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BY

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IN TWENTY-SEVEN VOLUMES

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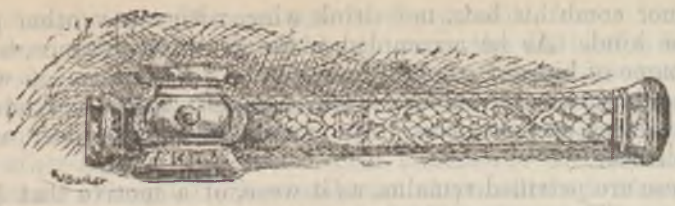

CHAPTER XII

THE PRINCIPLES OF LAW IN ISLAM

WRITTEN SPECIALLY FOR THE PRESENT WORK

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IN studying the lines along which Islam has developed we are confronted with a singular antithesis within the faith itself. It is the outcome of a revolutionary movement which arose to declare war against the past of the Arab nation and of all other nations which it subdued by the ruthless sword of Islam. Yet it had scarcely taken the first step in its career, before investing with little short of sacramental importance an idea so wholly alien to the spirit of subversion and revolution that it seems to us rather a palladium of the most rigid conservatism. This is the idea of the sunna.

Sunna means traditional usage, or custom hallowed by ancestral use, by practice transmitted through past generations. He who violates this custom trespasses against the Holy of holies, against something far above any article of a legal code drawn up with all the mature consideration and cool deliberation of the judicial mind; he had sinned against the pious reverence due to the days of old. This is the view which underlies the sanctity of the sunna. Translated into legal phraseology sunna might accordingly be denominated right by custom, but a better idea of its meaning may be gained by comparing it with the *mores majorum* or *usus longævus* of the Romans. For the determining factor in it is not its established character but the high esteem in which it has been held from remote antiquity.

All this (to return to the proposition from which we started) is little in accord with a system which originated with a prophet of revolution who could not say, as Jesus said of himself, that he was "not come to destroy but to fulfil — at least, not as far as the traditional institutions of the Arabs were concerned. Mohammed does, indeed, represent himself as restoring what has been lost, as bringing back the golden age of religion to mankind, the rule of the *din Ibrahim* (the religion of Abraham) which had been lost by corruption and wickedness, and obscured by gross heathenism on its own native soil (for according to Mohammed the Kaaba at Mecca is the temple of Abraham and Ishmael). But it is not this pretension which will enable us to grasp the significance of the idea of the sunna in Islam.

Amazing as it may sound, and accustomed as we are to associate the idea of the sunna with the sheikhs who keep jealous watch over the holy places of Islam, sunna is not primarily an Islamite word, nor is the idea it expresses peculiar to Islam. It is deeply rooted in the ethical sentiment of the very heathenism which the prophet arose to overthrow. Sunna is an idea which Islam adopted from Arab heathenism, and which, in the change of meaning it underwent in this new sphere, became one of the main pillars of the new system.

The conception involved in the sunna, as defined at the beginning of this essay, represents the heathen Arab's ideal of life and the primitive idea of laws and morals in tribal life. In this respect there was no difference between the two classes which went to make up the sum total of the Arab world, between the Bedouins and the dwellers in towns. The *mores majorum* were their law and their religion. The customs of their forefathers were their dogmas; the practices that had come down to them from the remote past were their sacraments. To infringe these was criminal sacrilege. If the cult of tribal fellowship and regard for the duties arising out of this association constitute the sum total of morality, how much more imperatively did the principle apply to the maintenance of a supersensual fellowship with the generations of the past.

Hence, in the persecution with which the world of Arab heathenism received his preaching, Mohammed was not confronted by opponents who defended the old state of things by arguments based on religion, or wielded the weapons of serious controversy to refute his doctrines. The heathen Arabs had but one argument against the message proclaimed to them by the visionary of Mecca — it was an innovation. He represents his heathen fellow-countrymen as putting forward this argument against himself in exactly the same manner as he represents the heathen nations of old as hurling it at their prophets. "If one saith to them, 'Obey the laws which Allah sends you,' then they say, 'We follow the customs of our fathers.' If one saith to them, 'Come and adopt the religion which Allah hath revealed to his ambassador,' they answer, 'We are satisfied with the religion of our fathers.' When the evil-doers commit an evil deed they say, 'Thus we saw it done by our fathers, it is Allah who commands such things.' But they say, 'We found that our fathers were on this road and we tread in their steps.' Speak and say — do I not proclaim to you a better thing than that whereat ye found your fathers?"

