

ISLAMIC CONSTITUTION-MAKING

By MUHAMMAD ASAD

The Issue Before Us

FOR many centuries, a discussion of the principles that should govern an Islamic State could have no more than academic flavour in this country; for, even if the Muslims had desired it, there was no immediate possibility of their achieving an Islamic State. With the attainment of Pakistan's independence, however, we of the present generation have such a possibility before us; and it is for us to convert this possibility into a certainty—if we so wish—or, alternatively, to allow it to recede again (God alone knows for how long), into the realm of academic speculations. There is no earthly, outside power to prevent us from taking either of the two courses. However we choose, the responsibility will be ours, and ours alone.

There is no gainsaying that countless Muslims in this country passionately desire the first of these two alternatives; but there is, also, no doubt that very strong forces are at work to deflect the community from its Islamic goal and to make Pakistan a "secular" state in slavish deference to what almost all non-Muslims today regard as desirable. For, the majority of people in other countries—including many Muslim countries—have grown accustomed to look upon institutional religion as something antiquated, and therefore not quite "respectable" from the intellectual point of view: as something out of tune with the so-called "progressive" endeavour to free man from all moral obligations not devised by himself: as something, in short, that enlightened people cannot seriously consider in the context of national, social and economic planning: and for this reason, a suggestion to build a state on religious foundations is usually described in such circles as reactionary or, at the best—with a smiling shrug of the shoulders—as "impractical idealism."

Apparently, many educated Muslims think today on these lines; and in this, as in so many other aspects of our contemporary life, the influence of Western thought is unmistakable.

For reasons of their own, the people of the West have become disappointed with religion (*their* religion), and this disappointment is reflected in the ethical, social and political chaos now pervading the major portion of the world. Instead of submitting their decisions and actions to the criterion of a universal moral Law—which is what religion

ultimately aims at—those people have come to regard "expediency" as the only obligation to which men's affairs should be subjected: and because the ideas as to what is expedient naturally differ in every group, nation or community, the most bewildering conflicts of interests have come to the fore. For, evidently, what is expedient or desirable to you (from a purely practical view-point) need not, and usually is not, expedient or desirable to me; and unless we submit our endeavours to the guidance of an objective, moral consideration, our respective interests must come to a clash at some point or other; and the more we struggle against another, the wider our interests diverge and the more antagonistic become our ideas as to what is right and what is wrong in the dealings of men.

This is, perhaps, the ultimate explanation of the chaos to which the modern world is gradually succumbing. It has become obvious that none of the contemporary Western ideologies—Economic Liberalism, Communism, Fascism, Social Democracy, and so forth—is really able to transform that chaos into something resembling order, simply because none of them makes a serious attempt to consider economic or social problems under the aspect of absolute moral principles: with the result that none of them has ever recommended itself to even one people's general acceptance. In those Western countries in which there is a semblance of such a "general" acceptance of a particular ideology—as is the case, for instance, with Communism in Soviet Russia—unanimity is invariably *enforced* from above with all the paraphernalia of dictatorship, secret police and social terror; and the very existence of such an apparatus of oppression shows that in reality there is no question of a unanimous, popular acceptance at all. Communists will, of course, say that in their particular case oppressive dictatorship is "expedient" in view of the internal conditions in Russia and of her peculiar relations with the rest of the world. But this is just the point: on the plea of "expediency" you may excuse anything, whether you are a Communist or a Capitalist: you may, in other words, commit the most atrocious crimes and still have a smug feeling of self-righteousness in the conviction that these crimes serve the ends of your particular ideology. As a matter of fact, the crimes which Western civilisation (whether Capitalistic or Communist) now inflicts on humanity, are usually being committed on this most convenient plea. And as long as this plea is maintained by the governments and naïvely regarded as valid by the masses of the common people, there can be no moral significance whatever in the concept of the State popularly described as "secular".

For, in a "secular" state there is no stable norm by which to

judge between Right and Wrong, the only possible criterion there being "the nation's interest". But it is obvious that in the absence of an objective scale of moral values, different groups of people—even within one nation—may have, and usually do have, widely divergent views as to what constitutes the nation's best interests. While a Capitalist may quite sincerely believe that civilisation will perish if Economic Liberalism is superseded by Socialism, a Socialist is usually of the opinion that the very maintenance of civilisation depends on the abolition of Capitalism and its supersession by Socialism. Consequently, both make their moral views—that is to say, the views as to what should and what should not be done with and to human beings—dependent on their economic views, with the resultant chaos in their mutual relations.

I have given the above only as an example. In reality, the ethical differences between and within the various "secular" societies are almost beyond count. These differences are unavoidable as long as the discrimination between Right and Wrong, between what should and what should not be done, is left to the mercy of individual or group interests—in other words, to people's changeable and changing preferences. If we were to admit that this is a natural (and therefore desirable) state of mankind's affairs, we would admit, by implication, that the terms "right" and "wrong" have no permanent meaning in themselves but are exclusively conditioned by time, circumstances and individual interests. In logical pursuance of this thought one has no choice but to deny the existence in human life of any moral obligation as such: for "moral obligation" becomes quite meaningless if it is not conceived as something absolute. As soon as we begin to believe that our concepts of Right and Wrong are only man-made, variable products of social convention and environment, they cannot possibly serve us as reliable guides in our affairs; and so, in planning those affairs, we gradually learn to dispense with all moral guidance and submit with a vengeance to the dictates of "expediency". This, in turn, leads to ever-growing dissensions within and between human groups and to a progressive crumbling-away of the amount of happiness vouchsafed to man.

No nation or community can know happiness unless and until it is really united from within: and no nation or community can be really united from within unless it achieves a large degree of unanimity as to what is right and what is wrong in the lives of men: and no such unanimity is possible unless the nation or community agrees on a moral obligation arising from a permanent, absolute, moral Law. Obviously, it is *religion* alone that can provide such a Law and, with

it, the basis for an agreement on a moral obligation within any one nation or community. It does not, therefore, call for special cleverness to realise that a state built on the foundations of religion offers an infinitely better prospect of national happiness than any "secular" political organism could offer: provided, of course, that the religious doctrine on which such a state rests—and from which it derives its sovereignty—makes full allowance, firstly, for man's physical needs and, secondly, for his social and intellectual evolution. The first of these two conditions can be fulfilled only if the religious doctrine in question says emphatically Yes to the bodily, biological aspect of man's nature—as Islam undoubtedly does; and the fulfilment of the second condition depends on avoiding all rigidity in the religious concept of Political Law—which is, precisely, what we claim for the Political Law laid down in Qur'an and Sunnah.

On Constitutional Forms

AT a first glance it might appear that this claim is not justified: for the popular notions concerning the forms and functions of an Islamic State contain just that element of rigidity which one must regard as incompatible with the demands of human development. I am referring, in particular, to the idea prevalent among many Muslims that there could be only *one* form of state deserving the adjective "Islamic"—namely, the form manifested under the Four Right-Guided Caliphs—and that, therefore, any deviation from that model would detract from the Islamic character of the state. This idea is, however, entirely erroneous. If we critically examine the political laws and ordinances forthcoming from Qur'an and Sunnah we find that in reality there is no "specific" form of the Islamic State. The *shari'ah* does not prescribe any definite pattern to which a state should conform, nor does it elaborate in detail a constitutional theory, but, on the contrary, allows for a great latitude in governmental methods and administrative procedure. The Political Law laid down in the context of Qur'an and Sunnah is, nevertheless, no illusion. It is very real and self-contained, and gives us the outline of a political scheme which is capable of realisation at all times and under all conditions of human life: but precisely because it was meant to be realised at all times and under all conditions, that scheme has been given to us in an *outline* only and not in details—for, man's political, social and economic needs are time-bound and therefore variable. Being a Divine Ordinance, the *shari'ah* duly anticipates all possibilities and necessities of historical evolution and confronts man with no more than a very

limited number of fundamental, political laws to which any constitution must conform if the state is to be Islamic; beyond that, it leaves a vast field of constitution-making activity (and of legislation generally) to the *ijtihād* of the time concerned.

In other words, there is not only one form of Islamic State but many; and it is for the people of every period to discover the form most suitable to their needs.

The political *shar'i* laws to which I have just alluded (and which shall presently be discussed) found their full expression in the constitutional forms that prevailed at the time of the Right-Guided Caliphs—and therefore their state was Islamic in every sense of the word. But we must not forget that in the unwritten constitution to which the Islamic Commonwealth conformed in those days, there were, side by side with all the explicit *shar'i* laws relating to statecraft, certain other laws which were not directly connected with the *shari'ah* as such—that is to say, legislative enactments not derived from Qur'ān and Sunnah but from purely common-sense considerations of administrative efficiency, public welfare, and so forth. In as much as these enactments were sanctioned by the Government of the day—embodied in the person of the Caliph—and were, moreover, not contrary to the spirit or the letter of the *shari'ah*, they acquired full legal validity for that time. But this does not mean that they must remain valid for all times.

It is quite conceivable (I should rather say, unavoidable) that different times and a different intellectual and economic environment may give rise to very different conclusions as to the best means of achieving administrative efficiency, social equity and public welfare—and so quite a big proportion of the state's constitutional enactments must vary accordingly. This cannot, of course, affect those elements of the constitution which are laid down by the *shari'ah* and are therefore unchangeable; nor can it affect the fundamental proviso that such common-sense, non-*shar'i* enactments must on no account run counter to the spirit or the letter of the *shari'ah*. But with all this, it is obvious that an Islamic constitution to be evolved thirteen centuries after the Right-Guided Caliphs may legitimately differ in more than one point from that which was valid in and for their time—simply because our time differs in more than one point from theirs.

It is, however, not even necessary to postulate a time-distance of thirteen centuries in order to understand that the constitutional requirements of one time do considerably differ from the requirements in this respect of an earlier period. Even within the short span of a

few decades the Right-Guided Caliphs varied their administrative methods—or, as we would say today, the constitution of the state—in many a point. As an illustration let us take the problem of electing the Head of the State.

