

## LEGISLATION AND THE CALIPH

The Caliph was not the source of law as in the case with absolutist states where all authority vests in the ruler; he was only the executor of the Divine Law. The sources of Law during the Pious Caliphate were three: 1. the Quran, the last revealed book of God; 2. the Traditions of the Holy Prophet Muhammad; and 3. the Ijma (Consensus of the Companions of the Holy Prophet). The Quran was regarded as the chief and primary source of law, and no authority could either amend or abrogate those fundamental laws which were to be found in the Quran. For the explanation and elaboration of the Quranic Commandments, help had to be taken from the Hadit, i.e., the actions, precepts and sayings of the Holy Prophet Muhammad, which constituted a commentary on the Quranic principles. Thus the Traditions of the Holy Prophet were regarded as the second source of Islamic Law. The third source of Islamic Law was the Ijma, or the consensus of the Companions of the Holy Prophet. We can conclude, therefore, that in an Islamic State sovereignty belongs to God in the sense that all its laws are to be derived from the fundamental Quranic principles and the traditions of the Holy Prophet by those well versed in these sources.

During the Pious Caliphate, the Caliphs, being the closest Companions of the Holy Prophet to whom the Quran was revealed, knew the Quran and its interpretation and the traditions of their Prophet better than anybody else and were consequently entrusted with the framing of laws.

During this period, a body of experts in the Shariat Law (Divine Law) existed. Whenever the Caliph felt the necessity of legislation on any difficult problem, he would convene a meeting of this Council and after due deliberations the new legislation would be enacted. The Caliph-in-Council would have recourse to all the above mentioned sources of Law and then would come to some definite decision. In ordinary matters of legislation, decisions of this Council were considered sufficient. But for deciding matters of unusual national importance, a general assembly of the Refugees (Muhajirin) and Helpers (Ansar) was convened.

Since the hands of the legislators were bound by the fundamentals of the Divine Law, they could not place themselves above the law; neither could they pass such laws as to favour any particular

class of people, or to evade their application in order to suit their own interests. Hence there was perfect equality before the law and in matters of taxation and civic rights during this period. It also resulted in the fraternity of the believers, liberty of conscience, social justice and above all toleration towards members of other faiths.

### **Caliph and Judiciary**

Before we could deal with the judiciary in Islam, it would be desirable to know the conception of crimes in an Islamic State. According to the Islamic conception, all crimes are divided into three categories:

(1) Crimes against God demanding al-Hadd (Divine punishment), e.g., adultery (by a married person), punishable with being stoned to death; fornication (by an unmarried person), punishable with one hundred stripes; false accusation (of a married person) of adultery, punishable with eighty stripes; apostasy, punishable with death; drinking wine, punishable with eighty lashes; theft, punishable with the amputation of the right hand; and highway robbery, punishable with the loss of hands and feet, and comes under al-Hadd. The Caliph or the judge could not pardon offenses coming under al-Hadd, as they are crimes against God which can be pardoned by Him alone. Repentance by a Muslim may be accepted by God, but the Muslim ruler had to carry out the Hadd. In the case of a non-Muslim, a crime demanding al-Hadd can be pardoned if he becomes a Muslim; for it is an accepted principle among the Muslims that conversion to Islam absolves an individual of all his pre-conversion sins.

(2) Crimes against man demanding, al-qisas (retribution). Most of the crimes against man, such as murder, injury, insult, etc., could be settled by agreement among the parties. A murder, for instance, was not viewed as an offense against the State. It was considered to be a crime against the heirs of the victim. If a murderer were found guilty, it was open to the aggrieved party to get him executed, to have him released, to exact blood money from him, or to pardon him unconditionally. The Caliph could not pardon an offender against man.

(3) Certain crimes like rebellion and embezzlement of public money were considered crimes against the State. Such crimes could be forgiven by the Head of the State.

According to Muslim notions, the Caliph had a two-fold judicial function, the positive and the negative. His positive work related to the establishment of peace in his kingdom, development of concord among the various sections of the people and the protection of the weak against the strong. His negative business concerned punishment of evildoers and the restitution of the rights of the injured. Fearless judgement was a point of honour among the Arabs and in several verses the Quran enjoins upon Muslims decision with justice and upright testimony.

The chief feature of the judiciary in Islam has been its separation from the Executive. Up to the time of Hazrat Abu Bakr, the Caliph himself and his administrative officers also acted as judges. It was necessary in the beginning that, until a government gets well established and its administrative machinery becomes sufficiently developed, every department stands in need of the support of government prestige and power. Under such conditions, therefore, a man who possesses no authority beyond the right of deciding suits cannot carry out even his judicial functions efficiently. It was out of this consideration that Hazrat Umar wrote to Abu Musa Ash'ari that no person who did not command public respect could be appointed as a judge. But as soon as administration became well established, the Caliph Umar completely separated the judiciary from other departments, established courts of justice, appointed judges and laid down rules regarding judicial procedure.