This plea, which constitutes, so to speak, the methodology of the struggle of the heathen against the prophet, is, as it were, a constant element that pervades all the laments of the *Koran* over the stubbornness of the heathen. They hate the prophet because he insults their forefathers, who were likewise his own. He is lacking in filial piety. And the touchstone of his error is his antagonistic attitude towards the remote past. To the heathen his idols are dear as "heritages from the worthies who have bequeathed this inheritance."

Only a few decades elapsed before Islam had its own sunna. The element of antiquity in this case was, of course, a figment; it anticipated for its justification the generations yet to be born, who should look up to this new standard as to something hallowed by tradition. It had no warrant in the actual experience of successive generations which had already regarded it as inviolable.

The *Koran*, the oldest and most authoritative document of the Islamite movement, is not a book which offers to the believer a comprehensive body

of religious instruction sufficient to satisfy all inquiries. What it pre-eminently does is to predispose religious sentiment to the acceptance of the religion which arose on this foundation. Nor is it more complete if regarded as a statutory guide in questions of law, since it takes note of only a small and very limited department of juridical needs. What it does is to predispose ethical sentiment in favour of the new aspects in which social life and the legal relations it involves are to be considered.

While these sentiments gave precision to the form of these new standards, investing them with the character of divinely instituted laws, their substance drew its nourishment from alien sources, from new views, which were a consequence of the great career in history upon which the new Islamite community entered soon after it came into existence. Much fresh territory was conquered. It was impossible that contact with foreign elements should fail to implant fresh ideas in the Semitic mind, singularly receptive as it is — ideas which were destined to give its final shape to the faith of Islam with which its adherents had embarked on their conquering career.

Without the effect produced on the religious sentiment of Mohammedans by questions that arose under the influence of Greek philosophy, there would have been no formulated system of Mohammedan dogmatics, and in like manner the first impulse towards the creation of a Mohammedan system of law was given by contact with two great spheres of civilisation — the Romaic and the Persian, the former in Syria and the latter in Mesopotamia. It has already been remarked that the influence of Roman law on the sources of a legal system in Islam is attested by the very name given to jurisprudence in Islam from the beginning. It is called *al Fikh*, reasonableness; and those who pursue the study of it are designated *Fukaha* (singular *Fakih*). These terms, which, as we cannot fail to see, are Arabic translations of the Roman (*juris*) *prudentia*, and *prudentes*, would be a clear indication of one of the chief sources of Islamite jurisprudence, even if we had no positive data to prove that this influence extended both to questions of the principle of legal deduction and to particular legal provisions.

The positive laws of the *Koran*, and the few legal decisions made in particular cases by the first caliphs and other companions of the prophet at Medina in the early days of Islam, together with all the legal customs retained from heathen days, were inadequate to serve for the state of things brought about by the great conquests and immense expansion of the Moslem empire. Even if all elements which had previously and all which had come into being to meet the primary requirements of the new Mohammedan society had sufficed for an Arab commonwealth on an Islamite basis, the sum total of it all would nevertheless have been inadequate to the needs of the new political fabric of Islam in countries subject to entirely different economic and social conditions, and amidst conquered peoples whose lives were ordered on a systematic legal basis. When Islam subdued such ancient civilised peoples with the edge of the sword, it could not impose upon them the primitive conditions of life under which it had come forth into the wide world from the steppes and oases of Arabia. It could mould the results of the historic past into harmony with its own religious sentiment; but it could not destroy it, if for no other reason than that it had nothing to put in its place. Hence it had to leave many institutions in the conquered countries substantially as it found them. The problem first presented itself in Syria, the first halting-place of the victorious advance of Islam. The *Koran* and its earliest applications in practice made provision for family and matrimo-

nial rights and rights of succession, but proved worse than meagre when applied to the privileges attaching to landed property in a great agricultural state, or to the laws of contract and obligation which, in the countries conquered by Islam, were ordered by the fixed standards of Roman law. In this department the heads of the new government had to take over very many ordinances of Roman law.