There was, naturally, no difference among the Companions as to the principle of elective government as such, for, as we shall see, the *shar'i* law is perfectly clear in this respect. But though it is beyond doubt that the Head of an Islamic State must be elected, the Law does not specify any particular *method* of election: and so the Companions regarded the method of election, rightly, as something outside the scope of the *shari'ah*: as something, therefore, that could legitimately be varied in accordance with the needs of the time and the best interests of the community. Thus, the first of the Right-Guided *khulafā'*, Abū Bakr, was elected by the chiefs of the *Muhājirs* and *Anṣār* present at Madinah at the time of the Holy Prophet's demise. On his deathbed, Abū Bakr designated 'Umar as his successor, and this choice was subsequently ratified by the community (ratification being, in this case, equivalent to election). When 'Umar, in his turn, was dying, he nominated an electoral body composed of six of the most prominent Companions and entrusted them with choosing his successor from among themselves; their choice fell on 'Uthmān, who was thereupon recognised by the community as 'Umar's rightful successor. After 'Uthmān's death, 'Ali was proclaimed *amīr al-mu'minin* by a congregation in the Prophet's Mosque, and the community thereupon ratified this proclamation.

Hence, under each of these four reigns which we describe as "right-guided", the constitution of the state differed in a very important point: for nobody can deny that the method by which the Head of the State is elected is a constitutional point of great importance. The changing treatment of this point by the Companions—both with regard to the composition of the electorate and the electoral procedure—shows that, in their opinion, the constitution could be changed from time to time without making the state any the less "Islamic" on this account. This opinion, needless to say, was absolutely correct. Islam demands of us no more and no less than that the constitution should always faithfully reproduce the few fundamental, explicit rules laid down in this context by the *shari'ah*; while the rest of the constitution's contents may be left to the communal *ijtihād* dictated by the needs of the particular time to which it applies.

On the basis of these reflections we may now safely proceed with discussing the *shar'i* fundamentals of an Islamic State—or, to be more

precise, those elements of legislation which must under all circumstances be embodied in a constitution that claims to be Islamic.

Fundamental Principles

THE ultimate purpose of an Islamic State lies in its providing a political framework for Muslim unity and co-operation—a co-operation in terms of Islam and for the sake of Islam :

واعتصموا بحبل الله جميعاً ولا تفرقوا واذكروا نعمت الله عليكم إذ كنتم أعداء فألف بين قلوبكم فأصبحتم بنعمته إخواناً وكنتم على شفا حفرة من النار فأنقذكم منها كذلك يبين الله لكم آياته لعلكم تهتدون ولكن منكم أمة يدعون إلى الخير ويأمرون بالمعروف وينهون عن المنكر وأولئك هم المفلحون

“Hold fast, all together, to the covenant of God, and do not separate. And remember God's favour unto you—how when you were enemies, He united your hearts, so that by His favour you became brethren; and how when you were on the brink of an abyss of Hell, He drew you back from it. Thus makes God His signs clear to you, so that you may be guided aright, and that there may grow out of you a community of people who invite to equity, enjoin what is right and forbid what is wrong: and it is these that shall attain to spiritual happiness.” (Sūrah 3 : 103, 104)

It appears, therefore, that the State is not an end in itself, but only a means to an end: the end being the growth of a community of people who stand up for equity and justice, for Right and against Wrong—or, to phrase it differently, for the creation and maintenance of such social conditions as would enable the greatest possible number of human beings to live, spiritually and physically, in accordance with the Natural Law of God, Islam. Our attainment of this objective largely depends on the social conditions under which we live. However well-intentioned you, as an individual, may be, you cannot possibly live a truly and fully Islamic life in isolation: you cannot mould your private existence in accordance with the demands which Islam makes on man's actions and behaviour unless, and until, the society around you agrees to subject the dealings among all its members to the pattern visualised by Islam. In other words, the moral quality of your actions and the continuity of your rise in spiritual stature—which can be described as the twin objectives of

religion—depend to a large extent on something that is outside yourself: namely, on whether you are helped, encouraged and protected by the people around you, or not. But if the people around you are willing to accord you all the help, encouragement and protection of which you are in need, they expect, of course, the same co-operation from you. Hence, the members of the society are individually and jointly responsible to each other for how they behave and what they do. Within all civilised societies, this responsibility assumes a concrete aspect in the creation of a co-ordinating agency endowed with powers of command and prohibition—that is, the State. With reference to Muslim society, the functions of the State can be reduced to a yet simpler formula: to arrange human relations in such a way that every individual should find as few obstacles as possible and as much encouragement as possible in the development of his or her personality in terms of Islam. This, and nothing else, is the *shari* concept of the State—the concept which the Apostle of God has placed before mankind from the very beginning of his Mission.

To make the Law of Islam the law of the land; to ensure the people's co-operation in terms of Islamic justice and equity; to enable individual men and women to realise the tenets of Islam not only in their beliefs but also in the practical, socio-economic concerns of their life; to defend the community against attack from without and disruption from within; and to propagate Islam to the world at large: herein lies the innermost purpose and justification of the State as conceived in Muṣṭafā's Message. If it answers to these requirements, a state can be rightly described as “God's vicegerent on earth”—at least in that part of the earth which falls under its jurisdiction.

In so far as the legality of such a state arises from the people's agreement on a particular scheme of social co-operation, it might be said that sovereignty rests with “the people”; but in so far as in a consciously *Muslim* society the people's agreement on this particular scheme is but a result of their accepting Islam as a Divine Ordinance, there can be no question of their being endowed with sovereignty *in their own right*. Their power is of a vicarious kind, being held only in trust from God: and so the Islamic State derives its sovereignty, in the last resort, from God. Therefore, the first article of our new Constitution must say:

“The State holds power in trust from God so that the people may live in accordance with the Law of Islam”.

From this first article it logically follows that the foremost duty of the Islamic State consists in enforcing the ordinances of the *shari'ah*

in the territories under its jurisdiction. The Qur'an is absolutely unequivocal on this point:

ومن لم يحكم بما أنزل الله فأولئك هم الفاسقون

"Whoso does not judge by what God has sent down—these indeed are the evil-doers" (sūrah 5:47). Hence, no Constitution can be described as Islamic unless it contains a clause to the following effect:

"The laws of the shari'ah bearing on matters of public concern form the inviolable, basic Code of Public Law."

I should like to point out here that this limitation of State jurisdiction to "matters of public concern" does not, of course, mean that the shari'ah as such is, or ever could be, similarly restricted: for it undoubtedly refers to the whole of man's life, both in public and in private. We must not, however, lose sight of the fact that the State, being a social organisation, is primarily concerned with the social aspect of human life, and therefore requires of the shari'ah no more than a code relating to this aspect. But this code it must have if it is to be an Islamic State.

In view of the well-known disagreement among Muslim scholars as to the extent and scope of the shari'ah, it is necessary to make here a few general observations on this subject.

The Problem of Islamic Law

ONLY a fraction of the laws comprising what today goes by the name of shari'ah rest on injunctions expressed in clear-cut terms of command or prohibition in either of the Two Sources of Islam, Qur'an and Sunnah. By far the larger proportion of the laws which fiqh describes as "shar'i laws" is the outcome of centuries of *ijtihad*—in other words, of subjective deductions arrived at by the great *fuqahā'* of our past on the basis of their study of the Two Sources. There is no doubt that in the case of the foremost exponents of *fiqh*, this study was very deep and extremely conscientious. Nevertheless, its results were subjective in the sense of having been determined by each *faqih's* individual approach to, and interpretation of, the legal sources of Islam. The intellectual methods applied in this labour were many, and most diversified; and so, with the progress of centuries, a very complicated picture of Islamic Law came into being—so complicated that it is not now easily accessible to the understanding of an ordinary, intelligent Muslim who has not for many years specialised in the study of *fiqh*.

Apart from this, it was unavoidable that those *ijtihadī* deductions of the great *fuqahā'* were strongly influenced by the intellectual and social environment of their age; and because that environment was in many respects very much different from ours, the ideas about Islamic Law arrived at, say, one thousand years ago naturally clash with many a sociological experience available to us at the present time. This is, in a nutshell, the main reason of so many a "modern" Muslim's reluctance to apply the principles of Islam to problems of practical economics and politics.

If Islam is to remain a practical proposition, our ideas about its Law must be freed from all the limitations imposed on them by centuries of time-bound *fiqh*. To put it differently: we must restore the concept of the shari'ah to that clearness and conciseness, to that purity and obviousness it possessed at the time of its enunciation by the Holy Prophet; for it is quite futile to speak of the "eternal" values of the shari'ah—values arising from its being a Divine Law—and at the same time to lump it together with the results of human *ijtihad*—a mistake committed by many Muslim scholars from the third century A.H. onwards.

Being a Divine Law, the shari'ah cannot possibly have been made dependent on deductions, inferences or subjective conclusions of any sort, but must be contained, in its entirety, in the positive, clear-cut ordinances—expressed in terms of command, prohibition or a definite statement—forthcoming from Qur'an and Sunnah and technically described as *naṣṣ* (sing., *naṣṣ*). Now these *naṣṣ* injunctions are, by their very nature, not liable to conflicting interpretations—as a matter of fact, they do not require any interpretation, being absolutely obvious and self-contained in their meaning. For, "the *naṣṣ* of Qur'an and Sunnah denotes the ordinances (*aḥkām*) contained in the plain (*ẓāhir*) wording in which they are expressed" (*Lisān al-'Arab*, vol. VIII, p. 367). Lane, whose dictionary is exclusively based on the works of the classical Arab lexicographers, summarises *naṣṣ* as "a thing (or statement) plainly, or explicitly, declared or made manifest by God and His Apostle; . . . an expression, or a phrase, or a sentence, indicating a particular meaning, not admitting any other than it; . . . a statute or an ordinance indicated by the manifest, or plain, meaning of the words of the Qur'an and of the Sunnah" (Lane's Lexicon, vol. VIII, p. 2798). The reader should note the philologists' ever-recurring insistence on *naṣṣ* being conditioned by plain (*ẓāhir*) expressions which have "a particular meaning, not admitting any other than it"—that is, injunctions in Qur'an and Sunnah which are so unequivocal that conflicting interpretation becomes impossible.

