommend, the concept of vertical equity may be adopted for taxing those sources of income or types of wealth which have not been explicitly prescribed by the *Sharī'ah*. The reason is that the *Sharī'ah* does not seem to consider taxation as a measure to reduce inequalities of income. [25] It uses other measures to reduce inequalities of income and wealth. For example, it does not allow earning of income by lending on interest. One can earn through one's labour and by taking risk in the business. These modes of earning have definite limits and do not allow an individual to amass huge amounts of wealth. But if one is able to do so, one has the obligations of *zakāh* and *infāq*. The Islamic law of inheritance further distributes the wealth. Thus, Islam does not use progressive taxation as a means to reduce inequalities of income and wealth. It is interesting to note that despite all expectations of reducing inequalities, progressive taxation has not been able to do so. [26]

Periodicity

Zakāh is payable once in every lunar year except for agricultural output which becomes due as soon as the crop is harvested. The reason for the exception, perhaps, is that the *Sharī'ah* wanted people to pay *zakāh* when it is easy and convenient for them. An annual levy on agricultural income would have caused hardship to people as it may become due, according to the lunar calendar, at a time of the year when the crops had not been harvested.

The calculation of one year on financial assets does not mean that one-year should pass on each extra dollar that a person gets because it is not possible to keep such accounts. Instead, if a person is *ṣāḥib al-niṣāb* in the beginning and at the end of the assessment year, he is considered to be liable to pay *zakāh* even though during the year, he has not remained *ṣāḥib al-niṣāb* for some broken periods. The purpose of one year's condition is that no one should be made to pay tax more than once in one year. This is, then, the guiding principle. As far as possible, taxes should be levied in such manner that everyone has to pay it once in a year on his income and wealth.

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[25] This statement seems queer. For the Qur'ān, after stating the numerous recipients of *fay'* – God and His Messenger and the kindred and orphans and the needed and the wayfarer clearly indicates the purpose of casting the net of division so wide: "... in order that it may not merely make a circuit between the wealthy among you" (59:6). The same principle is indicated in the *ḥadīth* regarding *zakāh*: that it is taken from the wealthy and forwarded [literally, returned] to the poor. See, Muḥammad ibn Ismā'īl Bukhārī, *Ṣaḥīḥ Bukhārī*, Kitab al-Zakāh, Bāb Wujūb al-Zakāh. Ed.

[26] Earl R. Ralph, "Taxation" in *International Encyclopaedia of the Social Sciences*, 15: 524.

But sometimes a person has income from more than one source. Suppose a person has an agricultural income on which he has paid *'ushr* at the time of harvest. Some of this income remains with him in the bank and accumulates with his savings from other sources, say, his salary or business income. At the end of the financial year, when he has to pay *zakāh* on his net wealth, he will be paying *zakāh* on his entire savings. It will include income from agriculture as well. Is this not double taxation? The jurists think that it is not. They use the term *māl al-mustafād*, that is, the new wealth that accrues to someone during the year. They think that the agricultural output once sold for cash becomes *al-māl al-mustafād*.[27] Therefore, it is not the same wealth as earned from agriculture. This is a weak argument which calls for some rethinking. We need to determine a mechanism to exempt the agricultural income from the other wealth to comply with the intention of the *Sharī'ah* that nobody should be made to pay tax twice in one year. We have discussed this issue elsewhere.[28] To put the matter succinctly, individuals should be made to pay *zakāh* on the lower of the closing and opening balance of their wealth at 2.5% per annum, assuming that they have paid *zakāh* on their incomes as well. It is because, if the opening balance increased due to the addition of savings from other sources of income on which they had paid *zakāh* during the year, they should now be paying *zakāh* on the opening balance, exempting any addition for this year only. However, if the closing balance of the wealth decreased as compared to the opening balance, it means that the taxpayer had dis-saved some of his wealth. He would then pay *zakāh* on the reduced balance, since expenditure out of the wealth is exempt.

Coverage of *Zakāh*

The exemption limits and the rates of *zakāh* show that the coverage of *zakāh* is very wide. The exemption limits are so low that most of the people come under its net. The rates are also very low. A mere 2.5% tax on all financial assets and savings once a year is not a very heavy burden as compared to the taxes in our time which even go up to as much as 50% of the income; or at times even more. Thus, the incentive to evade *zakāh* is also very weak. One of the characteristics of a good tax system is that it should have a wide coverage. Such a system is acceptable to people since it appears equitable. Combined with this, the low rates of tax make it possible for people to pay it willingly. Thus, the *Sharī'ah* has handled the most difficult issues of public finance, viz. tax evasion and equity in one go.

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[27] Yūsuf al-Qaraḍāwi, *Fiqh al-Zakāh*, Urdu tr., 104.

[28] See this writer's paper titled "Some Accounting Issues relating to *Zakāh*", 110–11.

Incidence of Tax

By incidence of tax we mean he who ultimately bears the burden of a tax. In direct taxes, it is the person who pays the tax who bears the burden in most of the cases, as it is not usually possible for him to shift the burden of his tax forward or backward. One can, however, shift the burden forward, for example, by adding the tax to the price of the commodity and if a sale tax is imposed on that commodity make the customer pay the tax. In all indirect taxes such as sales tax, excise duty and value added tax, the prices carry the element of tax in it. Tax can also be shifted backward by making the employee, for example, pay a certain tax, thus effectively reducing their wages or making the landlord bear a tax, thus effectively reducing the rents.

Zakāh is a direct tax. It cannot be shifted as part of the price. Everyone who pays *zakāh* carries the burden himself. Thus, in general, we can say that the *Sharī'ah* is inclined to levying direct taxes. Should we say, then, that levying indirect taxes is against the *Sharī'ah*? Perhaps not. We find that custom duty and octroi charge (*'ushūr*) was levied by caliph 'Umar b. al-Khaṭṭāb (d. 23/643) on international trade as a reciprocal duty on the traders of those countries where such tax had been levied on the Muslim traders. In all probability, these traders must have been adding this duty in the price of their merchandise. In the present times, an Islamic state may need revenues which are not available from direct taxes. It can, therefore, levy some indirect taxes to supplement its income. The advantage of indirect taxes is the ease with which they can be collected. The government has to collect them from a small number of points. But ultimately everyone pays it.

Indirect taxes raise important issues of equity and justice. They can be regressive in their effect since the burden may be shifted to the poorer sections of the society. They can also cause regional disparities, for else the burden may have to be borne by a certain region only. Thus, levying of indirect taxes requires a lot of analytical work on the probable incidence of these taxes before they are enforced.

Zakāh is a proportionate tax. To the extent that *zakāh* is a tax on net wealth, its effect is that of a progressive tax. It is assumed that a person who is able to accumulate a larger amount of wealth is a richer person than he who has a smaller net worth at the end of the year. Thus, despite being a tax at a uniform rate, its effect is that of a progressive tax. However, to the extent that it is a tax on income or output, it is a proportionate tax.

Some people have argued that the agricultural tax (*'ushr*) is regressive in nature since a small farmer has to pay the tax at the same rate as the one at which a large farmer pays, although the latter has the benefit of economies of scale. The cost per unit of output for the small farmer is higher and thus his

net income is smaller than that of a big farmer. This argument would be valid if we were to levy *'ushr* on the gross value of the crop. There is no doubt that the classical opinion is the same. According to the classical opinion, *'ushr* is payable on the gross output and not on the net output. In our opinion, this area needs reconsideration. The cost of production in agriculture has gone up many folds since the days of the Prophet (peace be on him). In my opinion, we need to levy *'ushr* on the net value of the produce, and that too after deducting the *niṣāb* from the total output. This is in line with the general approach of the *Sharī'ah* to make things easier for the people and to ensure justice and equity. Here the rules of *zakāh* need further and critical rethinking.

Zakāh on Illegal Earnings?

The Islamic state is required to close all doors to illegitimate (*ḥarām*) income. Additionally, whether the state does or fails to do so, Muslims as individuals are, in any case, required to shun even doubtful earnings, let alone earnings that are downright forbidden. But what should be done if some people do have this type of income either because the state had not imposed restrictions on the sources of illegitimate income or because they were able to evade those restrictions. Moreover, there are also many Muslims who live in non-Muslim countries where, of course, it is hardly conceivable that the state would enact laws that would close all possible avenues leading to earnings deemed illegitimate from an Islamic viewpoint. There will also be non-Muslims in an Islamic state for whom business in such prohibited items as liquor, within certain limits, will be permissible. So, should *zakāh* be paid, and levied on illegitimate earnings? This problem has arisen in the present times especially with regard to the income derived in the form of interest.

The matter, in our opinion, should be considered at two levels. First, at the level of the state which collects *zakāh*: in my opinion it should levy *zakāh* on the total wealth of a person. While levying *zakāh*, the state need not examine the sources from which people obtain their income. Second, individuals too are required to pay *zakāh* on their total wealth, and they have to do so whether the state collects *zakāh* from them or not. The whole basis of Islamic behaviour is that a person is conscious that he would be called to account by God from whom nothing is hidden. It would be religiously obligatory for them to wash their hands off illegitimate earnings and part with them. But individuals often have an income which is an intermixture of both legitimate and illegitimate. In such a case, one is required to pay *zakāh* on all one's income. Yūsuf al-Qaraḍāwī, dealing with a special issue, expresses the opinion that even such income would be liable for the payment of *zakāh*.[29]

[29] Yūsuf al-Qaraḍāwī, *Fiqh al-Zakāh*, Urdu tr., 319.

This stands to reason because making such incomes exempt from *zakāh* will possibly encourage people to earn from these sources. The general principle, however, would remain that one should abstain from illegitimate income and that the Islamic state should try to plug all sources which lead to it. In fact the Islamic state should also discourage people from earnings derived from whatever is harmful for humanity (e.g. cigarettes), even if it might not be explicitly prohibited. This is in keeping with the responsibility of individuals as well as the state to enjoin what is proper and prohibit what is improper. Therefore, the state should try to discourage illegitimate sources of income. However, if, inspite of all this, there are people who still manage to make money from illegitimate sources, they would be required to pay *zakāh*.

Collection of Taxes

The *Sharī'ah* has given elaborate instructions for the collection of *zakāh*:

- The tax collectors should exercise as much leniency as possible at the time of collection.
- The tax collectors should allow the assessee to defer the payment of *zakāh* till such time as his cash flow allows him to pay it. Nobody should be forced to sell his personal effects to pay *zakāh*.
- In case of losses, the tax collectors should give rebates and allow setting off losses in the payment of *zakāh* of the future years.
- In case of *zakāh* of cattle or agricultural crops, the collectors should not collect the best cattle or the best part of the crop. Instead, they should accept the average categories.
- If a person likes to make advance payment of *zakāh*, it should be accepted.

These principles of *zakāh* collection can be adopted for the collection of all taxes.