But, even apart from the adoption of legal standards, Roman law exercised a notable influence upon the legal thought of the new intruders into a country whose jurists had been trained in the scientific jurisprudence of the school of Berytus. The influence exercised by the Roman legal methods on the system of legal deduction in Islam is a more important factor in the history of Moslem civilisation than even the direct adoption of particular points of law. By what systematic rules or what devices can deductions be drawn from positive laws, written or traditional, which shall apply to newly arising cases at law and to the decision of legal questions for which the positive written law provides no answer? In dealing with this juridical problem the Arab *Fukha* took their stand entirely upon the instruction they had gained from circles familiar with the work of Rome in the domain of law. The dualism of written law (Arabic, *nazz*) and unwritten law is a mere reflection of the dualism of *leges scriptæ* (*chakhamim*), and *leges non scriptæ*. Just so, about half a century before, the Jewish jurists (a word which in its legal application is likewise a translation of the Roman term *jurisprudentes*) had been moved by their intercourse with the Romans to make the hitherto unrecognised distinction between the *tora she-bitche-thab*, or written law, and the *tora she-be'al-peh*, or oral law.

The application of principles and rules borrowed from the methodology of Roman jurisprudence first made it possible to extend the limited legal material supplied by the *Koran* and the old decisions which were accepted as the basis of the law, to other departments of juridical activity, of which these authorities had had no prevision. The *ratio legis* (*illa*), the principle of presumption was applied to analogies (*kyas*) in words and things; nay, just as Roman legal practice gave great weight to the *opinio prudentium* in legal deduction, so the Islamite *prudentes* assumed the prerogative of an authoritative subjective *opinio;* for *ra'j*, as it is called in Arabic, is a literal translation of the Latin term. Of all these principles (which are not exhausted by the examples just cited) none more strikingly demonstrates the profound influence of Roman law on the development of legal opinion in Islam, than that which is known in Arabic as *maclaha* or *istilah*, — *i.e.*, the public weal and regard for the same. The significance of this principle lies in the license it grants to the interpreter of the law to apply the legal standard in the manner best fitted to serve the public weal and interests. Here we recognise the Roman standard of the *utilitas publica*, which gives the interpreter of the law the right, by interpretation, an application to wrest a plain and unambiguous law into something quite different from its original meaning, in the interests of the public weal.

Such principles, derived from foreign instructors, served for the deduction of Mohammedan law, as soon as the teachers of the people felt the necessity of withdrawing the domain of law from the capricious action of the sovereign and his instruments in the administration and judicature, which had free play by reason of the meagreness of positive legal matter based upon generally recognised authority. The Islamite jurists declared that the conclusions at which they had arrived on the basis of these principles (which, as we have seen, were no part of Islam) were in harmony with the

true spirit of Islam, the rightful outcome of its original character. This phenomenon, which early came to maturity and was widely accepted in Mohammedan theological circles as legal and of indubitable authority, is of profound importance to our historic estimate and judgment of Islam. Whatever the ignorant men who stood by its cradle may have thought to be the meaning of the new word which they were charged to proclaim to the oriental world, the first step which conquering Islam took on its victorious career taught it to accommodate itself to an alien spirit, and to mould its own intellectual heritage by influences which seem absolutely heterogeneous to a superficial observer.

In more than one point of its doctrinal fabric, Islam in its early days was a borrower. Its founders were anxious, it is true, to avoid the appearance of appropriating other men's property. But loudly as they trumpet the principle, "Be different from them in all things" (*Chalifuhum*) the reference here being chiefly to Jews and Christians, their documents are crammed with borrowings from the Scriptures of the very confessions which, on their own assertion, it was their leading principle to oppose. The stubborn antagonism of Islam to the rest of the world, its inflexible protest against the influence of foreign elements, is an illusion which historical study of the movement must dissipate if it is to rise to a scientific comprehension of this great historic phenomenon.

Though contact with the Romæi was the influence which caused the first seeds of law in Islam to germinate, we must not overlook another side upon which Islam in its early days came into direct contact with a foreign national element, the influence of which was very important in the development of its legal system. We refer to its contact with the people and the religion of Persia. This can be traced back to pre-Islamite times, and even Mohammed himself was not absolutely free from the influence of the religious ideas of the Parsees (*madjus*, magians), whom he classes in the *Koran* with Jews and Christians, and contrasts with the heathen as confessors of more favoured religions.

But Persian nationality did not become a formative element in Islam until the latter subjugated the geographical sphere of the old Parsee religion, and by the right of conquest imposed the faith of the prophet of Mecca and Medina upon the followers of Zoroaster. The Mohammedan occupation of 'Irak is one of the most telling factors in the religious and juridical development of Islam.