In order to maintain justice, the Caliph appointed judges in consultation with the members of his Advisory Council throughout the State.

### **Qualifications of the Judges**

No person could be appointed a judge unless he was found to be well-versed in Divine Law (Shari'ah), i.e., he possessed sound knowledge of Quranic principles, Traditions of the Prophet and the precedents of his Companions. He had to be an adult male in full possession of his mental faculties, a free citizen, Muslim by faith, irreproachable in character, and sound of sight and hearing. So much care and insight were exercised in the selection of judges that the persons selected for the posts were always men of distinction throughout Arabia. Sometimes the candidates were put to a very hard test by

the Caliph himself and if they passed successfully, then they were appointed. High salaries were paid to these judges so that they might not fall into temptations. For instance, Salaman Rabiah and Qadi Shurayh were each paid five hundred dirhams a month, which was quite sufficient in those days. After receiving these high salaries, however, the judges were not permitted to engage in trade or buy and sell in the markets, a rule which was adopted in non-Muslim countries much later, after ages of experience.

### **Duties of the Judges**

The duties of the judges were: settlement of disputes, restoration of rights, administration of endowments, execution of wills, encouragement and arrangement of the marriage of widows, execution of the prescribed punishments, removal of public encroachments, control over subordinates, and protection of the weak against the strong. The duties of the judges required them to decide in accordance with the Quranic law and to enforce the Divine law.

When the Islamic territory expanded by leaps and bounds and new Muslim colonies sprang up throughout the length and breadth of the vast Islamic Empire, a network of judicial courts had to be established to decide disputes between the Muslims according to the Law of Islam. The central government also superintended the work of local and provincial authorities and sometimes revised their decisions. Revision seems to have developed into an organized and systematic institution during the time of the Caliph Umar who, profiting by the annual gathering of the Hajj season, allowed everybody to complain about any and every authority. He promptly and summarily dealt with the cases after hearing the accused. This made the most powerful governors tremble and act with a sense of responsibility and caution. The higher a man's position, the stricter and severer was Umar's scrutiny of his conduct.

### **Umar's Instructions to His Judges**

On the appointment of Qadi Shurayh, one of the most just and efficient judges of the time, Hazrat Umar is said to have issued him the following instructions: "If thou knowest nothing on the subject to be in the whole of the Book of God, then decide according to

what thou findest in the precedent decisions of the Prophet of God. If thou knowest nothing on the subject in the decisions of the Prophet, then decide according to what thou findest in the decision of the rightly guided Caliphs. If thou knowest nothing on the subject in the whole corpus of the decisions of the rightly guided Caliphs, then exercise thy personal opinion and consult men of learning and piety.”

### **The Institutions of Jurisconsults (Ifta)**

In order to help the Judges and also the public, who needed clarification on some point of Islamic Law, Hazrat Umar systematized the Institution of Jurisconsults (Ifta). He authorized only a few famous, capable and trustworthy scholars to give legal opinion on application without charging any fee. Hazrat Umar was so careful in these matters that occasionally he examined even those who had been appointed for the work. The names of these scholars used to be announced in public assemblies in order that everybody should know of their appointment.

This important institution justified the State in assuming that every citizen knew the law, for it gave a free opportunity to every person to know such legal details which he or she did not already know. Sometimes even judges who were not quite sure on certain legal points referred the case to a Mufti (Jurisconsult), and obtained clarification from him.

With regard to the procedure which should be followed by a Qadi, Hazrat Umar issued the following instructions to Abu Musa Al-Ash'ari when the latter was appointed judge in Basrah. The document may be summarized as follows:

(a) Administration of justice is a Divine ordinance and a practice of the Holy Prophet, which ought to be followed.

(b) If a suit is filed before you, decide it after careful consideration and execute it, for even the most rightful judgment without execution is useless.

(c) Both the parties should be treated equally so that the poor might not despair of justice and the tyrant might not long for partiality.

(d) The burden of proof lies upon the claimant, and the defendant can deny the claim on oath.

(e) The parties may compromise out of the court, but the conditions of their compromise should not be in contravention of religious commands or prohibitions.

(f) Review of judgment is not disallowed in clear cases, since a revocation is always better than persistence in injustice.

(g) In the absence of law and precedent on some question, deduction should be made with analogy to similar cases, and after due consideration of everything, a judgment which is nearer to right and dearer to God should be pronounced.

(h) A claimant must be given the time to produce evidence. If he is thereafter unable to prove his case, his claim may be dismissed.