All such *naṣṣ* ordinances apparent in the Two Sources are so formulated that they can be applied to every stage of man's social development; while, on the other hand, many of the subjective conclusions of the *fuqahā'* are no more than reflections of a particular time and a particular intellectual environment, and cannot therefore lay a claim to eternal validity. We must, in other words, give up the ridiculous notion that whatever the great scholars of our past have thought about the Divine Law is identical with that Law itself.

Furthermore, it is obvious that only the uncontrovertible, self-evident *naṣṣ* injunctions of Qur'ān and Sunnah—"do this", "don't do that", "such-and-such a thing is right", and "such-and-such a thing is wrong"—only these injunctions constitute the real, eternal *shari'ah* of Islam. There are, comparatively, only few such injunctions to be found in Qur'ān and Sunnah: therefore, the true *shari'ah* is not only easy of comprehension but is also very much smaller in volume than the pseudo-*shari'ah* evolved through the *fiqh* of various schools of Islamic thought. But because it is so small in volume, the *shari'ah* cannot—nor was it ever intended to—provide detailed legislation for every exigency in life; and therefore the Law-Giver meant us human beings to provide for the necessary, additional legislation through an exercise of our *ijtihad* (individual reasoning). Whatever *ijtihad* legislation we may evolve under the inspiration of Qur'ān and Sunnah (occasionally even with the help of the *ijtihad* of past generations) will add up to what is best described as Muslim Law—a changeable law, liable to amendments and improvements by ourselves and by those who will come after us—in distinction from the unchangeable, Islamic Law, which is called *shari'ah*.

The *shari'ah* cannot be changed, because it is a Divine Law; and it need not be changed, because all its ordinances are suchwise formulated that none of them ever conflicts with the real nature of man and the real requirements of society at any time: simply because it legislates only with regard to those aspects of human life which are not necessarily subject to change. Now this special characteristic of the Divine Law—its applicability to all stages and conditions of human development—presupposes that its ordinances cover, in the first instance, general principles only (allowing thereby for the necessity of time-conditioned variations in matters of detail), and in the second instance, provide for detailed legislation in such matters as need not be affected by changes due to human progress. On examining the context of the *shari'ah*, it will be found that this assumption is correct.

Wherever detailed *naṣṣ* legislation is forthcoming, it invariably relates to such aspects of our individual and social existence as are

independent of all time-conditioned changes of environment (for example, the basic elements of human nature and of human relations). Wherever, on the other hand, time-conditioned changes are indispensable for human progress (for example, in matters of government, industrial legislation, and so forth), the *shari'ah* does not stipulate any detailed laws, but either lays down general principles only or entirely refrains from making any legal enactment. And this is where Muslim Law (in the above-mentioned, temporal sense of the word) comes to its own. For, the *shari'ah* concerns itself exclusively with what the Law-Giver has ordained in unmistakable terms as an obligation (*fard*) or put out of bounds as unlawful (*ḥarām*); while the far larger area of things and activities which the Law-Giver has left unspecified—neither enjoining nor forbidding them in *naṣṣ* terms—must be regarded as allowed (*mubāḥ*) from the religious point of view. The entire area of *mubāḥ* things and activities is the legitimate sphere of what I have described as Muslim Law. The existence of an amendable Muslim Law, subject to the authority of the irrevocable, unchangeable Islamic Law (the *shari'ah*), is indispensable to a healthy, progressive communal life, and so, in the last resort, to a genuinely Islamic life—for there can be no Islamic life where thought is stifled and creativeness killed.

The Functions of Muslim Law

THE need to differentiate between Islamic Law and Muslim Law—between the Divinely ordained *shari'ah* and the man-made, *ijtihad* legislation arrived at through *fiqh*—has been largely overlooked by scholars of many centuries: with the result that the *ijtihad* of the early Imāms has quite unwarrantably received the imprint, as it were, of Divine Ordinance. An unavoidable consequence of this attitude was the fixation of all *ijtihad* to the thought-processes of one particular period—or, more exactly, the removal of all real *ijtihad* from the community's life. This suppression of creative thought was one of the foremost reasons of the tragic decay of Muslim culture.

If we wish to stop that downward trend, we must, obviously, cease to regard the *fiqh* conclusions of the great scholars of our past as something final, and must restore *ijtihad* to its rightful position. This, of course, implies our right and our duty always to turn to the *naṣṣ* of Qur'ān and Sunnah as the only admissible criterion of what the Law of Islam expects us to do and to leave undone. For, the *shari'ah* begins and ends with the enunciation of the *nuṣūṣ*-laws in these Two Sources of Islam; and no person who came after the Holy Prophet

can claim *shar'i* weight, and therefore finality, for the results of his *ijtihad*. As a matter of fact, none of the great Imāms of our early history ever claimed such a status for his *ijtihādī* conclusions. All of them were perfectly aware of the element of fallibility inherent in human thought as such; and all of them strove for light with humility and self-dedication. Their subsequent elevation to the regions of infallibility was due to the mistaken piety of their later, lesser followers, who were unable to rise to that high level of intellectual independence, and who for that reason remained content with repeating the thoughts of their great predecessors instead of thinking themselves.

This habit of intellectual inertia, kept up by the Muslim community for so many centuries, may not with impunity be kept up for ever. A society that would consent—merely out of respect for the greatness of its past—to be always ruled by the thought-processes of scholars of one particular period, would thereby sign its own death warrant: for when thought ceases to be creative, spiritual death sets in.

All this has a direct bearing on the question of temporal, Muslim Law.

We have seen a little while ago that the *shari'ah*, consisting as it does exclusively of the *naṣṣ* ordinances of Qur'ān and Sunnah, is very much smaller in extent than popular convention would have it. Additional, *ijtihadī* legislation is therefore necessary at all times if all the varying, time-conditioned exigencies of social life are to be covered by law. In due course we shall have an opportunity to consider the legislative apparatus required for this purpose; but it is as well to say here a few words about the lines which we may legitimately follow in evolving our temporal, amendable, Muslim Law as a complement of the eternal, unchangeable, Islamic Law (the *shari'ah*).

In cases where no detailed *shar'i* rulings are available but where the interests of the community do call for detailed rulings, we must, first of all, look into the context of the *shari'ah* for a general principle of law. If such a general principle is forthcoming from the *nuṣṣ* of Qur'ān and Sunnah, it falls within the scope of Muslim Law to evolve the relevant details of legislation in consonance with the established *shar'i* principle. But we may also be confronted with problems entirely untouched by the *shari'ah*—that is to say, legal cases and situations with regard to which neither detailed rulings nor even a general principle have been formulated in the *nuṣṣ* of the Two Sources—: and in such cases we are entirely free to formulate our own, temporal laws, taking only the spirit of Islam and the community's welfare into consideration. This is precisely what Imām Mālik has

described as the method of *istiṣlāḥ*; and it is this that the Qur'ān has referred to in the words:

لِكُلِّ جَعَلْنَا مِنْكُمْ شَرْعَةً وَمَنْهَاجًا

"For every one of you We have made a Divine Law and an open road" (*sūrah* 5: 48). Hence, while the Divine Law (the *shari'ah*) broadly outlines the area within which Muslim life may develop, the Law-Giver has conceded to us, within this area, an "open road" (*minhāj*) for temporal legislation which would provide for the contingencies purposely left out from the over-all structure of the *shari'ah*. To be more precise, the legitimate field of the community's temporal, Muslim Law comprises legislation regarding (a) details in cases and situations where the *shari'ah* provides a general principle but no detailed rulings, and (b) principles and details in cases and situations which are *mubāḥ*, that is, not covered by *shar'i* laws at all.

But while we are undoubtedly at liberty to supplement the unchangeable Divine Law by temporal, changeable and changing laws of our own making, we are, equally undoubtedly, not at liberty to omit any of the existing *shar'i* rulings from the context of whatever temporal law we may have at any time, or to frame legislation that would run counter to the letter or the spirit of the *shari'ah*. Therefore, our Constitution must explicitly state that

"No temporal legislation, mandatory or permissive, shall be valid if it is found to contravene any stipulation of the *shari'ah*."

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STRICTLY speaking, the *shar'i* requirements of an Islamic Constitution could be fully met by the three clauses which have been considered in the foregoing—namely, by the declaration that "the State holds power in trust from God", secondly, that "the laws of the *shari'ah* form the inviolable, basic Code of Public Law", and, thirdly, that "no temporal legislation may contravene any stipulation of the *shari'ah*": for, between them, these three clauses circumscribe the purpose and outlook of the Islamic State to perfection. It would be, however, not quite practical to limit the clauses of our Constitution to these general statements. As already mentioned, there exists a good deal of confusion in the minds of the Muslims as to what the *shari'ah* really connotes. It has never yet been codified on *zāhiri* lines (the only method of codification that could successfully eliminate controversies arising from divergent *fiqhī* interpretations), and so there is not much

chance, for the present, of our scholars beforehand agreeing on a uniform concept of the Law. Though such a codification will have to be—and undoubtedly will be—undertaken sooner or later, a generally accepted “minimum” code of the *shari'ah* is unfortunately not available to us so far. In its absence, the existing disagreements between the various schools of thought are bound to lead to most conflicting views as to what actual, concrete clauses our Constitution should contain in pursuance of the principle that “the laws of the *shari'ah* form the basic Code of Public Law.” In order, therefore, to reach a common ground *immediately* acceptable to all the relevant schools of thought among the Muslims, I propose to analyse certain positive aspects of the Islamic Constitution arising from the few fundamental, political laws forthcoming to this effect from Qur'an and Sunnah. This analysis will relate to the structure of the state as well as to the rights and duties of the citizens.

The Head of the State

AS the purpose of an Islamic polity is the fulfilment of God's Law on earth, it is obvious that only a person who believes in that Law—in a word, a Muslim—may be entrusted with the office of leading the state and presiding over its executive. For, what we are aiming at—or, rather, what we *should* aim at—is not just “self-determination” for a racial or cultural entity but the enthronement of Islam as a practical proposition in men's affairs. I am under no illusion as to our immediate achievement of this goal. After all the centuries of our spiritual degeneration, there are too many waverers among us, too many “liberals” to whom religion is but an irksome relic of the past—in short, too many people who are “Muslims” only in name and have neither the courage nor the incentive to stand up for the ideals of Islam: and so our dream can be realised only through slow and painful evolution. None the less, the Constitution which the Muslims of Pakistan are about to frame will point the way we will have to go for many years to come. We must, therefore, compile its statutes in such a manner that a truly Islamic progress will be possible on its basis, whatever our present shortcomings. Our very first endeavour should be this: to bring home to every Muslim that there can be no Islamic life without an Islamic State, and that no state can be Islamic unless it is administered by people who can be supposed to bow in reverence before the Word of God.