Persian theologians carried their inherited views into the new religion they had adopted, the conquering power enriched the poverty of its own religious store with elements supplied by the experience of a profound religious life, such had been a native growth among the conquered Persians from of old. Hence it is hardly possible to overestimate the importance of the part played in the development of Islam by the spiritual movement which came to birth in 'Irak and is associated with the schools of Bacra and Kufa. In analysing the elements of which Islam is composed we are not surprised to find many of Persian origin, the outcome of this connection.[1]

These influences are brought into fullest play by the great revolution which befel the Moslem empire in about the hundred and twenty-eighth year of its existence — the fall of the Omayyads and the usurpation of the sceptre of the caliphs by the Abbasids. The worldly spirit which had guided the

[1] I have treated this subject more fully in the address delivered before the meeting of the *Congrès d'Histoire des Religions* at Paris (Sept. 6th, 1900) and entitled *Islamisme et Parsisme*. Actes I, pp. 119–147 and *Revue de l'Histoire des Religions*, XXII, pp. 1–29.

policy of the fallen dynasty—a spirit genuinely Arab, devoid of any real comprehension of the religious aims and the transcendental interests of Islam—now makes way for a theocratic bias, which drew its ideas in the main from the character of the Persian "divine monarchy." It is the Sassanid spirit in an Islamite garb. The indifferentism of the ruling powers gives place to the encouragement of religious tendencies. The religious tolerance of earlier days is at an end. Sectarianism, pietism, harsh dogmatism, and, linked with them, the persecuting spirit—are the dominant notes of public life. Disputations concerning matters of religion impress their characteristic stamp upon the intellectual tendencies which find favour in high places. Opposing religious parties come into the field and frame their subtlest arguments.

Moreover, this was the opportune moment for working up into practical juridical systems the suggestions in the department of jurisprudence derived in earlier days from Roman law. In the second century of the Hegira, Islamite jurisprudence enters upon the classic period of its efflorescence and completion. The scene of its glory is the scholarly world of Mesopotamia, which sheds its rays upon every quarter of the Mohammedan empire. Even such advances in the sphere of law as come to light outside this birthplace of systematised jurisprudence are the fruit of the intellectual movement on the soil of the ancient empire of Persia. And even the demonstrations of antagonism to the aspirations which took shape there (for it aroused tremendous opposition) are affected by its influence.

Abu Hanifa (699–767) of Kufa, the grandson of a Persian, is recognised in Islam as the father of that jurisprudence which, by the employment of the free speculative method already described, found ways and means to make provision for the whole vast sphere of legal activity (which includes both law and religious ceremonial) out of the scanty stock of positive legal documents. This completion of the legal system of Islam was arrived at by laborious development along the lines of its main principles, by modification of the method evolved in some particular school, by open contravention of the fundamental ideas of some particular tendency, and, lastly, by deliberate compromise between antagonistic lines of thought. It was reached with a rapidity which is characteristic of all the intellectual creations of Islam. It is a singular feature of the whole literature of Islam that everything reaches its prime with amazing rapidity, only to decline as rapidly. In the fourth century of the Hegira every branch of Arabic literature had come to full maturity, to flourish for a brief while, and enter upon its period of decadence about the beginning of the sixth.

By the end of the third century (ninth century A.D.) jurisprudence had reached its classic prime. Leaving out of account some other heads of schools who soon retire from the scene, there are four men in particular to whom it does honour as to its founders and fathers, four men whose disciples represent the main currents which flow side by side through the construction of Islamite law: (1) Abu Hanifa (died 767), the true representative of the free method; (2) Malik b. Anas (died 795), the most celebrated imam in the prophet's city of Medina; (3) Muhammed b. Idris al-Shafii, a pupil of the latter (died 820), most famous for his educational work in Egypt, where his sepulchral chapel (in the Karafa at Cairo) is reverenced by the natives as a place of pilgrimage; and (4) Akhmed b. Hanbal (died 855), the pious teacher of Baghdad, the principal champion and valiant apostle of the old conservative views in religion, whose tomb in the Harbiah graveyard at Baghdad has, in the phrase of Guy l'Estrange, the writer of the monograph on the ancient city of the caliphs, "become the object of a devotion savouring of idolatry."