Simplicity and Economy

An outstanding feature of *zakāh* is that it is simple to enforce. Even an illiterate person can calculate his liability without much difficulty. This is a universally accepted feature of a good tax system. The system is economical, as the tax collectors have to be paid from out of the proceeds of *zakāh* itself. In a well-managed *zakāh* system, the expenditure on the collection and distribution of *zakāh* can be made as a certain percentage of the total proceeds. This percentage can act as a guideline for the pay and allowances of the tax collectors.

Tax Expenditure

The expenditure from *zakāh* can be made on the specified eight heads of account (see the Qur'ān 9:60). This suggests that this tax is collected for a definite expenditure profile. The *zakāh* proceeds cannot be intermingled with other taxes. Therefore, in an Islamic state, the *zakāh* budget will have to be prepared and accounted for separately. It has wide ranging implications for the state finance, accounting and auditing. The government employees dealing with *zakāh* will also need a special type of training for managing these funds.

Can we conclude, then, that in an Islamic economy all taxes should be levied for specific heads of expenditure? Some people have so suggested. They think that it will put a control on the government's ability to run budget deficits for a very long period. The government will be constrained by the tax proceeds. But we think it is an unnecessarily restrictive approach and does not recognize the realities of governance. Making all taxes specific to heads of expenditure will take away the flexibility that a present day government needs to run its day-to-day affairs. In fact, if such had been the intention of the *Sharī'ah*, it would have made *zakāh* an all-encompassing tax or specified such restrictions for the state. We can think of other measures to control the budget deficits such as reduction in wasteful expenditure, control of tax evasion, privatisation of certain state functions, etc.

Another distinctive feature of *zakāh* expenditure is that it should normally be collected locally and also distributed locally.[30] As a result, the organization of *zakāh* and its management becomes essentially a local government function. It helps overcome regional disparities. It is also an effective measure to reduce tax evasion. If the local people are responsible to collect and distribute *zakāh*, it becomes difficult for anyone to evade it. Local people can detect the evasion much more easily than the central government machinery. People are also motivated to pay *zakāh* when they can see the tangible results of their taxes in their own locality. Thus the *Sharī'ah* has not only simplified the collection, distribution and accounting of *zakāh*, it has also effectively involved the local population of each area in its management.

Taxes Other than *Zakāh*

There is controversy in the literature on Islamic economics about the legitimacy of taxes other than *zakāh* in an Islamic state. Some people have argued that the *zakāh* is the only tax that an Islamic state is authorised by the *Sharī'ah* to levy. But this is an unnecessarily restrictive view. Firstly, there are explicit traditions of the Prophet (peace be on him) that allow levying of other

[30] Al-Bukhārī, *Ṣaḥīḥ Bukhārī*, Kitab al-Zakāh, Bāb Wujūb al-Zakāh.

taxes.[31] Secondly, this question also has a pragmatic dimension. If we expect a present day government to perform certain functions we will have to allow it to collect revenue as well. The only method to restrain the government from other taxes is to reduce the mandate of the government. Anyhow, we do not want to get into the details of the controversy here. We presume that an Islamic government of the present day has the mandate to perform some functions for the *maṣlaḥah* of the society. Therefore, it also has the authority to levy these taxes. Let us see what is the Islamic position with regard to various taxes other than *zakāh*.

Kharāj: We have discussed, though obliquely, the implications of the *zakāh* on agricultural output. The tax on land or *kharāj* started in the days of the second caliph ʻUmar b. al-Khaṷṷāb after Iraq, Syria, Egypt and Iran were conquered. ʻUmar decided not to distribute the lands acquired as a result of the conquests among the soldiers and declared them the property of the Muslims. He retained the existing cultivators on those lands and levied *kharāj* on them. The peasants were supposed to cultivating the lands on behalf of the Muslim *ummah* and pay a land tax to the owners of these lands, that is, the Muslim *ummah.* This was a tax other than *zakāh*, which was levied on the non-Muslim population, to begin with. But with passage of time the peasants of these lands either converted to Islam or sold these lands to Muslims with all the obligations intact. This gave rise to a great deal of controversy regarding the levy of taxes on these lands. The literature on Islamic economics has documented this controversy extensively but it is more of a historical nature rather than relevant for the present age.

In the present age, in Muslim countries where it can be established that the land originally belonged to non-Muslims and was declared as the property of the Muslim *ummah* after its conquest, the land tax will be deemed to be *kharāj*. Its rates, exemption limits, and heads of expenditure will all be at the discretion of the state, which can decide the matter of by consultation (*shūrā*). But in those cases where this cannot be established, and the title of the land is with a Muslim, the tax will be *ʻushr* and will be part of the *zakāh* budget alongwith all the restrictions levied by the *Sharīʻah*. In the case of non-Muslims having title over the land, the tax will be *kharāj*. The old debate that the *ʻushrī* land cannot become *kharājī* will, in any case, have to be reviewed as we cannot make non-Muslims pay *ʻushr* and we cannot also displace them from their lands.

Historically, *kharāj* has been levied either on the basis of acreage or on the basis of the output of land. The former rate, known as *kharāj muwaẓẓafah*,

[31] For the relevant *aḥādīth* on the subject, see Yūsuf al-Qaraḍāwī, *Fiqh al-Zakāh*, pp. 968 ff.

would charge a certain flat rate per acre, irrespective of the fact that the land was cultivated or not. The latter, known as *kharāj muqāsamah* would make the government a partner in the produce.[32] Abū Yūsuf has strongly recommended that the *kharāj* should be part of the actual produce of the land and not levied at a flat rate since the former is nearer to equity. Besides, he has also recommended that the farmers should be given rebates if there were crop losses or if the productivity of a certain land is lower than the average.[33] We think that, in our own time too, this is a reasonable approach. The land tax should be equitable and should take into account the actual output and productivity of the land.

'Ushūr: The origin of import duties (*'ushūr*) can also be traced back to the times of caliph 'Umar b. al-Khaṷṷāb who started a levy of ten percent on the stock-in-trade of the traders of other countries, if those countries levied a similar duty on the Muslim traders who entered their lands. The structure of *'ushūr* was subsequently elaborated to include Muslims as well. But the rate for them was a quarter of the rate for the non-Muslims. In the present age, all countries have elaborate tariff structures. The Islamic state cannot remain indifferent to this. It will have to decide its tariff structure in the light of its domestic interests as well as the policies of other countries. There is nothing specific that the *Shari'ah* prescribes except that on the whole it inclines toward free trade. Therefore, wherever possible, the Islamic state should persuade its trading partners to reduce the tariffs. This should be all the more necessary if the other trading partner is also a Muslim state. Much has been written on the possibility of developing a Muslim Common Market and Free Trade Area. But nothing very concrete has come up. Perhaps this is an area where serious initiatives are needed.

Sales Taxes and Excise Duties: These are indirect taxes which are shifted to the consumers. The Islamic government can levy these taxes with due regard for their incidence. The objective of the Islamic state is to promote the *falāḥ* of the people. Therefore, those taxes which put a heavier burden on the poorer classes of the society should be avoided. Hence comfort and luxury should be taxed at a higher rate. In the present age, value added tax has emerged as a popular version of sales tax. The value added tax has several administrative advantages over the traditional one-stage indirect sales tax. But in its incidence it is a burden on the consumers. Therefore, even if an Islamic economy adopts value added tax, it should exempt the basic necessities required by the poorer sections of the society.

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[32] Abū Yūsuf, *Kitāb al-Kharāj*, Urdu tr., 217, 220–21.

[33] Ibid., 306.

Death Duties: In some states death duties are levied on the estate of the deceased. The declared objective is to reduce the inequalities of wealth. The fact is that these duties have hardly been able to achieve their basic objective. Even as a revenue raising device they have not been a very fertile source. In the Islamic economy, death duties are not allowed. The Islamic law of inheritance has given the details of all the heirs and state is not one of them. It is ony when a person has nobody at all to receive his inheritance that the wealth reverts to the public treasury. But this cannot be called death duty.

III

NON-TAX FINANCING

Non-Tax Sources of Revenue

Taxes are not the only source of revenue any government. The state raises funds from several non-tax sources. Some of these are as follows:

- *Dividends from Public Investment*: The government receives dividends from its investments in public enterprises or public utilities.
- *Leasing of Government Assets*: The government also receives rents from its buildings and other facilities.
- *Sale of Output*: Sometimes the government sells the output of its farms, industries and minerals, thereby earning income.
- *User Charges*: The government also collects revenue by levying service charges for the facilities it provides to the public.
- *Fees and Fines*: The government also levies fines and fees for certain offences by the public.

The government revenue from these sources is usually an insignificant fraction of its total revenue or its total needs. Therefore, not much reliance can be placed on them if the government falls short of funds. The governments try to overcome the budget deficits by raising loans domestically or from external sources. We shall, therefore, now turn to this subject.

Public Debt

Can an Islamic government raise public debt? The general reply is: "Yes, it can". We find evidence of public debt even in the lifetime of the Prophet (peace be on him) himself. Siddiqi has documented seven such cases in which the Prophet (peace be on him) borrowed in cash or in kind for the purpose of

jihād or for need fulfilment.[34] While borrowing, the Prophet (peace be on him) sometime expected to return the loan out of the income expected shortly, but in other cases, he borrowed in the hope of some future income. In all cases, he repaid the loans even though, for retiring one loan, he had to raise another loan for a short while.[35] Thus we can say that a present day government can borrow funds if there is a genuine need for them. In the days of the Prophet (peace be on him) the genuine need signified the defence of the country as well as need fulfilment of the common people. In our times, it could also include development of the economy, if the *maṣlaḥah* of the *ummah* so requires. But the present day governments are in the habit of borrowing not out of genuine necessity. Chapra has identified four important causes of present borrowings by the Muslim governments: high defence expenditure, price subsidies, inefficient and large public sector, and corruption and waste in the public sector.[36] It is evident that some of these items cannot be deemed to be legitimate reasons for incurring loans. Despite all this we can imagine that there could be legitimate needs that would prompt a government in our time to resort to borrowing.

One such need is investment for long-term infrastructure projects with huge amounts of capital benefits from which some benefit should also go to the future generations. In all fairness, the present generation should not be the only one to pay for such projects. The future generations, who will also receive some of the benefits arising from these projects, should also pay for these works. Thus considerations of inter-generational equity would suggest that the government can borrow for such programmes.

Sources of Public Debt

The Islamic government can borrow money from its own citizens, commercial banks, the central bank and also from external sources such as multilateral agencies, foreign development banks, and foreign commercial banks. The essential condition is that it cannot borrow on interest. This narrows down the scope of government borrowings. What is the possibility that a government will be able to borrow without interest? There are two such possibilities: (a) to raise interest-free loans; (b) to involve both the domestic and foreign private sectors in meeting some of its obligations. We shall discuss some of these possibilities below.

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[34] See M.N. Siddiqi, "An Overview of Public Borrowing in Early Islamic History" in *Review of Islamic Economics*, 2:2 (1993), 1–16.