However unpalatable such a “discrimination” against our non-Muslim citizens may be to those who identify progress and modernity

with indifference to religion, it should be clear to everybody that without a certain amount of discrimination between Muslim and non-Muslim there can be no question of our ever having an Islamic State; and that, therefore, any prevarication on this subject is utterly dishonest either with regard to the non-Muslim world around us or, alternatively, with regard to the Muslim community itself. Now this does not mean that we should discriminate against non-Muslim citizens in the ordinary walks of life. They must be accorded every freedom which a Muslim citizen can legitimately claim: only they must not be entrusted with key positions of leadership. One cannot go round the fact that no non-Muslim—however great his personal integrity and determined loyalty to the state—could ever be supposed, on psychological grounds, to work whole-heartedly for the ideological objectives of Islam: for, as I have pointed out more than once, the innermost objective of the Islamic State is not merely the safeguarding of the “nation's” worldly interests (within the current meaning of this term), but the moulding of the people's life in accordance with the ideology of Islam. As a matter of fact, no ideological state—whether based on a religious or any other doctrine—can ever afford to entrust the direction of its affairs to persons not professing its ideology. Is it conceivable, for instance, that a non-Communist could be given a political key position—not to speak of actual leadership of the state—in Soviet Russia? Obviously not, and rightly so: for as long as Communism supplies the ideological basis of a state, only persons who identify themselves unreservedly with the aims of Communism can be relied upon to translate those aims into terms of administrative policy. This principle holds good of the Islamic polity as well.

From the Islamic point of view, the legality of the State—that is to say, its absolute claim to a Muslim's allegiance—rests on the following *naṣṣ* ordinance of the Holy Qur'an:

أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولَى الْأَمْرِ مِنْكُمْ

“Obey God and obey the Apostle and those in authority *from among yourselves*” (*sūrah* 4: 59)—that is, from among the Muslim community. No government headed and directed by non-Muslims has any *shar'i* claim to the Muslim community's allegiance. And as it is our aim to endow our state with precisely this claim, we must see to it that those who wield supreme authority in Pakistan and are responsible for the shaping of her policies should always be Muslims—and this not merely *de facto*, by virtue of our majority in the country, but also *de jure*, namely, by virtue of a constitutional

enactment. Provided that we are really resolved to make Pakistan an ideological, Islamic State, we must have the moral courage to declare frankly that we are not prepared to endanger our future by falling into line with the demands of that spurious "liberalism" which refuses to attribute any importance to men's beliefs and convictions; and that, on the contrary, the beliefs and convictions a man holds are far more important to us than the mere accident of his having been born or "naturalised" in the country in which we live.¹

Apart from the question of communal allegiance, the Qur'ān-verse just referred to implies that the government's representative, Islamic character is conditioned by the community's free choice and consent: or else it could not be described as being "from among yourselves." Hence, the *shar'i* sanction behind the leadership of the state lies in the elective nature of that leadership. The "how" of election is left entirely to the community's discretion (as has been shown in the example of *al-khilāfāt ar-rāshidah*); but any assumption of governmental power through non-elective means—for instance, on the basis of the fictitious "birth-right" implied in hereditary kingship—becomes automatically, even though the claimant be a Muslim, as illegal as an imposition of power from outside the Muslim community.² It is, therefore, essential that our Constitution should have a clause to this effect:

"The Head of the State (Amir) shall be a Muslim; he shall be elected to his office by the community; and, on being elected, he shall declare that he would govern in obedience to the Law of Islam."

¹ It is interesting to note that in one of the most representative constitutions of the modern world, that of the United States of America, no person is eligible to the post of President unless he was born in U.S.A. This naturally excludes *naturalised* citizens—an obvious act of discrimination against a group of people who otherwise have the same civic rights as persons born in U.S.A. In an Islamic State, however, it is not the place of birth but the ideological allegiance which qualifies or disqualifies man in respect of this office.

² Some of our 'ulamā' will, perhaps, object to this conclusion by pointing to the frequent occurrence of the term *sultān* in some of the most authentic *aḥādith* dealing with political problems. As a matter of fact, the use of this very expression by the Prophet has for centuries supplied an excuse for the quite un-Islamic institution of kingship. This excuse is, however, entirely invalid, for the Holy Prophet never used this term in the sense of "king." Whenever applied in the context of political thought, *sultān* denotes in classical Arabic no more and no less than "government": and it is in this sense that the Prophet used the word when he spoke of the community's political life. The application of this term to a person entrusted with government—that is, to a ruler—is a definitely post-classical corruption of the original meaning. (See, for instance, Lane's Lexicon, vol. IV, p. 1406.)

As already mentioned, the *shari'ah* does not stipulate any particular mode of election. It will be, consequently, the task of the Constituent Assembly to devise a method of suffrage in accordance with the best interests of the community. The same applies to the question of the period during which the *Amir*¹ shall hold office. It is conceivable that a specified number of years may be fixed for that purpose; alternatively, the *Amir*'s tenure of office may be subject to termination on the incumbent's reaching a certain age limit, provided he discharges his duties loyally and efficiently; or, as a third alternative, the tenure of office may be for life-time, with the same proviso as above: that is to say, the *Amir* would have to relinquish his office only if and when it is shown that he does not loyally perform his duties, or that he is unable to maintain efficiency owing to bodily ill-health or mental debility. The *shari'ah* does not express any clear-cut preference for either of these alternatives, and so it is left to the Assembly's good sense to make an appropriate enactment in this respect.

Autocracy or Government by Council?

AND now let us turn our attention to the legislative side of the state—for, as we have seen, the *shari'ah* does not (nor was it ever intended to) provide detailed laws for all the manifold, changing requirements of our social existence. The need of unceasing, temporal legislation is therefore self-evident.

The legislation to be transacted in an Islamic State will have a twofold aspect. Firstly, there will be many problems not specified in the *shari'ah* at all—that is to say, matters of law entirely left to the common-sense of the community. Secondly, there will be problems with regard to which the *shari'ah* has provided general principles but no detailed legislation: and it will be for the community to evolve the relevant, detailed legislation through the exercise of *ijtihad*. It goes without saying that in matters affecting the communal side of our life such legislative, *ijtihadī* decisions cannot possibly be left to the discretion of individual scholars but must arise from the whole community's agreement (which, of course, does not preclude the community's agreement, in any matter under consideration, on an

¹ I am using here the designation *Amir* for the sake of convenience and, moreover, because it is one of the two designations used by the Prophet for the Head of an Islamic State (the other being *Imām*). But the community is under no *shar'i* obligation to adopt this title, and so there can be no objection to the Constituent Assembly deciding on any other designation.

ijtihādī decision previously arrived at by an individual scholar or a group of scholars). It is the twin duty of the Islamic State to make the necessary arrangements for the community's free, representative deliberation on all such legislative problems, and to see to it that the enactments decided upon are enforced.

Now who is to enact this temporal legislation for and in the name of the community? Obviously, the "community as a whole" cannot be supposed to sit together and to legislate: and so there must be some person or a limited number of persons to whom the community could delegate its legislative powers, and whose decisions would be binding on the whole community. The question is, therefore, as to what person or persons should be entrusted with this task.

Many Muslims are of the opinion—seemingly justified by the example of *al-khilāfat ar-rāshidah*—that all powers pertaining to temporal, non-*shar'i* legislation should be vested in one person, namely, the Head of the State: for, having been freely elected by the community, he might be supposed to represent the latter not only in executive but also in legislative concerns. But many other Muslims hold the view—also supported by historical experience—that so great an accumulation of power in one man's hands is always fraught with the gravest risks. For one thing, an individual, however brilliant and well-intentioned, may easily commit mistakes of judgment due to personal bias in this or that matter; while, on the other hand, in an assembly composed of many persons, the very existence of contrasting opinions—and the ensuing debate on these opinions—tends to illuminate every problem from various angles: thus, the danger of an "individual bias" obtruding itself on legislation is, if not completely eliminated, at least greatly reduced. Nor is this all. More often than not, the possession of absolute power is liable to corrupt its possessor and tempt him to abuse it in his own or his friends' interests. Consequently, the legislative powers should not vest in the *Amir* alone, but should be delegated to a body of legislators whom the community would elect for this specific purpose.

The choice before the Muslims is thus, apparently, between an autocratic rule exercised by the *Amir* alone, on the one hand, and a rule by the *Amir* plus Council (or Assembly, or Parliament, or whatever name we may give to it), on the other. But when we begin to examine the question more closely we find that, in reality, our "freedom of choice" between these two alternatives is non-existent, the issue having been most categorically decided by an ordinance of the Holy Qur'an:

أمرهم شوري بينهم

"Their [i.e., the Believers'] affairs (*amr*) are transacted in consultation among themselves" (*sūrah* 42: 38).

This *naṣṣ* injunction must be considered as the fundamental, operative clause of all Islamic thought relating to statecraft. It is so comprehensive that it reaches out into almost every department of political life; and it is so self-expressive and unequivocal that no attempt at arbitrary interpretation can change its purport. The word *amr* occurring in it refers to all business of communal nature, and therefore also to the method by which the Islamic State is to be run. Thus, unavoidably, government by council and popular consent—not only as regards its establishment but also as regards the way in which it transacts all legislative business—is the only kind of government that can meet the requirements of the *shar'i'ah* and, consequently, of a truly Islamic life: which means that the legislative business of the state must be vested in an Assembly—or, to use an Islamic term, a *Majlis ash-Shūrā*—wielding its authority by virtue of a popular mandate.

Before we proceed further we must, in all fairness, answer an objection which some Muslims are bound to raise on historical grounds.