The views which have been enumerated, borrowed from the method of legal deduction in Roman law, were not employed to the same extent by all schools of jurisprudence. While in that of Abu Hanifa the validity of the *opinio* goes so far as to accord recognition to the personal inclination of the administrator of the law, other schools were not disposed to give such free scope to the subjective judgment. The principle of *istiçhab* (*præsumptio*) was most fully recognised in the school of Shafii; that of regard for the public weal (*istiçlah*) in that of Malik.

In the erudite world which busied itself with the theoretical exposition of the law there were, however, large bodies of scholars, who took up their parable to proclaim that, generally speaking and on principle, they could not profess to recognise principles of method which depended for their authority on the subjective work of the human reason. They would recognise two things only as the sole basis of legal deduction — Scripture and tradition; that is to say, the *Koran* and the traditions or positive decisions of the prophet, his companions and their successors, of whom it could be safely assumed that they had acted and given judgment in the spirit of the founder of the faith. Only in cases of extreme necessity, and when these authoritative sources obstinately refused to yield an answer, was it lawful to admit the authority of *ra'j* (*opinio*), or more particularly, of *kiga* (analogy). These latter were "like the vulture, the eating of which was permitted as an exception in time of dearth when other food could by no means be obtained." Under normal circumstances it was not permissible to reason; the only right course was to abide by the letter of tradition, since nothing outside of that could be set on a par with it. Truth manifests itself not in answer to the question "What is reasonable?" but in answer to "What did the prophet say and how did he act?"

Here we find ourselves face to face with the idea of the sunna which had come down from the Arabs of old (the idea explained at the beginning of this article), in its most rigid form, but with this difference — that the sunna, as now understood, does not look back to a remote antiquity but to a very recent past. The genuine sunnist only feels solid ground beneath his feet when he can base his judgment and conduct on the authentic text, or on well-accredited tradition concerning the words and deeds of the earliest authorities recognised by the Islamite world. Of all the four schools, the Hanbalite, the one founded by the youngest teacher, was that in which this rigid view found most favour. In modern times it has been brought into prominence as a principle of government by the puritanical state of the Wahabees, the "*Tempelstürmer von Hocharabian*," as they are called by Karl von Vincenti in a historical novel in which he describes their proceedings.

It is, however, an easy thing to say, "Tradition and nothing but tradition!" But what if, with the best will in the world, no answer can be wrung from tradition to the most pressing questions of ordinary life? The judge must give judgment; the shepherd of souls must lay down rules for his flock on questions which hourly crop up for decision in a state of life ordered by religious laws in even the most trifling details; and in doubtful cases the mufti must be able to expound the meaning of the divine law with no uncertain voice. What, then, if Scripture and tradition be dumb, and no effort can draw forth the least enlightenment from them? Where all the sources of tradition ran dry, men had to make concessions, whether they would or not, to individual opinion and the right of speculative interpretation. This led to the rise of a school of thought which endeavoured to reconcile the two sharply antagonistic tendencies. It was absolutely neces-

sary to discover a middle course between excessive subjectivism and rigid traditionalism, and to define accurately the juridical spheres of the two conflicting elements. It was necessary to discover rules, in accordance with which speculative methods might be used to supplement tradition in the work of legal deduction, and to set up standards for the right use of traditional data in the correct formulation of the law. This work of reconciliation was done by the founder of the second school on the list, at Shafii.

Moreover there was another point of view from which the systemisation of the use of speculation as a source of law on the one hand and of tradition on the other proved an imperative necessity. If, in the one case, it was requisite to curb the arbitrary exercise of the subjective reason, it was no less necessary to check the rank growth of traditional matter, which, as it increased, hampered more and more the use of authentic tradition. The one-sided partisans of the sunna needed traditional matter for the establishment of such a legal system as they desired to see. Nor was any refutation of their theses, nor any opinion advanced against them, in their eyes worth discussing unless it could appeal to the authority of tradition. As a result, where no traditional matter was to be had, men speedily began to fabricate it. The greater the demand, the busier was invention with the manufacture of apocryphal traditions in support of the respective theses.