[35] Ibid.

[36] Muhammad Umar Chapra "Islam and International Debt Problem in *Journal of Islamic Studies*, 3:2 (1992), 49–77.

Interest-free Funds from Citizens

Patriotism Bonds: The government can raise interest-free loans from its citizens through, what some writers have called, 'patriotism bonds' or 'benevolence bonds'. The government can appeal to the patriotic spirit of the citizens to help the government by providing interest-free loans in times of need. There is a possibility that people may respond positively. But a lot depends on the political stability, the nature of the need for which appeal has been made, and the demonstration by the government of a will to redeem the debt on a timely basis. Thus, we should expect that this may not be a very fertile source of funds for the government.

Foreign Currency Loans: Sometimes the government can raise foreign currency loans from its citizens with a guarantee of repayment in foreign currency. People may be attracted to lend it to the government if there is a likelihood of devaluation of the local currency. Again, this may not be very attractive for the people and the government will possibly not be able to raise large sums of money in this manner.

Advance Payments for Government Assets or Services: The governments may collect funds from people as price for the sale of land or houses to be developed and built later. The funds thus collected can be used immediately for some of its financial needs. Similarly, the government may receive donations for the construction of such useful institutions as universities or hospitals with the promise that the donors will have the right to free or subsidised education or medical treatment for a certain period of time for themselves and their children. It could also be the case for utilities like electricity, telephones or water supply. The government can announce to sell electricity or telephone services in the future at a fixed rate for some period to those who donate some money to the government now or who agree to make lump sum amounts at the present as user charges in advance. The funds thus collected can be used for some other urgent needs.

Interest free Funds from Commercial Banks: The government can take interest-free loans from commercial banks. The commercial banks in the Islamic economy are not supposed to pay any interest on demand deposits. The law can make the commercial banks set-aside part of these demand deposits for lending to the government on interest-free basis. In time of need the commercial banks can get a re-finance from the central bank against the interest-free loans given to the government.

Interest-free Loans from the Central Bank: The government can also borrow from the central bank on interest-free basis. In fact, the borrowing from the central bank is a myth. The government usually owns the central bank. It does not make any sense that the government should borrow from itself on interest. Therefore, borrowing from the central bank means creating more high-powered money. This could be inflationary if the government is borrowing for unproductive expenses. Therefore, borrowing from the central banks should, in no case, be for purposes which do not create marketable goods and services.

Involuntary Loans: The government can force the private sector corporations, banks or other organisations to lend money to the government, if there is a real national need. This is very much like the authority of the government to levy taxes. The difference is that the taxes are not refundable but loans are repayable.

Loans Involving the Private Sector: The government can involve private sector, domestic as well as foreign, for raising funds on commercial basis. Some of the possibilities are as follows.

Build-operate-transfer: The government can invite private sector to build, operate and transfer the infrastructure projects. For example, it can invite the private sector to build a power house, operate it for some years to recover the investment with some profit, and then transfer the power house to the government.

Build-and-lease: The government can invite the private sector to build certain public sector facilities like schools, hospitals, etc. which the government will take on lease on a permanent basis or for a long-term. The government will thus not be required to spare funds for construction, which may be many times more. The private sector will be able to earn a reasonable return on its capital in the form of rent. Of course, regular maintenance and wear tear is the responsibility of the private firms which have leased the assets to the government.

Sale-of-output-certificates: The government can issue certificates to sell the output of some of its facilities, such as a toll bridge or a tourist spot or a hotel. People can buy these certificates and get the right to manage these facilities. They will be able to get a return on these certificates in the form of net gain after meeting the expenses. In a secondary market, these certificates can be made negotiable so that those who want their money back can get it, without

making the government ever redeem these certificates. These facilities can remain on lease forever. The certificate holders can be made to set aside some funds from out of the income as depreciation reserve for replacement of these assets or for regular maintenance.

Joint Ventures: The government can invite the private sector to invest in the government commercial enterprises like railways, airlines, gas companies, etc. on the basis of partnership. The government can retain the management or give it to the private sector depending upon the degree of its interest and other political considerations.

IV

CONCLUSION

A survey of the Islamic principles relating to public finance reveals, in the first place, that the fundamentals of Islamic public finance are clearly delineated in the Qur'ān and the *Sunnah*. Hence there is little ambiguity as to what would be the guiding principles of public finance. In like manner, several principles and rules that should guide in dealing with questions pertaining to public income and expenditure have also been laid down in these basic sources which have served as the raw material to develop an elaborate body of rules in different areas of life, including public finance. All this invests the Islamic system of public finance with its characteristic identity and provides it with stability and permanence. On the other hand, in the actual application of these principles in different space-time contexts, the Islamic system of public finance displays a high degree of flexibility, a flexibility which seems to be a built in feature of that system. Thanks to the twin elements of permanence and flexibility, it is possible for an Islamic society to maintain its Islamic authenticity in the field of public finance as well as to make use of Islam's inherent flexibility and dynamism to operationalise its normative ideals in the flux of history.

Abū Ḥanīfah's Use of the Solitary *Ḥadīth* as a Source of Islamic Law

SAHIRON SYAMSUDDIN

Introduction

Abū Ḥanīfah (d. 150/767), "the founder and first codifier of the speculative school of law",[1] was in some ways a controversial scholar. In his *Ta'rīkh Baghdād,* Aḥmad ibn 'Alī al-Khaṭīb al-Baghdādī (d. 463/1070) cites many reports attributed to prominent members of the Ahl al-Ḥadīth group of scholars which inform us that Abū Ḥanīfah's opinions relating to legal issues often contradicted the *naṣṣ* (textual statements) of the Qur'ān and the *Ḥadīth*,[2] the two primary sources of Islamic law.[3] One of the numerous reports is a statement attributed to 'Abd Allāh ibn al-Mubārak (d. 181/797): "Whoever looks at Abū Ḥanīfah's books sees that Abū Ḥanīfah permits what Allāh

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[1] This description is Ignaz Goldziher's, taken from his book *Introduction to Islamic Theology and Law*, tr., Andras and Ruth Hamori (Princeton: Princeton University Press, 1981), 49. See also Marshall G. S. Hodgson, *The Venture of Islam* (Chicago: The University of Chicago Press, 1974), 1: 327; and Aḥmad ibn Muḥammad ibn Khallikān, *Wafayāt al-A'yān wa Anbā' Abnā' al-Zamān*, ed., Iḥsān 'Abbās (Beirut: Dār Ṣādir, 1977), 5: 409. Ibn Khallikān also calls him *imām fī 'l-qiyās* (a leader in inferential reasoning).

[2] See Aḥmad ibn 'Alī al-Khaṭīb al-Baghdādī, *Ta'rīkh Baghdād aw Madīnat al-Salām* (Baghdad: al-Maktabah al-'Arabiyyah, 1931), 13: 394–423. In his book al-Khaṭīb al-Baghdādī quotes numerous reports attributed to Sufyān ibn 'Uyaynah (d. 198/814), Mālik ibn Anas (d. 179/795), Ḥammād ibn Zayd (d. 179/796), 'Abd al-Raḥmān ibn al-Mahdī (d. 198/814), 'Amr ibn 'Abd al-Raḥmān al-Awzā'ī (d. 157/773), Sufyān al-Thawrī (d. 161/778), Sulaymān ibn Ḥarb (d. 224/839), 'Abd Allāh ibn al-Mubārak, Muḥammad ibn Idrīs al-Shāfi'ī (d. 204/819), Aḥmad ibn Ḥanbal (d. 241/855), and many others.

[3] See Muḥammad ibn Idrīs al-Shāfi'ī, *al-Risālah,* ed., Aḥmad Muḥammad Shākir (Cairo: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1940), 73; Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Uṣūl al-Sarakhsī*, ed., Abū'l-Wafā' al-Afghānī (Cairo: Maṭābi' Dār al-Kitāb al-'Arabī, 1954), 1: 65; 'Abd Allāh ibn 'Abd al-Muḥsin al-Turkī, *Uṣūl Madhhab al-Imām Aḥmad*: *Dirāsah Uṣūliyyah Muqāranah* (Riyadh: Maktabat al-Riyāḍ, 1977), 102; and Muḥammad Zāhid al-Kawtharī, *Fiqh Ahl al-'Irāq wa Ḥadīthuhum*, ed., 'Abd al-Fattāḥ Abū Ghuddah (Beirut: Maktab al-Maṭbū'āt al-Islāmiyyah, 1970), 18.

forbids, and forbids what He permits."[4] Likewise, al-Ghazzālī[*] (d. 505/111) says in his *al-Mankhūl* that Abū Ḥanīfah turned the *sharī'ah* completely upside down, confounded its method, and changed its structure.[5]

These claims are largely based on the assumption that Abū Ḥanīfah relied on *ra'y* (personal judgment), i.e. *qiyās* (inferential reasoning) rather than on the *naṣṣ* of the Qur'ān and Prophetic traditions[6] in deriving legal rulings. This assumption has been adopted by many orientalists. Ignaz Goldziher (d. 1921), for example, says in his book *The Zāhirīs: Their Doctrine and Their History:* "Abū Ḥanīfa made the first attempt to codify Islamic jurisprudence on the basis of *qiyās.*"[7] The Ahl al-Ḥadīth's criticism of Abū Ḥanīfah, whom they saw as a representative of the Ahl al-Ra'y, has been understood by many scholars, among them N.J. Coulson, as a crystallization of the conflict between the two groups. In this case, Coulson seems to support the traditional view that the former disregarded reason in forming legal decisions, and the latter the *naṣṣ*.[8]

On the other hand, Muḥammad ibn Maḥmūd al-Khawārizmī (d. 665/1267), in his *Jāmi' al-Masānīd,* rejects the above claim, saying that those responsible for it did not correctly understand the *fiqh* of Abū Ḥanīfah. In support of this notion, he offers several arguments in his work.[9] Furthermore, Ibn Ḥājar al-'Asqalānī (d. 852/1449) did not consider Abū Ḥanīfah and his followers to belong to Ahl al-Ra'y or to have neglected the *naṣṣ* in favour of personal reasoning. He said:

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[4] Al-Khaṭīb al-Baghdādī, *Ta'rīkh Baghdād*, 13: 403.

[*] There is some disagreement about the spelling of this name. While most scholars call him al-Ghazālī, a few scholars prefer to call him al-Ghazzālī. This latter is now very rare, nevertheless, in deference to the author's preference, in this article the name has been spelled as al-Ghazzālī. –Ed.