(i) The evidence of every Muslim is admissible except of the one who has received corporeal punishment for immorality or is notorious for false evidence. Again, one cannot give evidence in favour of one's own kin and relatives.

(j) The judge must not behave in a haughty manner nor evince displeasure at the utterance of truth.

It was Qadi Shurayh who ordered for the first time that witnesses should appear separately. Prior to that all the witnesses remained in the court room and heard one another. When Shurayh was criticized on this order, he calmly remarked: "When ye have introduced innovations, we too have brought innovations."

The system of examination-in-chief followed by cross examination in such a way that one witness might not hear the account given by another was first adopted by Hazrat Ali. Evidence must be corroborated. The general rule was that there should be at least two male witnesses or one man and two women. Strict rules were elaborated to check judicial vagaries, regulate the proceedings of the court and ensure the veracity of witnesses.

### **Quick Disposal of Cases**

Despatch in judicial work was a conspicuous and prominent feature of Muslim administration. This was rendered possible by the nature of the system itself.

The Muslims laid greater stress on the prevention of crimes than on punishing the culprits after the offenses had been committed. The system was more preventive than retributive. The Muhtasib (Censor

of public monarchs) and his officials exerted themselves to prevent crimes against God and the Sahib al-Shurtah (Police Officer) and his subordinates to prevent offenses against the State and the private individual. Secondly, the judges tried to effect compromise between the contending parties through the appointment of an Arbitrator who was to possess all the qualities of a Qadi (Judge). Thirdly, the great bulk of the petty civil and criminal work was disposed off first by the village organizations and local guilds, and whatever passed beyond them, by the district officers. Consequently the quantity of litigation which went up to the provincial or central courts was incredibly small. These were the causes which helped expedition of justice. Then, the filing of suits and the procedure of the courts were not over-burdened at every step with a multiplicity of formalities to be fulfilled before the suits could come up for trials. Neither was there the ingenious lawyer to delay the process indefinitely by a display of his debating faculty.

The concept that "The king can do no wrong" does not hold good in an Islamic State, as Islam does not consider any person absolutely infallible. The Holy Prophet set up a lofty example when he invited civil and tort cases against his own self. The Caliph Umar had appointed full-time judges, not only in provinces but even in the capital, al-Madinah. Consequently, even the Caliph had to appear in the court if somebody chose to lay claim or complaint against him. Since the law applied by the judges was divine in origin, the judges' court was considered a religious institution, and the divine law was applied to all irrespective of status, race, sex and nationality. Nobody, not even the highest in the state, could secure or demand any preferential treatment.

In fact the Caliphs themselves would not tolerate any such preferential treatment at all shown by any Qadi, even if it was done inadvertently. Once Hazrat Umar had a dispute with Ubayy ibn Ka'b who lodged a suit against the Caliph in the court of Zayd bin Thabit. Hazrat Umar appeared as a defendant and the Qadi stood up out of respect for him. Thereupon Hazrat Umar remarked: "This is the first act of injustice which you have committed in this case. I did not appear as Commander of the Faithful but as an ordinary defendant." Hazrat Umar then sat down along side of Ubayy. According to usage, the plaintiff directed that Umar should take an oath. In view of the defendant's position as the Commander of the Faithful, the Qadi

requested the plaintiff to waive his right of oath. Hazrat Umar was annoyed at this partiality and addressing the Qadi said: "If Umar and other people are not equal in your eyes, you are not fit for the post of a judge." It is these precedents established during the period of *Khilafat-i Rashida* that independence of judiciary was established on a sound basis. There are recorded cases in history of this kind not only regarding Hazrat Umar and Hazrat Ali but even relating to Umayyad and Abbasid Caliphs.

### **Justice and Non-Muslims**

Since Islam respects the religious law of other religious communities, the protected subjects could not be brought under the jurisdiction of the Islamic Law (Shariah), unless they themselves so desired. But once they brought the case to a Qadi's court, they could not take it back to their own. However, when disputes among non-Muslims took a turn which was likely to affect law and order, the government could interfere. Legal relations between themselves were therefore governed by the laws of their own faith. In cases of inheritance, marriage, divorce and the like, the Muslims followed their law and the non-Muslims their own law.

Whenever a dispute arose between a Muslim and a non-Muslim, the case was decided by the Qadi and the principle adopted was: "The non-Muslim is just like a Muslim in matters concerning this world." In the punishment of crimes there was no difference between a Muslim and a non-Muslim. If a non-Muslim were killed by a Muslim, the latter was liable to the same penalty as in the reverse case. The golden rule adopted by Islam in this respect was: "The blood of a protected subject is like the blood of a Muslim."