We know that at the time of the four Right-Guided Caliphs there was no "legislative assembly" in the modern sense of this term. To be sure, the Caliphs did consult the leaders of the community on all outstanding problems of policy: but neither were the persons thus consulted properly "elected" by the community for this purpose, nor did the Caliph feel himself bound to follow the advice tendered in every case. He asked for advice, considered it on its merits, and thereupon made his decision in accordance with what he thought right—sometimes accepting the advice of the majority, sometimes that of a minority, and sometimes overruling both. One might therefore be tempted to ask: If the Right-Guided Caliphs did not think it necessary to have a "parliamentary" system of government, how can anybody claim today that such a system corresponds to the intentions of the *shar'i* Law-Giver? Were not those great Companions far better acquainted with the innermost aims of Islam than we could ever be? Should we not, therefore, follow their example as closely as possible, and establish a more or less autocratic form of government in which the *Majlis ash-Shūrā* would have only an advisory function, while the *Amir* would have the last word in all affairs of the state, legislative as well as executive?

This objection has an emotional background of great potency, and so I shall try to answer it at this stage of our discussion.

No doubt, the Apostle of God has impressed on us the necessity of taking his Companions for an example—not only because they had spent many years in the Master's blessed company and were thus fully aware of his ways, but also because their character and their behaviour attained to the highest peaks vouchsafed to any man below the rank of a Prophet. But our moral and religious obligation to try and emulate the Companions' behaviour and character refers, precisely, to these things alone—namely, to their spiritual and social integrity, their selflessness, their idealism, their unquestioning surrender to God's Will and obedience to His Holy Prophet. It cannot and does not refer to an imitation, by people of later times, of the Companions' procedure in matters of state administration—for the simple reason that this procedure was in many respects an outcome of time-conditioned *ijtihād*, and did not in each and every case depend on *shar'i* ordinances alone.

In point of fact, none of the Companions ever considered his personal *ijtihād*—be it in questions of belief or of action—as binding on all Muslims at all times. Their hearts were blessed with that humility than which there is no greater greatness of the spirit; and none of them ever arrogated to himself the status of a "secondary Law-Giver". But precisely such a status has come to be ascribed to them by people of later generations: by people who have ceased to think for themselves and have learnt to place the burden of thought on the shoulders of their predecessors; by people who in their pious—and certainly justifiable—admiration of those splendid Friends of the Prophet, have become blind to the element of imperfection inherent in human nature as such. In this blindness they commit the mistake of regarding every detail of the Companions' *ijtihād* in political matters as something in the nature of "legal precedents" binding on the community for ever and ever—a view justified neither by the *shar'i'ah* nor by common-sense.

Without in the least impairing our reverence for the Companions, we may safely admit that all findings obtained through *ijtihād*, by however great a person, are invariably conditioned by that person's environment and state of knowledge; and knowledge, especially in matters of social concern, depends not so much on the loftiness of a man's character as on the sum-total of historical experience available to him. Now there can be no doubt that living as we do thirteen centuries after the Companions, the historical experience available to us is, without any merit on our part, very much wider than that which

was available to them. For instance, we have only to think of the immense development, in the intervening centuries, of so many psychological and sociological notions, in order to realise that we are in some respects better equipped to grasp the inner purport of this or that socio-economic proposition of Islam than the Companions could possibly have been: simply because we can draw upon the historical and intellectual experiences of those thirteen centuries which, to the Companions, still lay shrouded in the impenetrable mists of the future.

We should never forget that the Message of Islam is eternal, and must therefore always remain open to the searching intellect of man. The very greatness of the Qur'ān and of the Prophet's life-example lies in the fact that the more our knowledge of the world progresses, the better we can understand the purport of so many a law in the Two Sources of Islam. To find these new meanings and depths is the never-ending task of a true Muslim.

A Retrospect

WITH reference to the specific problem before us—the question of having or not having a *Majlis ash-Shūrā* whose legislative decisions would be binding on the community, including the *Amir* himself—there is yet another reason why we need not and may not implicitly follow the Companions' example in such matters.

When the first of the Right-Guided Caliphs, Abu Bakr, was confronted with the necessity—dictated by the Qur'ānic principle *amruhum shūrā baynuhum*—of having a council which would assist him in governing the state, he instinctively turned to an institution that was sanctioned by immemorial custom and had not been repudiated by the *shar'i'ah*: namely, the assembly of tribal chiefs and leaders of clans. In the circumstances, the choice was undoubtedly correct, for, in spite of the considerable loosening of tribal ties brought about by Islam, those ties had not yet been entirely discarded. The Muslim society of those days had preserved its tribal organisation to a large extent, and the tribal and clan leaders did in fact, if not in law, possess the authority to speak and act in the name of the groups they represented—the views expressed by, say, a leader of the Banū Zuhrah clan of Quraysh or of the Anṣārī tribe of Aws being in most of the cases identical with the views held by the other members of those clans or tribes. Hence, there was no need for the Caliph to call for elections. All that he had to do was to summon the most outstanding Companions and tribal chiefs—and there was his council, as representative of

the community as it ever could have been under the conditions then prevailing. This structural peculiarity of Muslim society—especially Arabian society—remained practically unchanged throughout the duration of *al-khilāfat ar-rāshidah*, with the result that none of the Four Caliphs saw any reason for changing the method by which the council came into being.

In our days, on the other hand, Muslim society does not possess any effective tribal organisation (which, by the way, is something for which we should be thankful to God). Consequently, we have no means of ascertaining the opinions of large sections of the community except through a popular vote. In matters of outstanding importance, this vote may take the shape of a referendum; and in matters of day-to-day legislation, nobody has as yet devised a better method than elections: that is to say, the appointment by the community, section-wise, of a number of persons who would act as its representatives.

All this is so obvious that I would not have dwelt on it were it not for the fact that many of our Muslim contemporaries have not yet realised the structural difference (a most far-reaching difference) between our society and that which existed in the early days of Islam. Faced with social conditions similar to ours, the Right-Guided Caliphs would certainly not have hesitated to have their council elected through popular vote: in other words, their *ijtihād* in this respect would have led them to conclusions vastly different from those they actually arrived at thirteen centuries ago.

This finding applies not only to the method by which the *Majlis ash-Shūrā* should come into being, but also to the terms of reference under which it should work and to the position it should have within the framework of a modern Islamic State. For, the comparative simplicity of the problems, both administrative and legislative, with which the Right-Guided Caliphs were confronted in the first decades of Islam made them conceive the principle *amruhum shūrā baynuhum* in a somewhat different light than we must conceive it today. They knew, of course, that consultation in matters of the state was absolutely essential if the polity was to conform to the Law of Islam, and so they established councils and called for advice whenever a necessity arose. But they also knew that political consciousness among the general run of people was still in its infancy, and that there was always a danger that the advice tendered might be coloured by considerations of tribal interest; and so, very wisely, they held themselves free to accept or to reject the advice of their consultants from case to case. Most probably this was the only course open to them at the time. Still, it is just possible that such an unfettered freedom of deci-

sion on the part of the Head of the State was one of the contributing factors of the rapid decay of the Caliphate: for, while it led to admirable results in the case of an exceedingly strong and far-sighted personality like 'Umar, it brought the entire institution of the Caliphate into discredit whenever a weaker ruler committed a serious error of judgment. Might not, perhaps, the whole Muslim history have taken a different course if, for instance, 'Uthmān had held himself bound (in the legal sense of the word) to follow in every case the decisions of a properly constituted *Majlis ash-Shūrā*?

Whatever answer may be given to this hypothetical question, we are certainly not justified to expect that every *Amīr* would possess the strength of purpose and wisdom of an 'Umar. On the contrary, all history shows that such personalities are extremely rare exceptions, and that the vast majority of administrators, at all times and in all societies, are prone to commit the most painful mistakes if left entirely to their own devices. Hence, they should not be left entirely to their own devices: which is one of those classical lessons of history that no community may neglect except at its own peril.

Apart from this, it is a mistake to believe that the forms of government and the administrative procedure obtaining at the time of the Right-Guided Caliphs represented the fulfilment of all Islamic aims with regard to statecraft. If this had been so, Islam would be no more than a call to eternal repetition, for nothing would have been left to us but to repeat and imitate the doings of our predecessors: in reality, however, Islam is a call to eternal progress, spiritually as well as socially.

Looking back at our history, we find that *al-khilāfat ar-rāshidah* was a most glorious beginning of Islamic statecraft, never excelled, nor even continued, in all the centuries that followed it: but it was, for all that, a beginning only. From the moment of Abū Bakr's accession to 'Alī's death, the Islamic Commonwealth was, from the structural point of view, in a permanent state of flux, organically growing and developing with each successive conquest and with each new administrative experience. Within a few decades after the Holy Prophet's demise this Commonwealth grew from the restricted confines of Western and Northern Arabia (with some loose dependencies on the east coast and in the south of the Peninsula) to an enormous dominion stretching from almost the Atlantic deep into Central Asia. A state which originally embraced only pastoral and agricultural communities with simple needs and comparatively static problems, suddenly became the heir to the most complicated Byzantine and Sassanian civilisations. Almost every day new problems

arose in the sphere of administration and of economics. The decisions of the government had often to be made on the spur of the moment, and thus many of them were, of necessity, purely experimental in nature. In short, the progress was so rapid and so all-embracing that almost all the energies of the government had to be directed at military consolidation and at ensuring the barest minimum of administrative efficiency.

In these circumstances, the Right-Guided Caliphs had neither time nor peace to work out a political theory in all its details and subsequently to translate it into practice. In particular, the principle *amruhum shūrā baynuhum* enunciated in the Book of God was so revolutionary, so out of all proportion with anything the people of those times had previously experienced by way of government, that even the genius of *al-khilāfat ar-rāshidah* could not all at once give full effect to it in clearly-formulated, constitutional enactments. Accordingly, the institution of a limited *shūrā* was, in those days, in the nature of a first experiment rather than in that of a final achievement. Had the inner development of the Commonwealth followed the lines mapped out by the Right-Guided Caliphs, that initial experiment might soon have blossomed into the full glory of achievement. But this was not to be. All the original aims of the Islamic polity were suddenly stultified by the emergence of an autocratic, dynastic state under Mu'āwiyah and his successors—and we have been left with nothing but an interrupted experiment.