[5] Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazzālī, *al-Mankhūl min Ta'līqāt al-Uṣūl*, ed., Muḥammad Ḥasan Haytū (Damascus: Dār al-Fikr, 1980), 500. See also Abū'l-Qāsim al-Mūsawī al-Khū'ī, *Mu'jam Rijāl al-Ḥadīth wa Tafṣīl Ṭabaqāt al-Ruwāt* (Qumm: Manshūrāt Madīnat al-'Ilm, 1983), 19: 164. In his book, al-Khū'ī quotes another statement attributed to al-Ghazzālī saying: "Abū Ḥanīfah completed the roots of the *shar'* (the canonical law of Islam) with a root by which he destroyed the *shar'* of the Prophet Muḥammad (peace be on him). Whoever does this, regarding it as lawful, he is an infidel. Whoever does it, regarding it permissible, he is a sinner." However, the present author have not been able to find this statement in al-Ghazzālī's *al-Mankhūl*.

[6] See Muḥammad ibn Maḥmūd al-Khawārizmī, *Jāmī' al-Masānīd* (Beirut: Dār al-Kutub al-'Ilmīyyah, n.d.), 1: 41–43; Al-Khū'ī, *Mu'jam Rijāl al-Ḥadīth*, 19: 164; and al-Kawtharī, *Fiqh Ahl al-'Irāq*, 21.

[7] Ignaz Goldziher, *The Ẓāhirīs: Their Doctrine and Their History*, trans. and ed., Wolfgand Behn (Leiden: E. J. Brill, 1971), 13.

[8] N. J. Coulson, *A History of Islamic Law* (Edinburgh: The University Press, 1964), 52.

[9] See al-Khawārizmī, *Jāmi' al-Masānīd*, 1: 41–53.

> You have no choice but to understand from the statements of *al-ʿulamā' al-muta'akhkhirīn* (the scholars of the later period), who say that Abū Ḥanīfah and his followers were Aṣḥāb al-Ra'y (party of reasoning), that the purpose of these statements was to reduce their stature; it does not mean that they gave priority to personal reasoning over the *sunnah* of the Prophet (peace be on him) and the opinions of his Companions, the reason being that they were innocent of that practice.[10]

It seems that Joseph Schacht (d. 1969) agreed with the above view, as is shown by his statement, "...The attitude of the Iraqians — including Abū Ḥanīfah — to traditions is essentially the same as that of the Medinese, but their theory is more developed."[11]

One can see from the above that scholars disagree on Abū Ḥanīfah's treatment of the *naṣṣ*, particularly the Prophetic traditions on which he based his legal opinions. This paper, therefore, will examine the issue by looking at the extent of Abū Ḥanīfah's reliance on *ḥadīth* reports, especially those that are considered *āḥād* (solitary),[12] and how he dealt with the contradiction between legal decisions based on solitary *aḥādīth* and those reached by *qiyās*.

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[10] Al-Kawtharī, *Fiqh Ahl al-ʿIrāq*, 21.

[11] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: The Clarendon Press, 1959), 27.

[12] What is meant by *āḥād* in this paper is the *ḥadīth* reports which are not categorized under the term *al-mutawātir*. Scholars such as al-Khaṭīb al-Baghdādī and Zayn al-Dīn ʿAbd al-Raḥīm ibn al-Ḥusayn al-ʿIrāqī (d. 806/1404), define *al-mutawātir* as a Prophetic tradition (*ḥadīth*) which is reported by a sufficiently large number of transmitters to ensure, according to common experience (*al-ʿādah*), the impossibility of their having agreed at any given time to lie, the unlikelihood of any obscurity being introduced into the *ḥadith's* text, and the absence of any factors that would have motivated the transmitters to lie. The *mutawātir* reports yield immediate or necessary knowledge (*al-ʿilm al-ḍarūrī*). It is, therefore, necessary that Muslims be guided in their lives by the *mutawātir* traditions. The *aḥādīth* which do not fulfil the above conditions are called *āḥād.* In terms of the quality, which depends on the *sanad* (chain of transmitters) and the *matn* (content of the report), the *āḥād* could be *ṣaḥīḥ* (sound), *ḥasan* (sufficient), or *ḍaʿīf* (weak). The *āḥād* traditions entail *ẓann* (probable knowledge). *Al-āḥād al-ṣaḥīḥ* and *al-ḥasan* can serve as sources in legal matters but not *al-ḍaʿīf*. More detailed information about these terms is available in many books of *uṣūl al-ḥadīth* and *uṣūl al-fiqh.* See al-Khaṭīb al-Baghdādi, *al-Kifāyah fi ʿIlm al-Riwāyah,* ed., Aḥmad ʿUmar Hāshim (Beirut: Dār al-Kitāb al-ʿArabī, 1986), 32; Muḥammad Jamāl al-Dīn al-Qāsimī, *Qawāʿid al-Taḥdīth min Funūn Muṣṭalaḥ al-Ḥadīth,* ed., Muḥammad Bahjah al-Bīṭār (Beirut: Dār al-Nafā'is, 1987), 151; Wael B. Hallaq, "On Inductive Corroboration, Probability and Certainty in Sunnī Legal Thought" in his *Law and Legal Theory in Classical and Medieval Islam* (Aldershot: Variorum, 1994), ch. IV: 3–31; Nicholas Aghnides, *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography* (Lahore: The Premier Book House, 1961), 39–47.

Before presenting and analyzing this issue, however, it would be useful to present a brief account of Abū Ḥanīfah's life in relation to his learning of *Ḥadīth*.

Abū Ḥanīfah and His Learning of *Ḥadīth*

Best known by his *kunyah,* Abū Ḥanīfah, the subject of our study originally bore the name al-Nuʿmān ibn Thābit al-Kūfī. He was born in the year 80/699 under the Umayyad caliphate of ʿAbd al-Malik ibn Marwān (d. 85/704), and died in the year 150/767.[13] It is said that he met with several of the Companions of the Prophet (peace be on him)[14], among them Anas ibn Mālik (d. 93/712), ʿAbd Allāh ibn Ḥārith ibn Juz' al-Zubaydī (d. 86/705), ʿAbd Allāh ibn Abī Awfā (d. 87/706) and Wāthilah ibn al-Asqaʿ (d. 83/702), from whom he received several *aḥādīth* directly.[15] On this basis, Muslim historians, like Muḥammad ibn Saʿd (d. 230/844) and al-Khaṭīb, considered him to have been one of the *Tābiʿīn* (Successors).[16] He also learned many *aḥādīth* from several of

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[13] Al-Khaṭīb al-Baghdādī, *Taʾrīkh Baghdād*, 13: 330. Concerning the year when Abū Ḥanīfah was born, al-Khaṭīb says that Dāwūd ibn ʿUlayyah claimed this to be 61 A.H. However, this information, he insists, is suspect. See also Taqī al-Dīn ibn ʿAbd al-Qādir al-Tamīmī, *al-Ṭabaqāt al-Saniyyah fī Tarājim al-Ḥanafiyyah,* ed., ʿAbd al-Fattāḥ Muḥammad Abū Guddah (Cairo: Lajnat Iḥyāʾ al-Turāth al-Islāmī, 1970), 1: 88; al-Khawārizmī, *Jāmiʿ al-Masānīd*, 1: 21 and 78; Muḥammad ibn Yūsuf al-Ṣāliḥī, *ʿUqūd al-Jumān fī Manāqib al-Imām al-Aʿẓam Abī Ḥanīfah al-Nuʿmān* (Ḥaydarābād: Maṭbaʿat al-Maʿārif al-Sharqiyyah, 1974), 42; and Jamāl al-Dīn Abū al-Ḥajjāj Yūsuf ibn ʿAbd al-Raḥmān al-Mizzī, *Tahdhīb al-Kamāl fī Asmāʾ al-Rijāl*, ed., Bashshār ʿAwwād Maʿrūf (Beirut: Muʾassasat al-Risālah, 1992), 29: 444. In this book, Yūsuf ibn ʿAbd al-Raḥmān al-Mizzī (d. 742/1341) mentions that Yaḥyā ibn Maʿīn (d. 233/848) said that the year of Abū Ḥanīfah's death was 151/768, and that according to Makkī ibn Ibrāhīm (d. 215/830), it was 153/770.

[14] Muslim informants did not agree on the number of *Ṣaḥābah* whom Abū Ḥanīfah encountered. Some, like Aḥmad ibn ʿAbd Allāh al-Aṣbahānī (d. 430/1038) said that they were three, viz. Anas ibn Mālik (whom he met in Kūfah when he was thirteen years old), ʿAbd Allāh ibn al-Ḥārith (whom he met in Makkah when he was sixteen), and ʿAbd Allāh ibn Abī Awfā. Some, like Ibn Khallikān (d. 681/1282), gave the number as four, that is, Anas ibn Mālik (in Kūfah), ʿAbd Allāh ibn Abī Awfā (in Kūfah), Sahl ibn Saʿd al-Sāʿidī (d. 91/710) (in Madīnah), and Abū Ṭufayl ʿĀmir ibn Wāthilah (d. 100/718) (in Makkah) . Some said six, namely Anas ibn Mālik, ʿAbd Allāh ibn Unays (d. circa 94/713), ʿAbd Allāh ibn al-Ḥārith, ʿAbd Allāh ibn Abī Awfā, Wāthilah ibn al-Asqaʿ, and ʿĀʾishah bint ʿAjrad. Some, like al-Khawārizmī, said seven, adding to these six the name of Jābir ibn ʿAbd Allāh (d. 78/698). Some said eight, adding to the above-mentioned seven the name of Maʿqal ibn Yasār (d. 65/685). See Aḥmad ibn ʿAbd Allāh al-Aṣbahānī, *Musnad Abī Ḥanīfah*, ed., Naẓar Muḥammad (Riyāḍ: Maktabat al-Kawthar, 1994), 24–25; Ibn Khallikān, *Wafayāt al-Aʿyān,* 5: 406; al-Khawārizmī, *Jāmiʿ al-Masānīd,* 1: 22–6 and 2: 345–348; al-Ṣāliḥī, *ʿUqūd al-Jumān,* 49–61.

[15] The *isnād* (chains of transmitters) of the *aḥādīth,* according to traditionists, vary from *ṣaḥīḥ* (sound) to *ḍaʿīf* (weak), and even *mawḍūʿ* (fabricated). See al-Ṣālihī, *ʿUqūd al-Jumān,* 54–62.