For the verification of didactic records, whether sacred or profane, Islam has adopted a singular form, which imparts to Islamite tradition a character altogether peculiar to itself, to which we can find no parallel (at least in such a mature and consistent shape) in any other literature. This is the *hadith*. The word *hadith* means simply communication, or narrative. If any such narrative is to be put forth with pretensions to authenticity the actual text must be preceded by what is called the *sanad* or *isnad* (literally, 'support'). This enumerates in correct and unbroken sequence the authorities who have handed the narrative down from mouth to mouth, from the last person responsible for its circulation up to its original author. The examination of this sanad allows free and unbiased criticism the opportunity of judging whether these men on whose authority any particular narrative has been passed from mouth to mouth and from generation to generation, and set down as an actual occurrence, were persons deserving of full credit.

From this point of view an unbroken chain of oral tradition constitutes a surer and more valuable guarantee of authenticity than any written document, whether contemporary or based upon contemporary records. Even if a written document bears all the outward tokens of authenticity, it must be able to show a consistent sanad reaching in uninterrupted sequence from the first author to the last teller of the tale, if its claim is to be admitted. Every narrative and every matter of tradition, without regard to its quantitative or qualitative importance, must be set forth with its "genealogy." This genealogy is the sanad. In theological matters, more particularly, it is the backbone without which no record can stand upright.

The literature of historic research also avails itself of this form of verification. Readers of the classic work of Muhammed Jarir al-Tabari, the "father of Islamite history" are familiar with this method of historic authentication. Each record takes the form of an appendage to a chain of tradition which reaches back to some direct authority, and to this chain the record is suspended in the very words of the first narrator. It sometimes happens that a record of the same event occurs in narratives that are traced back to different authorities, and not merely in different words and with trifling variations. The facts themselves are represented in a totally different

fashion, or the narratives of different authorities set them or their accompanying circumstances in a different light. All these divergent narratives are simply placed side by side, in a manner which cannot be compared with the different authorities for the narratives of the Pentateuch; for, unlike the latter, the traditional records of Arab history are not anonymous. On the contrary, they owe their distinctive character to this circumstantial system of authentication and the enumeration by name of the successive vouchers for their truth. Again, they show no trace of an attempt on the part of any editor to reduce conflicting accounts to harmony; they are simply set side by side, instead of being welded together. This circumstance has greatly facilitated the critical study of the periods from which such parallel narratives date. Wellhausen has recently given to the world a masterly study, in which he skilfully discriminates between the various points of view, and the particular bias of each of the authorities for the narrative of the victory at Tabari (*Skizzen und Vorarbeiten*, VI).

The same state of things prevails in the statements of tradition in matters of law and religion. Each statement, cast into the traditional form, and relying for authentication in the first instance upon the testimony of an actual eye-witness, professes to show the practice of the prophet at certain times of prayer, or what judgment was given by him or his companions in certain legal questions. During the first century of Islamism divergencies of practice in minor details of law and worship had grown up in different congregations of believers. Every one of these divergent forms can appeal to the authority of a formal and well-attested traditional account, with a sanad in which the names of the most trustworthy witnesses are adduced in support of theses diametrically opposed to one another.

In order to obviate this incongruity, there soon developed in Islam a science of textual criticism, a study in which Islamite erudition outstripped that of Europe by several centuries. Its object was to decide the claims of the various authorities, to judge of the degree of credit to be given to each, to weigh the possibility that sectarian or party tendencies might have vitiated the *bona fides* of men otherwise above reproach. The climax of this work of criticism is to be found in certain systematised compilations of traditions, the editors of which start with the definite object of sifting what appears to them authentic out of the vast body of obviously spurious material. The most famous of these compilations are those of Buchari (died 870) and Muslim (died 875). The general consent of Islam presently invested these compilations with canonical authority.

Other works of the same kind were also held in great honour. In course of time other compilations from among those made in the ninth century were added to the first two, and in these the sifting of tradition was carried out upon the most liberal principles. From the thirteenth century onward, six codices have been recognised as the sources of authentic traditional records. Out of these theological science gathers the evidence of tradition in questions of law, and with the *Koran*, they constitute the canonical literature of Islam.

Judged by a scientific criterion, only a very small part, if any, of the contents of these canonical compilations can be confidently referred to the early period from which they profess to date. Minute study soon reveals the presence of the tendencies and aspirations of a later day, the working of a spirit which wrests the record in favour of one or other of the opposing theses in certain disputed questions.