To stop at that first, glorious experiment, and to build our state, thirteen centuries after the Right-Guided Caliphs, in exactly the same forms in which *their* state was tentatively manifested, would not be an act of true piety: it would be, rather, a betrayal of the Companions' creative endeavour. They were pioneers and path-finders; and if we truly wish to emulate them, we must take up their unfinished work and continue on the trek, so splendidly begun by them, towards the Kingdom of God on earth. If we fail in this task—as so many generations have failed before us—and entrench ourselves in a lazy, indiscriminate contemplation of the glories of our past—demanding of ourselves no more than a blind imitation of that experimental past—we will only demonstrate, once again, that the world is not yet ripe for Islam . . .

The Legislature

ALL the foregoing discussion of *amruhum shūrā baynuhum* may be summed up thus:

Firstly, God has decreed in His Holy Book that all communal and state business (*amr*) of the Muslims should be transacted through "consultation among themselves": therefore, the institution of a *Majlis ash-Shūrā* is an indispensable obligation in an Islamic State.

Secondly, the expression "among themselves" refers to *all* Believers—that is, to the whole community—and so the *Majlis* must be truly representative of the community. Now such a representative character can be achieved only through free and general elections: therefore the members of the *Majlis* must be elected. Still, one might maintain that, instead of being elected by the community as a whole, the *Majlis* could be sufficiently representative if its members were simply nominated by the *Amīr*, because the latter, owing as he does his position to popular election, might be considered as being representative of the community's will. But the weakness of this view becomes apparent if we bear in mind that the *manner* in which a legislative body comes into being must be counted among the most important "affairs" of the state; and if we accept—as accept we must—the Divine dictum that the affairs of the Muslims are to be transacted on the basis of popular consultation, we cannot escape the conclusion that the process of constituting the *Majlis* must be, in itself, a matter of "consultation" in the widest and most direct sense of the word. In our days, such a consultation can take no other form but that of elections, at which the merits of the respective candidates are publicly discussed and the votes cast accordingly. The method of elections—direct or indirect, transferable or non-transferable vote, the extent of the electorate, and so forth—all this is of course a matter for communal *ijtihād*.

Thirdly, the Qur'ān makes the transaction of all legislative business not only consequent upon, but synonymous with, consultation—for, literally translated, the verse in question reads thus: "Their state business (*amr*) is consultation (*shūrā*) among themselves." Therefore, the legislative decisions arrived at by the *Majlis ash-Shūrā* are not merely of an advisory character, to be accepted or rejected by the holders of executive power at their own discretion, but are legally binding on them.

Fourthly, the expression "among themselves" naturally includes the *Amīr* within the group of the legislators—because, having been elected by the community, he must be regarded as its foremost representative. And by virtue of his being the Head of the State, and thus the focus of all *amr* in the Qur'ānic sense, he is not merely an ordinary member of the *Majlis ash-Shūrā*, but its leader: in other words, he is entitled to preside—either personally or through a

delegate—over its deliberations, and to guide its activities. This stipulation constitutes a specifically Islamic contribution to political theory. It presupposes that there is no radical separation of the legislative and the executive phases of state administration, but that, on the contrary, both these phases are integrated with another through the instrumentality of the *Amir*, whose executive function as Head of the State is made a corollary, as it were, of his function as President of the *Majlis ash-Shūrā*. It is, I believe, in this way only—and in no other—that the Islamic Law, *amruhum shūrā baynuhum*, can fully come to its own.

On the basis of the above conclusions, our Constitution should contain an article reading somewhat like this:

"The legislative powers in the State vest in the Majlis ash-Shūrā, the members of which shall be freely elected by the people. The Majlis is entitled to legislate in respect of all matters not covered by the shari'ah, and is presided over by the Amir or a delegate to be chosen by him from among the members of the Majlis. The laws passed by the Majlis are binding on the Executive."

The question of the period during which the *Majlis* shall hold its mandate has not been touched upon here as the *shari'ah* does not say anything on this point. It is, again, one of those questions which the Constituent Assembly is free to decide in any way it thinks proper. As already mentioned, the same applies to the method of elections. Nevertheless, I should like to make here a suggestion in this respect.

Self-canvassing for any elective post or any appointment in the state seems to be inadmissible in view of various sayings of the Prophet on this subject. For instance, when he was approached by Abū Musā al-Ash'arī with the request for a government post, he emphatically answered: "By God, we do not appoint to this post anyone who asks for it, nor anyone who covets it" (al-Bukhārī and Muslim, on the authority of Abū Musā).

Similar utterances of the Prophet are recorded in other authentic *ahādith*, and so it would be in full keeping with the spirit of Islam if our Constitution were to declare that

"Self-canvassing by any person desirous of being appointed to an administrative post or of being elected to a representative assembly, shall automatically disqualify that person from being elected or appointed."

Such an enactment would immediately remove one of the foremost

objections to the parliamentary system of government. At present anyone possessing local influence or wealth may—regardless of his real worth—secure his election to a legislative assembly by exercising a certain amount of "persuasion" on his electors; but under the above-mentioned enactment, all such attempts at persuasion, whether direct or indirect, would lead to immediate disqualification—with the result that only a person enjoying real and unasked-for esteem among the electorate would have a genuine chance of success. It would be, of course, still possible for a wealthy but otherwise worthless candidate to avoid the outward appearance of self-canvassing by appointing middlemen who would do the necessary propaganda among the public; but the fact that the candidate himself would be debarred from delivering electioneering speeches or from otherwise addressing the electorate in his own behalf, would make the task extremely difficult. In order to make doubly sure that only the really deserving should be elected to the *Majlis ash-Shūrā*, the Constituent Assembly might profitably decide that the elections should be indirect—for instance, the persons elected should not automatically become members of the *Majlis*, but should primarily form a panel out of which the *Amir* might make a final selection. This method would have a twofold advantage: firstly, none of the candidates offering themselves for primary elections could be sure of passing the final test, namely, the *Amir's* selection (which would lessen the candidate's readiness to attempt, directly or indirectly, a bribing of the electorate), and, secondly, the *Majlis* thus constituted would be much smaller and therefore much more efficient than such elected assemblies usually are. Apart from this, the *Amir's* power of making a final choice from a panel of names submitted to him by the electorate would fully correspond to the law of *amruhum shūrā baynuhum*—being, in this case, a "consultation" between the elected *Amir* and the community as a whole.

A few words more remain to be said about the method of business to be followed by the *Majlis ash-Shūrā*.

As elsewhere in such legislative assemblies, the decisions of the *Majlis* should be obtained on the majority principle—a simple majority in regard of ordinary legislation, and perhaps a two-thirds' or even three-fourths' majority in questions of exceptional importance, like a demand for a deposition of the *Amir* (to be discussed later), declaration of war, etc.

In view of the obvious failures of most of the so-called "democratic" systems prevailing in the modern West, some of our Muslim contemporaries dislike the idea of making the legislative activities in

an Islamic State dependent on a mere counting of votes. The bare fact, so they argue, that a legislative measure is supported by a majority does not necessarily imply that it is a "right" measure: for it is always possible that the majority, however big and even well-meaning, is on occasion mistaken, while the minority—in spite of its being a minority—is right.

The objective truth of this view cannot be disputed. The human mind is extremely fallible; moreover, men do not always follow the promptings of right and equity; and the history of the world is full of examples of wrong decisions made by a silly majority in spite of the warnings or the opposition of a wiser minority. Nevertheless, I should like to ask my critics as to what alternative they propose to the method of majority decisions. Who is to establish, from case to case, whether the majority or the minority in the *Majlis ash-Shūrā* is right? Whose opinion shall finally prevail? One might, of course, say that the final verdict should rest with the *Amīr*: but—quite apart from the contention that the grant of such absolute power to any one person militates against the principle *amruhum shūrā baynuhum* so strongly insisted upon by the Law of Islam—is it not equally possible that the *Amīr* is mistaken, while the view of the majority is right? Is there any Divine guarantee attached to the views of the *Amīr*? To this, some of my friends give the answer: "When we are about to elect an *Amīr*, we should see to it that the wisest and most righteous man is chosen; and the very fact of his being chosen on the grounds of his superior wisdom and righteousness should be guarantee enough that his decisions will be right." Perfectly true: but is it not equally true that you are supposed to elect the *Majlis ash-Shūrā* on the grounds of the wisdom and the righteousness attributed to each of the candidates? Is this not "guarantee enough" that their legislative decisions will be correct? Of course not, my friends: for "guarantee enough"—whether in the case of the *Amīr* or of the *Majlis*—can never be a substitute for perfect guarantee; and perfection is unfortunately, in both the cases, beyond our reach.

In point of fact, human ingenuity has not yet evolved a better method for corporative decisions than the majority principle; and it is extremely doubtful whether any better method will ever be evolved. A majority can err; but so can a minority. However we turn, the fallibility of the human mind makes the committing of errors an inescapable factor in human life—and we have no choice but to learn through trial and error and subsequent correction. This, indeed, is the meaning of progress.

The Executive

WHILE discussing the office of the Head of the State I have quoted the Qur'ān-verse

أطيعوا الله وأطيعوا الرسول وأولى الأمر منكم

"Obey God and obey the Apostle and those in authority from among yourselves" (*sūrah* 4: 59). Now from the preceding it has become obvious that the *Majlis ash-Shūrā*, presided over by the *Amīr*, represents the *ūlu'l-amr* ("those who wield authority") on the legislative side. On the executive side, the *dhu'l-amr* is the Head of the State in his capacity as Head of the Government. It follows, therefore, that the *Amīr* must possess executive powers within the fullest meaning of the word—otherwise there would not be much sense in making the Muslims' obedience to him a corollary of their obedience to God and His Apostle—and that, therefore, the *Majlis* is empowered to frame the laws on the basis of which the country is to be governed, but is certainly not entitled to interfere in the day-to-day administration of the state. An office of Head of the State shorn of all real, executive powers and reduced to the position of a mere figure-head—as, for example, that of the President of France or of the King of modern Great Britain—is evidently redundant from the *shar'ī* point of view, and so we need not consider it at all. Still, even if full executive powers are conceded to the *Amīr*—that is to say, even if we take it for granted that the Head of the State is to be Head of the Government as well—the question arises as to whether those governmental functions are to be vested in him alone, or whether he is expected to exercise them in partnership, as it were, with a Cabinet of Ministers representing the main parties in the Legislature and depending for their activities on the latter's vote of confidence.