[16] Al-Khaṭīb al-Baghdādī, *Taʾrīkh Baghdād*, 13: 324.

the *Tābiʿīn* as well. Al-Mizzī, in his *Tahdhīb al-Kamāl,* lists in fact no less than seventy eight *rāwīs* (*ḥadīth* nattators) , most of whom were settled in Kūfah.[17]

In order to expand his knowledge of *Ḥadīth,* Abū Ḥanīfah is reported to have travelled to other cities which were renowned as centres of *Ḥadīth*, especially Baṣrah, Makkah and Madīnah. There he studied *aḥādīth* under many prominent *muḥaddithīn* (traditionists). In Kūfah he was taught by Ḥammād ibn Abī Sulaymān (d. 120/738) from whom he also learned *Fiqh*, ʿĀmir al-Shaʿbī (d. 104/722), Salāmah ibn Kuhayl ibn al-Ḥaṣīn (d. 123/741) Abū Isḥāq Sulaymān ibn Abī Sulaymān al-Shaybānī al-Kūfī (d. 120/738), Simāk ibn Ḥarb (d. 123/741), Muḥārib ibn Dithār (d. 116/734), ʿAwn ibn ʿAbd Allāh (d. 116/734), Hishām ibn ʿUrwah (d. 146/763), and Sulaymān ibn Mihrān (d. 148/765). In Baṣrah, Abū Ḥanīfah also received education in *Ḥadīth* from Qatādah ibn Diʿāmah (d. 118/736), and from Shuʿbah ibn al-Ḥajjāj (d. 160/776). In Makkah he learned *Ḥadīth* from ʿAṭāʾ ibn Abī Rabāḥ (d. 114/732), and ʿIkrimah ibn ʿAbd Allāh al-Barbarī (d. 105/723). In Madīnah, he heard *aḥādīth* from Sulaymān Ibn Yasār (d. 107/725) and Sālim ibn ʿAbd Allāh ibn ʿUmar (d. 106/725).[18] The *aḥādīth* which Abū Ḥanīfah learned from his masters were passed on to his pupils whose names are listed by al-Mizzī in his *Tahdhīb al-Kamāl*. Among them were Ḥammād ibn Abī Ḥanīfah (d. 176/792), and Abū Yūsuf Yaʿqūb ibn Ibrāhīm al-Qāḍī (d. 182/798), Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189/805).[19] These three were responsible for compiling the *aḥādīth* narrated by Abū Ḥanīfah which are embodied in his *al-Musnad* or *Kitāb al-Āthār*.[20] The breadth of his knowledge of *Ḥadīth* was acknowledged

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[17] See Al-Mizzī, *Tahdhīb al-Kamāl,* 29: 418–20; and Muḥammad ibn Muḥammad al-Dhahabī, *Taʾrīkh al-Islām wa Wafayāt al-Mashāhīr wa al-Aʿlām,* ed., ʿUmar ʿAbd al-Salām Tadmurī (Beirut: Dār al-Kitāb al-ʿArabī, 1988), 9: 306.

[18] Shiblī Nuʿmānī, *Imam Abu Hanifah: Life and Work,* tr., M. Hadi Hussain (New Delhi: Kitab Bhavan, 1988), 18–26.

[19] See al-Mizzī, *Tahdhīb al-Kamāl*, 29: 420–22.

[20] There are fifteen collections of the *aḥādīth* transmitted by Abū Ḥanīfah, all of which al-Khawārizmī has incorporated in his *Jāmiʿ al-Masānīd.* They are the *Musnad*s compiled by ʿAbd Allāh ibn Muḥammad ibn Yaʿqūb al-Ḥārithī (d. 340/951–52), Ṭalḥa ibn Muḥammad (d. 380/990), Muḥammad ibn al-Muzaffar ibn Mūsā (d. 386/996), Aḥmad ibn ʿAbd Allāh al-Aṣbahānī (d. 430/1038), Abū Bakr Muḥammad ibn ʿAbd al-Bāqī al-Anṣārī (d. 535/1140), ʿAbd Allāh ibn ʿAdī al-Jurjānī (d. 365/975–76), al-Ḥasan ibn Ziyād al-Luʾluʾī (d. 204/819), ʿUmar ibn al-Ḥasan al-Ashnānī (d. 339/951), Abū Bakr Aḥmad ibn Muḥammad ibn Khālid al-Kalāʿī (d. 432/1041), Muḥammad ibn al-Ḥusayn al-Balkhī (d. 526/1132), Abū Yūsuf Yaʿqūb ibn Ibrāhīm al-Qāḍī, Ḥammād ibn Abī Ḥanīfah, Muḥammad ibn al-Ḥasan al-Shaybānī, whose collection is called *al-Āthār*, and ʿAbd Allāh ibn Muḥammad b. Abī al-ʿAwām al-Ṣaghadī (d. 290/903). See al-Khawārizmī, *Jāmiʿ al-Masānīd*, 1: 4–5; and al-Ṣāliḥī, *ʿUqūd al-Jumān,* 322–34. In his book, al-Ṣāliḥī adds to the above-mentioned collections two other *Musnads* done by Abū Bakr ibn al-Muqriʾ and Abū ʿAlī al-Bakrī.

by his contemporaries. Abū Yūsuf, for instance, said that no one was more knowledgeable of the interpretation of the *aḥādīth* touching on *fiqh* (Islamic law) than Abū Ḥanīfah.[21] Above all, Abū Ḥanīfah was considered an expert in the knowledge of *al-jarḥ wa al-ta'dīl,* a branch of the *Ḥadīth* sciences, which assesses the characters of transmitters so as to decide whether or not a *ḥadīth* is authentic. It is reported that Abū Ḥanīfah considered, for example, Sufyān al-Thawrī as a reliable (*thiqah*) transmitter, Zayd ibn 'Ayyāsh as a weak transmitter (*ḍa'īf*), and Jābir al-Ju'fī as a fabricator (*waḍḍā'*) of *aḥādīth.*[22] It follows that Abū Ḥanīfah's knowledge of *Ḥadīth,* and the qualifications of the transmitters on which its acceptance depends, is beyond doubt. What is at issue, however, is to what extent and how Abū Ḥanīfah employed his knowledge of *Ḥadīth* in arriving at legal decisions.

Abū Ḥanīfah's Attitude towards Solitary Traditions

There are many reports in which Abū Ḥanīfah is said to have preferred his personal reasoning to the information contained in the Prophetic traditions when dealing with legal problems. One informant, Ḥammād ibn Salamah, said that Abū Ḥanīfah received *ḥadīth* reports, but then rejected them in favour of his own *ra'y.*[23] After all, the reports with which al-Khaṭīb provides us are full of instances of Abū Ḥanīfah apparently speaking in a light vein about the Prophetic traditions. Sufyān ibn 'Uyaynah, for example, reported that when he told Abū Ḥanīfah of the Prophetic saying: "*Al-Bay'ān bi al-Khiyār ma lam yatafarraqā*" (the seller and the buyer have the right to rescind a transaction as long as they have not separated), Abū Ḥanīfah allegedly rejected it, saying: "What if both (the seller and buyer) are on a ship? What if they are in a prison? And what if they are on a journey? How do they separate from each other then?"[24] Another example is the report of Yaḥyā ibn Ādam (d. 203/818) that when Abū Ḥanīfah's attention was drawn to the *ḥadīth*: "*Al-wuḍū' nisf al-īmān*" (ablution is half of faith), he replied: "So, why don't you perform the ablution twice so as to perfect your faith ?"[25] In al-Khaṭīb's *Ta'rīkh* there are some other examples of Abū Ḥanīfah's rejection of certain *aḥādīth*, on the basis of which Juynboll concludes in his *Muslim Tradition* that Abū Ḥanīfah

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[21] Taqī al-Dīn al-Tamīmī, *al-Ṭabaqāt al-Saniyyah,* 1: 99.
[22] Ibid., 1: 111.
[23] Al-Khaṭīb al-Baghdādī, *Ta'rīkh Baghdād,* 13: 390–91.
[24] Ibid., 13: 389.
[25] Ibid., 13: 388. [The whole point of this light vein is that Abū Ḥanīfah felt certain that these statements, which were attributed to the Prophet (peace be on him); but in point of fact they were not his statements. Ed.]

can be regarded as rarely having been influenced by *aḥādīth*.[26] He even goes so far as to say that in Abū Ḥanīfah's drafting of legal decisions, Prophetic traditions never held any importance.[27] To my mind, this assessment seems to be very tenuous, for scholars have not sufficiently examined why Abū Ḥanīfah did not use such *aḥādīth*. In fact, there is every reason to believe that he rejected the *aḥādīth* because, according to him, they lacked the required *shurūṭ al-qabūl* (criteria for acceptance of Prophetic traditions).

Abū Ḥanīfah's attitude towards *aḥādīth* can be seen from the statement ascribed to Sufyān al-Thawrī, who said:

> I heard that he (Abū Ḥanīfah) said: 'I accept the Book of God (the Qur'ān). If I do not find anything in it, I accept the *Sunnah* of the Messenger. If I do not find anything in the *Sunnah*, I accept the opinion of his Companions; I will take of their opinions what I want, and leave what I want. I do not depart from their opinions and follow the opinions of others [i.e. non-Companions]. But when a matter has to do with by Ibrāhīm, al-Sha'bī, ibn Sīrīn, al-Ḥasan, 'Aṭā', Sa'īd ibn al-Musayyab and the like [i.e. Successors]: in such cases I will have recourse to *ijtihād*,[28] as they did'.[29]

We note from this statement that Abū Ḥanīfah regarded the *Sunnah* of the Prophet (peace be on him), which is available in the form of *ḥadīth* reports, as the second basis — after the Qur'ān — for making legal decisions. When there were no Qur'ānic verses or *ḥadīth* reports that had a bearing on the problem that Abū Ḥanīfah was facing, he referred to those opinions of the Companions that he considered to be true, whether they were formed on the basis of *ijmā'* (consensus) or consisted of personal opinions.[30] He had recourse to *ijtihād* only when he could not find any answers to a given legal problem in the above sources. The importance of the role of *aḥādith* in Abū Ḥanīfah's

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[26] G. H. A. Juynboll, *Muslim Tradition: Studies in the Chronology, Provenance, and Authorship of Early Ḥadīth* (Cambridge: Cambridge University Press, 1982), 122.

[27] Ibid., 120.

[28] *Uṣūlīs* define *ijtihād* as the utmost effort of a jurist's mental capacity in search of Islamic legal rulings. See 'Alī ibn Abī 'Alī al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām* (Cairo: Dār al-Ḥadīth, n.d.), 4: 218; Ibrāhīm ibn 'Alī al-Shīrāzī, *al-Wuṣūl ilā Masā'il al-Uṣūl*, ed., 'Abd al-Majīd Turkī (al-Jazā'ir: al-Shirkah al-Waṭaniyyah, n.d.), 2: 433; 'Abd Allāh Darāz's commentary on Abū Isḥāq al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'ah* (Beirut: Dār al-Kutub al-'Ilmiyyah, n.d.), 4: 64; and Wael B. Hallaq, "Was the Gate of Ijtihād Closed?" in his *Law and Legal Theory in Classical and Medieval Islam* , ch. V.

[29] See al-Mizzī, *Tahdhīb al-Kamāl*, 29: 443; al-Khaṭīb, *Ta'rīkh Baghdād*, 13: 368; al-Ṣāliḥī, *'Uqūd al-Jumān*, 172.