What we gather from these traditional authorities is by no means a homogeneous system of instruction. The voice of thoroughly well-attested

tradition can be quoted in support of the most diverse, nay, of the most contradictory teachings on certain points of ritual and law. This is one of the principal causes of divergences of practice in minor details of religious usage and of the law. These differences, together with the vexed question of the use of the subjective factor in legal deduction, lie at the root of the controversies between the four great schools of law (the founders of which we have already enumerated) which occupy the whole field of orthodox Islam. These schools are in accord upon the great fundamental doctrines of religion, and the outward differences in practice are not regarded as elements of division. The Islamites consider them of equal validity, with equal claims to pass for orthodox.

Sunnite Islam early formulated and put into the mouth of Mohammed the doctrine that "Differences of opinion in my congregation are to be regarded as tokens of the mercy of God." Like Lessing, the Islamites think that all trees cannot have the same bark. It is therefore a great error, and one which leads to a total misunderstanding of the whole character of Islam, to describe these four currents of thought, or *madsahib*, as the Mohammedans call them, as "sects," or use such language as recently appeared in a widely circulated journal, which said: "We need only recall the question which resulted in a schism in Islam, as to whether ablutions should be begun at the elbow or at the wrist." (*Münchener Allgemeine Zeitung*, Beilage No. 209, Sept. 12th, 1901.) The fact that these differences of ritual exist cannot be denied. But schisms take their rise from dogmatic and juridical questions of a far more radical character, and lie far beyond the sphere of the points in controversy between the four schools of the law.

On the other hand, in the present state of the Islamite world, orthodoxy is wholly confined to these four main schools of thought, which rank as the right and recognised modalities of correct religious usage and of the practical interpretation of the law. To borrow an image from philology, they and they alone are legitimate dialects of the one fundamental language of Islam. *Quintum non datur.* Zealous religious associations, which take their stand on the fundamental principles of Islam, yet cannot be classed in either of these four categories, are looked upon as dissenters of dubious character, although they themselves regard it as their one object in life to purify Islam and imbue it with fresh vigour. They are styled *chums* or *chawamis*, from a word meaning "fifth," to mark their independence of the four parallel streams of orthodoxy. Such, for example, are the Senussis, a religious association in north Africa, whose proceedings are at present engaging the serious attention of the leaders of French colonial policy. They are not adherents of the school of Malik, which predominates in north Africa, and are therefore regarded as *chawamis* by the Moslem "high churchmen" of the locality.

One of the cardinal points of orthodox Islam in every sphere of religion and law is the "general consent and practice of the whole body of believers" (*consensus ecclesiæ*). The Arabic name for this mighty principle is *ijma*. The general consent of the whole body of believers on certain points of faith and law is of binding force, no less than Scripture and tradition. Nay, even the authority of all the primary sources of the Islamite religious system, as historically developed, derives its force from this consensus, which constitutes its principal title to recognition. The acceptance of such compilations of tradition as are received as canonical, and subsequently of the standard juridical codes, rests on no other legal basis than this general consent of the whole body of believers, by which they have been invested with

binding authority. This great principle — which, if any man fail to realise and rightly appreciate the development of Islam and Islamite institutions, must remain a sealed book to him — was in process of time defined as the doctrine accepted alike by all the four orthodox schools of thought. This definition of the idea of ijma is the result of the self-imposed limitation of the principle itself in practical application. In process of time it was found impossible to verify this general consent by any other method than by confining it to the well-defined sphere of the schools of the law. Thus this free intellectual outlook lost the vital force which might have made it an element of far-seeing and liberal development.

The recognition of the principle of the ijma as a fundamental element is a point on which all schools of orthodox Islam are at one. The *shiite* branch of Islam, however, has not adopted it as one of its fundamental doctrines. It takes its stand on blind obedience to authority. In its eyes the visible and invisible heads of the whole body of true Islamites are the successors of Ali, the infallible imams. They alone are the legitimate rulers of the faithful, both as the rightful chiefs of the state, and as the true organs of the divine will in matters of law and doctrine. To this sect every historical and political development of Islam, which derives its title to authority from the consensus, is a usurpation and an impiety which the last imam, the Mahdi who is yet to come, will bring to a terrible end. From their point of view the recognition of the consensus is mere error and heresy, and the sentiment and will of the whole body of believers is not entitled to be recognised as a criterion. In its stead they set the word of the infallible imams, the lawful successors of the prophet and the interpreters of his will, which is one with the divine will. Thus perishes the last remnant of the autonomous authority which the body of orthodox Islamites have assumed by the recognition of the principle of the consensus.