In the event of our Constituent Assembly's deciding on the second of these two alternatives, the position of the *Amīr* would resemble that of the Prime Minister in most of the European democracies (for instance, Great Britain); while, if we adopt the first alternative, his position would be somewhat similar to that of the President of U.S.A., who combines in his person the twin functions of Head of the State and Head of the Government. There is no explicit, *shar'ī* enactment in either of the two directions. We may therefore, if we like, entrust all the executive powers to the *Amīr* alone—with the proviso, of course, of his being subject to the legislative decisions of the *Majlis ash-Shūrā* (of which, as we know, he is the statutory President)—or, alternatively, postulate that he should share his governmental powers with a Cabinet of Ministers deriving their mandate from, and directly responsible to,

the Legislature. Common-sense, however, tells us that such a distribution of executive competencies and responsibilities between the Amir and the *Majlis* would make the former's position entirely anomalous—for, on the one hand, he is supposed to be the executive *dhu'l-amr* in his own right, while, on the other hand, he would have to share his executive powers with a Cabinet of Ministers ultimately responsible to the Legislature. Apart from the insuperable administrative difficulties attaching to such a system, it would naturally result in the government's policy being always dependent on reaching a compromise—or, rather, an unending series of compromises—between various, sometimes quite conflicting, party programmes and never being able to attain to that ideological single-mindedness and inner continuity so essential in an Islamic State.

Now this principle of compromise between ever-changing programmes of political parties may be a necessary evil in the so-called democracies of the modern West, which are not animated by any definite ideology and are, therefore, bound to subordinate all political action to the people's utilitarian views as to what is right or wrong under given circumstances: but it is certainly out of place in an ideological state, in which, as we know, the concepts of Right and Wrong cannot possibly be made dependent on "expediency". In such a state, not only legislation but also administrative policy must have inner continuity, and must be expressive only of the ideology on which the community—the whole community—has beforehand agreed: and this can never come about so long as the government is obliged to subordinate its executive, day-to-day activity to a consideration of fluctuating party politics—that very disease from which the modern West is suffering. This, of course, does not mean that there might not be "parties" in an Islamic polity as well. As long as freedom of opinion and criticism is recognised as the citizen's inherent right (as it undoubtedly is in the political concept of Islam), people must be free to group together, if they so desire, for the purpose of propagating certain sets of views about what should be the policy of the state; and as long as those views do not run counter to the ideology on which the state is based—that is, the *shari'ah*—the parties thus constituted must have the right to argue them in and outside the *Majlis ash-Shūrā*. But, on the other hand, this freedom of party-formation should not be allowed to affect the day-to-day working of the government—as it necessarily would if the Ministers were to receive their mandate from, and remain responsible to, the party organisations represented in the *Majlis*.

The Islamic interests of the state demand, therefore, that all the

executive powers should be entrusted to one person only, namely, the Amir—and that he alone should be responsible to the *Majlis* for the government's policy. Being thus the Head of the State and the real Head of the Government at one and the same time, he would not have to "share" his executive functions with an independently constituted Cabinet of Ministers, but, on the contrary, the Ministers would be (like in U.S.A.) no more than his "secretaries", appointed at his own discretion and responsible only to him. In this way the baneful influence of party politics on the routine of government would be largely eliminated, while the principle of the government being subject to the laws passed by the *Majlis ash-Shūrā* would nevertheless remain intact.

As already mentioned, the *shari'ah* does not explicitly insist on this form of government; none the less, from the wording of many *ahādith* it appears that the Holy Prophet envisaged a combination of the functions of Head of the State and Head of the Executive in one and the same person (whom he variously described as Amir or Imām) as most suitable for the purposes of the Islamic polity. Here are some of these *ahādith*:

The Apostle of God said: "Whoso pledges allegiance to an Imām by giving him his hand and the fruit of his heart, shall obey him as long as he can [*i.e.*, as long as the Imām does not order anything contrary to the Law of Islam]; and if another man tries to usurp the Imām's rights, strike that other man's neck" (Muslim, on the authority of 'Abd Allāh b. 'Amr).

The Apostle of God said: "If anyone comes to you while you are united under one man's leadership, and tries to break your strength and to disrupt your unity, kill him" (Muslim, on the authority of 'Arfajah).

The Apostle of God said: "If God means well with an Amir, He provides for him a trustworthy minister (*wazir*) to remind him whenever he forgets, and to help him when he remembers. And if God does not mean well him, He provides for him an evil minister, who does not remind him whenever he forgets and does not help him when he remembers." (Abū Dā'ud and an-Nasā'i, on the authority of 'Ā'ishah.)

These and similar sayings of the Holy Prophet are entirely in keeping with his more general command that, whenever a group of Muslims are engaged on any work of common importance, one man should be chosen from among them to lead the others. If, therefore, we adopt for our state the one-man method of government—popularly known today as the "American system"—we will but realise a principle

indirectly laid down by the Apostle of God long before America had appeared on the map of the world; and this alone should weigh heavily with the Constituent Assembly when it makes its final decision. There is, however, yet another argument in favour of this system.

We know that the *ulu'l-amr* ("holders of authority") in the Islamic State must be Muslims. Now if the executive powers of the state were to be vested in a Cabinet of Ministers chosen from the Legislature on the basis of party representation—as in most of the European democracies—it is these Ministers who would be, together with the *Amir*, the executive *ulu'l-amr* by virtue of a mandate received from the Legislature; in which case the holding of ministerial power by a non-Muslim would contravene the clear-cut *shari'i* stipulation referred to above. Hence, the community would be faced with the alternative of either statutorily excluding non-Muslim citizens from all ministerial posts (which might make it very difficult for them to co-operate loyally with the state), or of blandly disregarding a fundamental enactment of the *shari'ah* (which would strike at the root of the Islamic concept of the State). But if, on the other hand, all governmental power is concentrated in the person of *Amir*, it is he who is the sole *dhu'l-amr* responsible for the executive policies of the government, the Ministers being merely his secretaries whom he appoints at his will and to whom he delegates certain administrative tasks inherent in his office. Because they are not responsible for policy-making, they cannot be regarded as *ulu'l-amr*—in which case there can be no *shari'i* objection whatever to a non-Muslim's being appointed to a ministerial post.

The mere fact of our having non-Muslim minorities in our midst (especially in East Pakistan) should therefore tip the balance in favour of the following constitutional enactment:

"The Head of the State (Amir) shall be Head of the Government as well, and he alone shall be responsible to the Majlis ash-Shūrā for the activities of the Government. He shall appoint and dismiss his Ministers at his own discretion; they shall act as his Secretaries of State, and shall be responsible to him alone."

Guardianship of the Constitution

AS soon as the *Amir* has been duly elected and has taken the pledge to govern in accordance with the Law of Islam, the Muslim citizens' allegiance to him becomes a matter of religious duty—for the Apostle

of God has said: "Whoso obeys me, obeys God; and whoso disobeys me, disobeys God. And whoso obeys my *Amir* [i.e., one who governs on my behalf], obeys me; and whoso disobeys my *Amir*, disobeys me." (Al-Bukhārī, on the authority of Abū Hurayrah.)

Thus, an individual citizen has no choice in the matter of allegiance. When the community has decided to entrust the reins of government to a particular person or group of persons, every citizen must regard himself not only legally but also morally bound by that decision, even if it goes against his personal liking. There are many authentic *ahādith* to show how severely the Prophet condemned a Muslim's rebellion against, or even passive aloofness from, the united will of the community; and all of them are summarised, as it were, in the following saying of his: "He who forsakes allegiance and separates himself from the will of the community (*fāraqa'l-jamā'ah*), dies the death of the Time of Ignorance" (Muslim, on the authority of Abū Hurayrah).

Obedience to the properly constituted, Islamic government is, accordingly, one of the primary duties of a Muslim. This, of course, coincides with a principle of citizenship recognised as fundamental in all civilised communities. But it is very important to note that within the context of an Islamic polity the duty of obedience remains a duty only so long as the government (or, the *Amir*) does not govern in violation of Islamic Law—that is to say, so long as the government does not enjoin or legalise the doing of things forbidden by the *shari'ah* or forbid the doing of things ordained by the *shari'ah*. In such a contingency, obedience to the government ceases to be binding on the community, as clearly stated by the Prophet:

"No obedience is due in the way of sin: behold, obedience is due only in the way of righteousness (*fi'l-ma'rūf*)" (al-Bukhārī and Muslim, on the authority of 'Alī).

"Hearing and obeying is binding on a Muslim, whether he likes or dislikes the order—so long as he is not ordered to commit a sin: but if he is ordered to commit a sin, there is no hearing and no obeying" (al-Bukhārī and Muslim, on the authority of Ibn 'Umar).

Thus, the people's allegiance to the government is conditional upon the latter's attitude towards the *shari'ah* as such. In other words, the community has been authorised by the Apostle of God to depose an *Amir* who governs in flagrant opposition to or disregard of the *shari'ah*. But in consonance with the principle of communal unity so frequently insisted upon by Qur'an and Sunnah, it cannot possibly be left to the discretion of an individual citizen or a group of citizens to decide when, if at all, obedience to the properly elected *Amir* ceases

to be a religious and civic duty. Such a decision can be taken only by the community as a whole or at least by its overwhelming majority: that is to say, by a popular *referendum*.

Now, who is to order such a referendum? Obviously, not the *Amir* himself; for it is he who is being impeached and has to be judged. One might, perhaps, think that the proper authority in this case would be the *Majlis ash-Shūrā*; but against this stands our finding that the *Majlis* is concerned only with the legislative and not the administrative side of the state. We require, therefore, another body for this purpose. And not only for this purpose—for, quite apart from the question of an *Amir's* deposition (which probably would arise only on very rare occasions), it may sometimes happen that the *Majlis* thinks it proper to object to an administrative act of the government because, in the opinion of the legislators, it contravenes some of the existing laws; just as it is conceivable that on occasion the *Amir* may feel conscience-bound to veto a legislative act passed by the majority of the *Majlis* because, in his opinion, it violates a *shar'i* stipulation. The resulting conflict of opinions might lead to a deadlock—for neither is the *Amir* entitled to override the majority decisions of the *Majlis*, nor has the latter a right to interfere in the day-to-day activities of the government. Here, again, the necessity of having an impartial machinery for arbitration becomes obvious.