[30] See 'Abd al-Ḥalīm al-Jundī, *Abū Ḥanīfah: Baṭal al-Ḥurriyyah wa al-Tasāmuḥ fī al-Islām* (Cairo: Dār Sa'd, 1945), 138.

eyes can also be gauged from the saying ascribed to him: "If there is a *ḥadīth* from the Prophet (peace be on him), I will not depart from it for something else, but will accept it; if there are opinions coming from his Companions, I will choose one of them; and if the reports come from *Tābi'īn* (Successors), I will [place myself on the same pedestal and] vie with them". [31]

However, it is recorded that Abū Ḥanīfah was very careful in employing *ḥadīth* reports. He used them as a legal source when he knew that they fulfilled the requirement of their acceptance. Abū Ghuddah in his edition of al-Kawtharī's *Fiqh Ahl al-'Irāq* mentions that Kawtharī, in his *Ta'nīb al-Khaṭīb,* describes in detail Abū Ḥanīfah's careful treatment of solitary *ḥadīth* reports. According to Kawtharī, Abū Ḥanīfah applied the following rules when dealing with them: (1) a solitary tradition, including a *mursal* tradition,[32] is accepted if it does not come into conflict with any stronger evidence (*dalīl*), such as the *'āmm* (universal) and *ẓāhir* (clear) verses of the Qur'ān, *al-sunnah al-mashhūrah,* that is, well-known traditions,[33] *mawārid al-shar'* (the main aims of Islamic legal rulings), and other *aḥād* which are considered to be more authentic (*aṣaḥḥ*);[34] (2) if the transmitter of the tradition concerned is considered reliable (*thiqah*); (3) if the transmitter does not reject the *riwāyah*

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[31] Al-Ṣāliḥī, '*Uqūd al-Jumān,* 173.

[32] *Al-mursal* is defined as a tradition from the Prophet (peace be on him) in which the *sanad* (chain of transmitters) lacks the mention of the first transmitter (i.e. a *Ṣaḥābī*). For example, a *Tābi'ī,* such as Sa'īd ibn al-Musayyab (d. 94/713), transmitted a *ḥadīth* from the Prophet (peace be on him) without mentioning the name of the Companion from whom he had recieved it. Scholars do not agree on whether the *mursal* tradition is authoritative (*ḥujjah*), or not. See al-Khaṭīb al-Baghdādī, *al-Kifāyah fī 'Ilm al-Riwāyah,* 423–35; Ḥusayn ibn 'Abd Allāh al-Ṭībī, *al-Khulāṣah fī Uṣūl al-Ḥadīth,* ed., Ṣubḥī al-Sāmarrā'ī (Baghdād: Iḥyā' al-Turāth al-Islāmī, 1971), 65–6; Jalāl al-Dīn al-Suyūṭī, *Manẓūmat 'Ilm al-Athar,* published with Maḥfūẓ ibn 'Abd Allāh al-Tirmisī's *Manhaj Dhawī al-Naẓar* (Beirut: Dār al-Fikr, 1981), 49–54; Ṣubḥī al-Ṣāliḥ, *'Ulūm al-Ḥadīth wa Muṣṭalaḥuh* (Beirut: Dār al-'Ilm li al-Malāyīn, 1988), 166–8; and Khaldūn al-Aḥdab, *Asbāb Ikhtilāf al-Muḥaddithīn* (Jeddah: al-Dār al-Sa'ūdiyyah, 1985), 203–70.

[33] This is, according to Ḥanafī *uṣūlī*s, on the grounds that the *takhṣīṣ* (specification of meaning) of the Qur'ānic verses and *al-sunnah al-mashhūrah* by means of *āḥād* is not allowed. Conversely, al-Shāfi'ī considered it acceptable. See Muḥammad ibn Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī,* 1: 364; Muḥammad ibn Idrīs al-Shāfi'ī, *al-Risālah,* ed., Aḥmad Muḥammad Shākir (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1940), 64.

[34] According to *muḥaddithūn* (traditionists), a *ḥadīth* is regarded as *ṣaḥīh* (sound) if it meets with four conditions, namely: (a) its *sanad* (chain of transmitters) is not disconnected from the beginning (the first transmitters, that is, a *Ṣaḥābī*) to the end; (b) all its transmitters are *thiqah* (trustworthy); (c) its *sanad* and *matn* (content) are not *shādhdh* (irregular, contradictory to the stronger evidence) and (d) its *sanad* and *matn* do not have any *'illah* (defect). The authenticity of *aḥādīth* varies from one to another, depending on how perfectly a *ḥadīth* fulfils the above prerequisites. See al-Ṭībī, *al-Khulāṣah fī Uṣūl al-Ḥadīth,* 35–8; 'Uthmān ibn 'Abd al-Raḥmān ibn al-Ṣalāḥ, *Muqaddimat Ibn al-Ṣalāḥ,* printed with the text of 'Abd al-Raḥīm ibn al-Ḥusayn al-'Irāqī, *al-Taqyīd wa al-Īḍāḥ: Sharḥ Muqaddimat Ibn al-Ṣalāḥ* (Beirut: Dār al-Fikr, 1981), 20–42.

that he reported, nor acts against its import, nor gives a *fatwā* (legal opinion) contrary to what he has reported. It must also be pointed out that in cases where there were several traditions concerning *ḥudūd* which were mutually in conflict, Abū Ḥanīfah preferred to follow the tradition which laid down a lighter punishment.[35] It was on these grounds that Abū Ḥanīfah rejected those traditions from the Prophet (peace be on him) which, in his opinion, did not meet these requirements.

In terms of the first requirement — that it should not be in conflict with a stronger evidence on the same subject — al-Sarakhsī explains that a *ḥadīth* which particularises a Qur'ānic verse should be considered to contradict that verse, and therefore cannot be regarded as authoritative.[36] This idea, he argues, is based on the following statement of the Prophet (peace be on him): "*Aḥādīth* will multiply among you after my death. Thus, if a *ḥadīth* is reported in my name, you must subject it to the Book of Allāh. Whichever report is compatible with the Book of Allāh, accept it and know that it is from me. Conversely, whatever report contradicts it, you must reject it and know that I am not responsible for it".[37] Another reason, according to him, is that the Qur'ān is definitive (*qaṭ'ī, mutayaqqan bih*), whether in terms of transmission or of content, whereas a solitary *ḥadīth* is only probable.[38] One example of a *ḥadīth* which Abū Ḥanīfah considered incompatible with the *ẓāhir* (clear) meaning of the Qur'ān is the one transmitted from Fāṭimah bint Qays. According to this tradition, Abū 'Amr divorced Fāṭimah three times. Khālid ibn al-Walīd went to the Prophet (peace be on him) to ask whether or not Ab ū 'Amr was obligated to provide her *nafaqah* (maintenance). The Prophet (peace be on him) reportedly said: "She does not receive *nafaqah* or *suknā* (dwelling)".[39] This solitary *ḥadīth* was rejected by Abū Ḥanīfah on grounds that it is opposed to the *ẓāhir* meaning of the Qur'ānic verse 65: 6: "House the (divorced) women where you live, according to your means".[40] On this point,

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[35] See al-Sarakhsī, *Uṣūl al-Sarakhsī,* 2: 3–7; al-Kawtharī, *Fiqh Ahl al-'Irāq,* 36–38; al-Jundī, *Abū Ḥanīfah: Baṭal al-Ḥurrīyah wa al-Tasāmuḥ fī 'l-Islām,* 140.

[36] Al-Sarakhsī, *Uṣūl al-Sarakhsī,* 1: 364.

[37] Ibid., 1: 365; al-Shāfi'ī, *al-Risālah*, 224; Ibn 'Abd al-Barr, *Jāmi' Bayān al-'Ilm wa Faḍlih* (Cairo: Idārat al-Ṭibā'ah al-Munīriyyah, n.d.), 1: 191.

[38] Ibid., 1: 365. See also 'Alā' al-Dīn 'Abd al-'Azīz ibn Aḥmad al-Bukhārī, *Kashf al-Asrār 'an Uṣūl Fakhr al-Islām al-Bazdawī,* ed., Muḥammad al-Mu'taṣim bi'llāh al-Baghdādī (Beirut: Dār al-Kitāb al-'Arabī, 1991), 3: 19–20; and Schacht, *The Origins,* 28.

[39] 'Abd al-Raḥmān ibn 'Amr al-Awzā'ī, *Sunan al-Awzā'ī,* compiled by Marwān Muḥammad al-Sha'ār (Beirut: Dār al-Nafā'is, 1993), 338. See also 'Abd Allāh ibn Muḥammad ibn Abī Shaybah, *al-Kitāb al-Muṣannaf fī al-Aḥādīth wa al-Āthār* (Beirut: Dār al-Tāj, 1989), 4: 137.

[40] See al-Sarakhsī, *Uṣūl al-Sarakhsī,* 1: 365.

Abū Ḥanīfah's opinion differed from Shāfi'ī's.[41] Shāfi'ī points out in his *Risālah* that this tradition is not contradictory to the Qur'ān because a solitary *ḥadīth* can particularize the *'āmm* meaning of a Qur'ānic verse, on the grounds that the '*umūm* (generality) of a Qur'ānic verse does not yield *al-yaqīn* (certainty), but only *al-ẓann* (probability), just as a solitary *ḥadīth* does, and that the *takhṣīṣ* (particularization) of a text by no means constitutes a contradiction between the particularized and the particularizing, but rather it explains which is not clear. Shāfi'ī gives several examples of the Qur'ānic verses which had been particularized by solitary *aḥādīth*.[42]

Abū Ḥanīfah's rejection of a *ḥadīth* which does not meet the essential criteria laid down for its acceptance can also be noted in the issue of sharing *ghanīmah* (booty) with fallen comrades. According to Abū Ḥanīfah, a Muslim who is killed in a war is not qualified for a share of the *ghanīmah* (booty).[43] In taking this position, Abū Ḥanīfah disregarded a *ḥadīth* related on the authority of al-Awzā'ī, that the Prophet (peace be on him) had granted a portion of the *ghanīmah* to a Muslim who was killed at Khaybar.[44] Abū Ḥanīfah's reason for rejecting this *ḥadīth* was that there existed a much more authentic *ḥadīth* narrated by al-Zuhrī in which he had stated that the Prophet (peace be on him) had refused to give a share of the *ghanīmah* to 'Ubaydah ibn al-Ḥārith, who was killed in Ṣafrā' during the battle of Badr.[45]

On the reliability of the transmitters of solitary *aḥādīth*, which constitutes the second requirement of acceptance, the Ḥanafī jurists point out that in order to be considered *thiqah* (reliable; trustworthy), the transmitters are required to have, in addition to their adherence to Islām and being possessed of *'aql* (intellect), the qualifications of '*adālah* (piety) and *ḍabṭ* (comprehension) are also required. What is meant by *'adālah* is consistency in religious observance, in particular by not committing any major sin (*kabīrah*) and by avoiding minor sins (*ṣaghā'ir*) as well as those acts that would cause him to lose his *murū'ah* (sense of honour).[46] *Ḍabṭ*, on the other hand, means someone's capacity of hearing, retaining in his mind and understanding a *riwāyah* (transmitted report).[47] Accordingly, Abū Ḥanīfah said: "No one should report

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[41] Schacht, *The Origins*, 29.

[42] See al-Shāfi'ī, *al-Risālah*, 64–79; 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, 3: 20; and al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, 2: 472–7.

[43] Abū Yūsuf Ya'qūb ibn Ibrāhīm al-Anṣārī, *al-Radd 'alā Siyar al-Awzā'ī*, ed., Abu'l-Wafā' al-Afghānī (Cairo: Iḥyā' al-Ma'ārif al-Nu'māniyyah, n.d.), 23.

[44] Al-Awzā'ī, *Sunan al-Awzā'ī*, 412.

[45] Abū Yūsuf, *al-Radd 'alā Siyar al-Awzā'ī* , 23–4.

[46] 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, 2: 743. See also al-Khaṭīb al-Baghdādī, *al-Kifāyah fī 'Ilm al-Riwāyah*, 102.

[47] 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, 2: 735–6.

a *ḥadīth* unless one has retained it in his memory from the time that he had heard it until the time that he reports it".[48] *'Adālah* and *ḍabṭ* are required of all *ḥadīth* transmitters on the ground that every report has the attribute of either *ṣidq* (accuracy) or of *kidb* (inaccuracy) and the accuracy, which is essential to any *ḥadīth* report, in part depends on these qualities being present in its transmitters.[49]

Concerning the possible contradiction between what a *rāwī* (transmitter of a tradition) has reported and his *fatāwā* (legal opinions) or his actions, in their respective works on *uṣūl* (legal theory) al-Sarakhsī and al-Bazdawī explain that there are four kinds of this type of contradiction. First, there is the case where the transmitter denies the *riwāyah* altogether. Some *fuqahā'* , like Abū Ḥanīfah and Abū Yūsuf, pointed out, on the one hand, that should this be the case, his *ḥadīth* report cannot be considered authoritative. On the other hand, Shāfi'ī and Muḥammad ibn al-Ḥasan al-Shaybānī still considered it to be an authoritative legal source.[50] An example of such a report is the *ḥadīth* transmitted by Sulaymān ibn Mūsā on the authority of Muḥammad ibn Muslim Ibn Shihāb al-Zuhrī (d. 124/742), who received it from 'Urwah, who heard it from 'Ā'ishah, that the Prophet (peace be on him) said: "Whichever woman is married without permission from her *walī* (relative), her marriage is, invalid".[51] It is recorded that when 'Abd al-Malik b. 'Abd al-'Azīz Ibn Jurayj (d. 150/767) asked Zuhrī about the *ḥadīth*, the latter did not recognize it. Abū Ḥanīfah and Abū Yūsuf, therefore, did not take this *ḥadith* into account. They chose another *ḥadīth* instead, one that validates the marriage of a woman without the permission of her *walī*. The *ḥadīth* says: "A widow is more entitled to herself than her *walī;* and a virgin's permission ought to sought, and her silence amounts to her permission".[52]

A second kind of contradiction consists in the transmitter's acting or giving a *fatwā* in opposition to the *ḥadīth* that he transmitted. In cases where his action or *fatwā* is recorded as having taken place before he received the *ḥadīth* concerned, or if there is any doubt as to the sequence of events, then the

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[48] Taqī al-Dīn ibn 'Abd al-Qādir, *al-Ṭabaqāt al-Saniyyah,* 1: 112.

[49] 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, 2: 728.

[50] See Al-Sarakhsī, *Uṣūl al-Sarakhsī,* 2: 3; and 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār,* 3: 124–5.

[51] See Abū Dāwūd Sulaymān ibn al-Ash'ath, *Sunan Abī Dāwūd,* ed., Muḥammad Muḥy al-Dīn 'Abd al-Majīd (Beirut: al-Maktaba al-'Aṣrīya, n.d.), 2: 229; and Aḥmad ibn Ḥanbal, *Musnad Aḥmad ibn Ḥanbal* (Beirut: Dār al-Fikr, n.d.), 6: 66.

[52] See 'Abd al-'Azīz al-Bukharī, *Kashf al-Asrār,* 3: 129–31; Muslim ibn al-Ḥajjāj al-Nīsābūrī, *Ṣaḥīḥ Muslim,* Kitāb al-Nikāḥ, Bāb Isti'dhān al-Thayyib fī al-Nikāḥ bi al-Nuṭq wa al-Bikr bi al-Sukūt; Abū Dāwūd Sulayman ibn al-Ash'ath, *Sunan Abī Dāwūd,* Kitāb al-Nikāḥ Bāb fī al-Thayyib; Abū 'Īsā Muḥammad ibn 'Īsā al-Tirmidhī, *Sunan al-Tirmidhī*, Abwāb al-Nikāḥ 'an Rasūl Allāh, Bāb Mā jā' fī Isti'mār al-Bikr wa al-Thayyib; and al-Khawārizmī, *Jāmi' al-Masānīd,* 2: 119.

ḥadīth is considered to be authoritative. But if the *fatwā* or action took place later, then the *ḥadīth* that he has reported is not accepted as a legal source. This is because the transmitter's ruling or action in contradiction to his own report indicates either that he is not reliable (*thiqah*), or that the *ḥadīth* was presumably abrogated (*mansūkh*) by some other *ḥadīth*. An example of such an abrogated *ḥadīth* is the report on the authority of Ibn 'Umar that the Prophet (peace be on him) would raise his hands before performing *rukū'* (bowing) and while getting up from *rukū'*. It is, however, recorded that Mujāhid said that in the course of the several years that he was associated with Ibn 'Umar, he never saw the latter raise his hands in prayer even once except in *takhīr* at the beginning of the prayer.[53]

The third kind occurs when the transmitter specifies a part of the possible meanings (*muḥtamalāt*) of the *ḥadīth* he reported. For example, Ibn 'Umar narrated that the Prophet (peace be on him) said: "The seller and buyer have the right to rescind a transaction as long as they have not separated". This *ḥadīth* has two possible meanings: (a) physical separation as Ibn 'Umar understood it; and (b) separation of their statements of offer and acceptance; that is offer from one party and acceptance from the other. Although Ibn 'Umar's understanding of the *ḥadīth* is not in itself authoritative, the *ḥadīth* is still regarded as sound. It is quite possible that Abū Ḥanīfah understood the *ḥadīth* as having the second meaning, so that when Yaḥyā ibn Ādam gave it the first meaning, Abū Ḥanīfah rejected his explanation. In other words, both recognized the authenticity of the *ḥadīth*, but they understood it differently.[54] On this point, one can say that Abū Ḥanīfah, in some cases, did not interpret the *ḥadīth* concerned in its literal sense, but went beyond it in order to make sense of it.[55] Finally, a fourth contradiction takes place when a transmitter refuses to act in accordance with the *ḥadīth* that he reported. Such a *ḥadīth*, therefore, cannot have a binding effect.[56]

Abū Ḥanīfah's strict criteria for the authenticity of solitary *aḥādīth*, as mentioned above, led to the rejection of many reports that are considered sound by Abū Ḥanīfah's contemporaries, such as the Syrian *muḥaddith* al-Awzā'ī, and the 'Irāqī scholar, Ibn Abī Laylā (d. 148/765), and a majority of the Madinese lawyers. While the differences between Abū Ḥanīfah's legal rulings and those of al-Awzā'ī and Ibn Abī Laylā were compiled by Abū Yūsuf in his books *al-Radd 'alā Siyar al-Awzā'ī* and *Ikhtilāf Abī Ḥanīfah wa Ibn Abī Laylā* respectively, the differences between Abū Ḥanīfah and the Medinese

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[53] Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 2: 5–6; and 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, 3: 132–4.
[54] Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 2: 6–7; and 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, 3: 135–37.
[55] Goldziher, *The Ẓāhirīs*, 18.
[56] Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 2: 6–7; and 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, 3: 135–137.

lawyers regarding legal matters were collected in al-Shaybānī's work *Kitāb al-Ḥujjah 'alā Ahl al-Madīnah.* It is quite likely that the criticism of Abū Ḥanīfah by his contemporaries stemmed, at least in part, from the differing views regarding the position of solitary *aḥādīth.* In our own opinion, the reason for Abū Ḥanīfah's rejection of many solitary *aḥādīth* was that he accorded greater importance to the stronger evidences of the Law such as the Qur'ān and the more authentic *aḥādīth.* What remains to be seen is whether or not Abū Ḥanīfah gave priority to *qiyās* over a solitary *ḥadīth*, when the two contradicted one another on a given point.

Solitary Traditions versus *Qiyās*

The issue of contradiction between a solitary *ḥadīth* and *qiyās* has also been discussed by many jurists of the Sunnī schools of law. Different opinions on this point can be identified from the following accounts. Al-Ṭūfī (d. 716/1316), a Ḥanbalī jurist, in his *Sharḥ Mukhtaṣar al-Rawḍah,* and Abū Isḥāq Ibrāhīm ibn 'Alī al-Shīrāzī (d. 476/1083), a Shāfi'ī jurist, in his *al-Wuṣūl ilā Masā'il al-Uṣūl,* points out that a solitary *ḥadīth* which has a sound *sanad* (chain of transmission) must be preferred to *qiyās.* This view, they argue, is based on a *ḥadīth* on the authority of Mu'ādh ibn Jabal, in which the sequence of Islamic legal sources is mentioned. In this ḥadīth *ijtihād* (which, includes *qiyās*) was listed below the *sunnah.* Other reasons for giving priority to *ḥadīth* over *qiyās* include the consensus of the Companions, and the consideration that *ḥadīth* represents the speech of a sinless person (*al-ma'ṣūm*), i.e., the Prophet.[57] On the contrary, Mālik ibn Anas and his followers preferred *qiyās* to a solitary *ḥadīth* whenever these contradicted one another. This is not only because of the authoritativeness of *qiyās* as a legal source, but also because the *ittiṣāl al-sanad* (the uninterruptedness of the chain of transmitters) of the *ḥadīth* is not beyond doubt, given the probability that at least one transmitter of the *ḥadīth* may either have lied or made a mistake in reporting. [58]

Unlike the above scholars, the Ḥanafī jurists, such as Abū'l-Ḥasan 'Alī ibn Muḥammad al-Bazdawī (d. 482/1089) and al-Sarakhsī, have pointed out that whether or not a solitary *ḥadīth* is to be given priority over *qiyās* depends on the quality of the *ḥadīth* transmitters (*rāwīs*). These transmitters, according to them, are divided into two categories: the first, *al-ma'rūfūn,* who are comprised of *rāwīs* known not only for being *thiqah* (reliable, i.e., on account

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[57] Sulaymān ibn 'Abd al-Qawī al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah,* ed., 'Abd Allāh ibn 'Abd al-Muḥsin al-Turkī (Beirut: Mu'assasat al-Risālah, 1988), 2: 239–40; and al-Shīrāzī, *al-Wuṣūl,* 2: 103–4.

[58] Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār,* 2: 699–700.

of their *'adālah* and *ḍabṭ*), but also for their *fiqh* (the capacity to understand the subject-matter of the *ḥadīth*); and the second, of the *rāwīs* who are recognized to have only the *'adālah* and *ḍabṭ,* but who lack *fiqh.* As for *al-majhūlūn,* they are the *rāwīs* who are unknown apart from the one or two *aḥādīth* that they might have reported. Some of the *majhūlūn* are regarded as trustworthy, and some as untrustworthy, while some are debatable in terms of their trustworthiness.[59]

There is no disagreement among the Ḥanafī jurists that the *aḥādīth* reported by the *ma'rūfūn,* who are well-known for their *fiqh,* such as the rightly guided caliphs — Abū Bakr, 'Umar ibn al-Khaṭṭāb, 'Uthmān ibn 'Affān and 'Alī ibn Abī Ṭālib — must be given preference over *qiyās.* The reasons articulated for this are the same as those offered by the Ḥanbalī and Shāfi'ī jurists, as mentioned earlier.[60] The Ḥanafī jurists, however, do not agree in regard to the *aḥādīth* reported by the *ma'rūfūn* who, notwithstanding their piety, are not renowned for their comprehension of legal problems like Abū Hurayrah and Anas ibn Mālik. According to 'Īsā ibn Abbān (d. 221/836), a Ḥanafī jurist, understanding (*fiqh*) of *ḥadīth* materials, in addition to *'adālah* and *ḍabṭ,* is required of the *rāwīs* before giving preference to the *aḥādīth* they reported over *qiyās.* This is due to the fact that there were many *rāwīs* who were able to convey only the meaning of a statement, and were unable to report it verbatim. It is obvious that in so doing the *rawīs'* capability of understanding counted for a lot. Conversely, for Abu'l-Ḥasan al-Karkhī (d. 340/952), the capacity for understanding the contents of *aḥādith* is not required on grounds that, in spite of *riwāyah bi al-ma'nā,* the alterations made by the *rāwīs* who were trustworthy would not have affected the meaning of the *ḥadīth* in any way.[61] On this point, al-Bazdawī and al-Sarakhsī seemed to combine the two opinions, saying:

> If the [solitary] *ḥadīth* reported by the *ma'rūf* who lacked the capacity of understanding (*al-fiqh*), supports the *qiyās*, the *ḥadīth* must be accepted. And if the *ḥadīth* contradicts it, it should still be preferred except in the event of *ḍarūrah,* i.e., where there are no grounds for sound reasoning to support the *ḥadīth*.[62]

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[59] See 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār,* 2: 697; and al-Sarakhsī, *Uṣūl al-Sarakhsī,* 1: 338.
[60] See 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār,* 2: 698–700; and al-Sarakhsī, *Uṣūl al-Sarakhsī,* 1: 339.
[61] See 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār,* 2: 707.
[62] 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, 2: 702. Cf. al-Sarakhsī, *Uṣūl al-Sarakhsī,* 1: 340–2.

Giving priority to the solitary *ḥadīth* over *qiyās* was actually the practice of the earlier jurists, such as Abū Ḥanīfah, Abū Yūsuf and Muḥammad ibn al-Ḥasan al-Shaybānī.[63] There are many examples of Abū Ḥanīfah's application of the above doctrine. He employed the solitary *aḥādīth* reported by Abū Hurayrah and Anas ibn Mālik in giving several legal rulings. One of these concerns the validity of fasting for someone who eats or drinks out of *nisyān* (forgetfulness). On this point, the implications of, *ḥadīth* and *qiyās,* seem to contradict one another. On grounds of *qiyās*, it can be argued that since any *'ibādah* (obedience to God) without the completion of its *rukn* (basic element) is invalid, this would also apply to anyone who eats out of forgetfulness while one is fasting.[64] On the other hand, the following statement of the Prophet (peace be on him) has been reported by Abū Hurayrah: "Whoever forgets, while fasting, and eats or drinks, he should complete his fasting. Indeed, [when he ate or drank out of forgetfulness] it is God who provided food or drink to him".[65] This led Abū Ḥanīfah to accept the validity of a fast which was apparently interrupted by forgetfulness.[66] In connection with this issue, Abū Ḥanīfah said: "If there were no such *ḥadīth,* I would have decided on the basis of *qiyās*".[67] It would be evident from this that although the *ḥadīth* that was reported by a non-*faqīh rāwī* contradicted the ruling arrived at by recourse to *qiyās,* the former was still preferable.

However, according to Bazdawī and Sarakhsī, the solitary *ḥadīth* reported by a non-*faqīh ma'rūf rāwī* would be given priority over *qiyās* only in case there is a measure of sound reasoning which backs up the *ḥadīth,* namely that there is another kind of *qiyās* which is in accordance with the *ḥadīth*.[68] But if there occurs what has been termed as *insidād bāb al-ra'y* that is, when the content cannot be sustained at all by human reason, then the decision reached by recourse to *qiyās* will be preferred. An example in this regard is afforded by the case of *al-taṣriyah* (leaving off milking an animal) mentioned in a *ḥadīth* that was transmitted by Abū Hurayrah. It tells us that the Prophet (peace be

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[63] See 'Abd al-'Azīz al-Bukharī, *Kashf al-Asrār,* 2: 704 and 708; al-Sarakhsī, *Uṣūl al-Sarakhsī,* 1: 342.

[64] See Abū Yūsuf, *Ikhtilāf Abī Ḥanīfah,* 135; Muḥammad ibn al-Ḥasan al-Shaybānī, *Kitāb al-Ḥujja 'alā Ahl al-Madīnah,* ed., Mahdī Ḥasan al-Kaylānī (Haydārabād: Maṭba'at al-Ma'ārif al-Sharqiyyah, 1965), 1: 391.

[65] Muslim ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, Kitāb al-Ṣiyām, Bāb Akl al-Nāsī wa Shurbuh.

[66] See also al-Shaybānī, *Kitāb al-Ḥujjah 'alā Ahl al- Madīnah,* 1: 393–95. Al-Shaybānī also mentions other Companions, namely 'Alī ibn Abī Ṭālib and 'Alqamah ibn Qays, as the narrators of this *ḥadīth.*

[67] See al-Shaybānī, *Kitāb al-Ḥujjah 'alā Ahl al-Madīnah,* 1: 392; and 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār,* 2: 708.

[68] See 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār,* 2: 702.

on him) said: "Avoid *al-taṣriyah* (leaving off milking) with respect to a camel or a sheep (in order that milk remains in their udders). Whoever buys such an animal after *al-taṣriyah* has the right to rescind the transaction after milking them. If he is satisfied, he keeps them; and if not, he may return them (to the owner), and make up for the milk with one *ṣā'* (a cubic measure) of dates".[69] This *ḥadīth*, which allows the option to rescind a transaction and guarantees that the seller would receive in lieu of the milk that has been consumed by the buyer by returning to the seller one *ṣā'* of dates. According to Bazdawī and Sarakhsī, however, this *ḥadīth* is not authentic because it contradicts a sound *qiyās* that is derived from the Qur'ān (2: 194),[70] other *aḥādīth*, and an *ijmā'*, which order Muslims to guarantee things for an equal value; in this case one *ṣā'* of dates being insufficient.[71] On this point, Abū Ḥanīfah and his prominent pupils, Abū Yūsuf and Shaybānī, had a difference of opinion. The latter considered the above *ḥadīth* to be authentic, as can be seen from their employment of it when dealing with the problem of *khiyār.*[72]

Concerning the solitary *aḥādīth* reported by the Companions who were not well-known, such as Fāṭimah bint Qays, Wābiṣah ibn Ma'bad, Salmah ibn al-Muḥbiq and Ma'qal ibn Sinān, the Ḥanafī jurists are agreed that these are not accepted if they contradict sound *qiyās*, because their *ittiṣāl* (uninterrupted transmission) from the Prophet (peace be on him) is highly suspect. Examples abound of the rejection, by Ḥanafī jurists, of traditions in favour of sound *qiyās* by other Companions and their Successors. An example in this regard is the *ḥadīth* transmitted by Fāṭimah bint Qays (the complete report has been quoted above in the discussion of Abū Ḥanīfah's attitude towards solitary *ḥadīth*), telling that the Prophet (peace be on him) had decided that she, who was divorced three times by her husband, was not entitled to *nafaqah* (maintenance). Her report was, however, rejected by 'Umar ibn al-Kha ṭṭāb, who considered it to be opposed to, what might be termed as a sound *qiyās* derived from the Qur'ān (65: 1 and 6). Accordingly, he said: "We do not abandon the Book of God and the *sunnah* of the Prophet (peace be on him) so

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[69] Muḥammad ibn Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Kitāb al-Buyū', Bāb al-Nahy li al-Bā'i' an lā yaḥfal al-Ibil wa al-Baqar wa al-Ghanam ...; Muslim ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, Kitab al-Buyū', Bāb Ḥukm Bay' al-Muṣarrāh; Abū Dāwūd Sulaymān ibn al-Ash'ath, *Sunan Abī Dāwūd*, Kitāb al-Buyū', Bāb Man Ishtarā Muṣarrātan fa Karihahā.

[70] The verse says: "... So if you are oppressed, oppress those who oppress you to the same degree..."

[71] 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, 2: 704–5.

[72] See Abū Yūsuf, *Ikhtilāf Abī Ḥanīfah*, 16; and al-Khawārizmī, *Jāmi' al-Masānīd*, 2: 25.

as to report a woman about whom we do not know whether she is truthful or a liar, and whether she remembers or forgets [what she hears or sees]". [73]

Conclusion

The evidence available to us leads us to conclude that the impression about Abū Ḥanīfah paid scant attention to solitary *aḥādīth*, let alone *aḥādīth* as such, is not correct. The fact is that he employed only those *aḥādīth* which he considered to be in agreement with the stronger evidence of the Qur' ān and the other better authenticated *aḥādīth.* In other words, Abū Ḥanīfah's rejection of many solitary *aḥādīth* was on grounds that they did not meet the criteria for the acceptance of *aḥādīth* which he considered necessary in assessing their authenticity. Abū Ḥanīfah preferred those solitary *aḥādīth* which ware reported by *rāwīs* known to have the religions and moral qualities expressed by the term '*adālah* and the intellectual capacity called *ḍabṭ* to the decisions arrived at by recourse to *qiyās.* Another important point is that there was considerable disagreement among the jurists of the early centuries of Islam, even among the jurists of the same *madhhab,* as regards the ways of assessing the authenticity of *aḥādīth* as a source of legal doctrines.

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[73] See 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār,* 2: 706–24; and al-Sarakhsī, *Uṣūl al-Sarakhsī,* 1: 342–45.