Now both with regard to such deadlocks between the *Amir* and the *Majlis* and with regard to the much graver question of an *Amir's* deposition, it is the *Qur'ān* itself that indicates to us a solution.

In the foregoing we have already considered the *Qur'ānic* ordinance

أطيعوا الله وأطيعوا الرسول وأولى الأمر منكم

"Obey God and obey the Apostle and those in authority from among yourselves." But this quotation gave us only the first part of the verse in question. Its second part runs thus:

فإن تنازعتم في شئ فردوه إلى الله والرسول

"Then, if you disagree in anything, refer it to God and the Apostle" (*sūrah* 4: 59). Evidently, therefore, in case of fundamental differences between the *Amir* and the *Majlis ash-Shūrā*, or between the *Amir* and the community as a whole, the point in dispute should be referred by either side to the arbitration of an impartial body which, in its turn, would have to decide that God and His Apostle (that is, *Qur'ān* and *Sunnah*) have to say on that particular point, and would give a final ruling in the matter. The establishment, for this purpose, of a Supreme Tribunal seems to be indicated.

It goes without saying that such a Tribunal must be composed of the greatest '*ulamā*' of the time; men who have fully mastered the *Qur'ān* and the science of *Hadith* and are also fully aware of the affairs of the world: for it is only such men that can decide, with as great a degree of certainty as is granted to human intellect, whether a doubtful legislative act of the *Majlis ash-Shūrā* or administrative act of the Government accords with the Law of Islam or not. There can be, of course, no assurance that all the members of the Tribunal will always agree in their conclusions—and so we are again faced with the necessity of resorting to majority decisions whenever unanimity is not obtainable. But whether unanimous or not, the Tribunal's verdict must be regarded as final and absolute, binding on all the agencies of the state and on the community as a whole, unless superseded by another, similarly obtained verdict. This last qualification is very important, for it is quite conceivable that another time and another composition of the Tribunal may give rise to a different decision in respect of the same problem; which means no more and no less than that here also the doors of *ijtihad* may never be closed.

There should be, accordingly, a clause like this in our Constitution:

"The guardianship of the Constitution is vested in the Supreme Tribunal, the members of which shall be elected by the Majlis ash-Shūrā on the advice of the Amir. This Tribunal shall have the right (a) to arbitrate, on the basis of the naṣṣ ordinances of Qur'ān and Sunnah in all cases of disagreement between the Amir and the Majlis ash-Shūrā referred to the Tribunal by either of the two parties, (b) to veto, on the Tribunal's own accord, any legislative act passed by the Majlis ash-Shūrā or any administrative act on the part of the Amir which, in the Tribunal's considered opinion, offends against a naṣṣ ordinance of Qur'ān or Sunnah, and (c) to order the holding of a referendum on the question of the Amir's deposition from office in case the Majlis ash-Shūrā prefers, by a two-thirds' majority, an impeachment against him to the effect that he governs in flagrant contravention of the shari'ah."

This clause should be of course amplified by further provisions. In particular, I would suggest that the members of the Tribunal should be elected by the *Majlis* from a panel of names submitted by the *Amir*. The appointments should be for life-time—that is, a member's

active tenure of office should be subject to a certain age-limit, but on retirement he should be entitled to full pay and status until the end of his life; he should not be prematurely removable from active service unless it is proved that he is unable to discharge his duties on account of physical or mental debility, or that he was guilty of misconduct; and, lastly, after having once been appointed to the membership of the Tribunal, he should be statutorily debarred from holding, after retirement, any other post in the state, whether elective or administrative, paid or honorary. This provision would help the Judges of the Supreme Tribunal to keep themselves entirely free from all further ambitions, and would thus enable them to achieve the highest possible status of impartiality.

As already mentioned, it is most important to make sure that the members of the Tribunal, in addition to being outstanding scholars in the domain of Islamic Law, possess also a high degree of general education and world-wisdom. This, I know, is a very heavy demand in view of the fact that such a combination of qualities is extremely rare in present-day Muslim society: and so we will have to amble along, for some years to come, with whatever human material is now available to us. In these circumstances it would be probably the best course to divide the membership of the Tribunal, in equal proportions, among the best of the available *'ulamā'* on the one hand, and lay judges (who of course must be Muslims), on the other. But a final solution of our problem can be achieved only through the establishment in Pakistan of a suitable *Dār al-'Ulūm* which in due course would produce the type of real *'ulamā'* so badly needed by our community.

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The mention of the Supreme Tribunal makes it necessary to say here a few words about the judiciary in general.

In spite of popular ideas to the contrary, the *shari'ah* does not prescribe in detail any specific system of judicature, but restricts itself to the enunciation of fundamental principles of justice, impartiality, judicial ethics (including the manner in which judges should behave), law of evidence, and so forth. The *institutional* side of the courts of law—that is to say, their structure and method of establishment—has been left to the discretions of the community: in other words, to the *ijtihad* of the time concerned. It appears, therefore, that the Constituent Assembly is free to evolve any system of judicature that promises the best results in and for our time—with the proviso, of

course, that justice must be administered in accordance with, and on the basis of, the *shari'ah*. Keeping this principle in view, we realise at once that an Islamic State cannot countenance the establishment (so frequently demanded in our days by half-baked public opinion) of separate "*qādis*" courts in distinction from "secular courts". The word *qādi* is but the Arabic equivalent for "judge"; and in a state that aims at making the Law of Islam the law of land, a distinction between a "*shar'i* judge" and a "secular judge" is entirely uncalled for. If the *shari'ah* is really to become the basic Code of Public Law—as it must if our state is to be Islamic—every judge will obviously have to be a *shar'i* judge in so far as he will be expected to master not only the various laws passed by the *Majlis ash-Shūrā* but also the entire context of the *shar'i* ordinances expressed in the *naṣṣ* of Qur'ān and Sunnah; and so the present division of the *corpus juris* into "secular" and "religious" compartments will gradually disappear.

The gradualness of its disappearance will be conditioned by the fact that our whole system of law will have to be overhauled under the inspiration of the *shari'ah*—beginning with a codification, on *zāhiri* lines, of all the *nuṣūṣ* of Qur'ān and Sunnah relating to matters of public concern, and a subsequent evolution by the *Majlis ash-Shūrā* of a complementary code of laws pertaining to all the manifold problems and exigencies not covered by the *shari'ah*. It is obvious that such a revision of the contents and the structure of our legal system will require many years; also, it will have to be accompanied by a complete reorientation of the legal training to be imparted in our Law Colleges. Both these changes—the revision of the existing *corpus juris* and the reorientation of legal training—could well proceed in parallel stages; and in this respect a central *Dār al-'Ulūm* could render a most significant service by having a Law School directly affiliated to it. In order that the development of our legal thought and practice should be fully brought into line with the requirements of the *shari'ah*, I would suggest that the Rector of the *Dār al-'Ulūm* should be the *ex-officio* Grand Mufti of the State and should act as the chief adviser to the legal committees of the *Majlis as-Shūrā*. A provision to this effect might be made in our Constitution.

Freedom of Opinion, Religion and Education

So far we have considered the structural elements of the Islamic State. And now let us turn to the question of fundamental rights.

Some of those rights have already been touched upon in the preceding: for example, the citizen's right to have a direct influence, by

means of elections, on the composition of the executive and the legislature, and his right to depose, by means of a referendum, a government that acts in contravention of the *shari'ah*. This naturally presupposes a right, on the part of the citizen, to criticise the government's administrative and legislative policy whenever there is reason to suppose that things go the wrong way. There are many verses in the Qur'an and many sayings of the Holy Prophet to the effect that to raise one's voice against manifest wrong is one of the foremost duties of a Believer, and especially so when the wrongdoer is the established authority. Thus, the Apostle of God has said: "The highest kind of *jihad* is, to say a true word to a government that deviates from the right path (*sultān jā'ir*)" (Abū Dā'ūd, at-Tirmidhī and Ibn Mājah, on the authority of Abū Sa'id al-Khudrī). It must be, of course, understood that this freedom of criticism may not amount to incitement against the authority of the government as such; for as long as the government is the *de jure* government of the Islamic State, its ordinances must be obeyed, however much an individual citizen or a group of citizens may dislike them. This has been clearly stipulated by the Apostle of God: "If anyone sees a hateful thing in the activities of the government [lit., *Amī*], he shall nevertheless bear it with patience: for, behold, he that separates himself from the will of the community (*yufāriq al-jamā'ah*) by even a span, dies the death of the Time of Ignorance" (al-Bukhārī, on the authority of Ibn 'Abbās). In other words, the freedom with which a Muslim may criticise the activities of the government should on no account be confused with a right to rebellion: for it is only by a verdict of the community as a whole that an established, Muslim government may be deposed; and an individual citizen may do no more than peacefully plead for such a communal verdict if he thinks that the government cannot be persuaded to mend its ways.

But it is not only the government that may come in for public criticism. A Muslim is enjoined by God and His Prophet to combat evil wherever he encounters it and to strive for an improvement of social conditions wherever possible. Apart from a right to criticism—so necessary for a healthy growth of social consciousness—the citizens must also have the right to bring forward new ideas and to discuss them in public: otherwise there can be no question of the community's intellectual progress. We have seen that a truly Islamic life presupposes the liberty of unceasing *ijtihād* in all matters not laid down as law in uncontrovertible, clear-cut *naṣṣ* ordinances of Qur'an and Sunnah: and for this reason the right to a free expression of one's opinions is a fundamental right of the citizen in an Islamic State. It

must of course be understood that this freedom of expression may not be utilised for propagating ideas hostile to Islam as such.

Our Constitution should, therefore, declare that

"Every citizen has the right to express his opinions, in speech and in writing, on any matter of public concern, provided that such an expression of opinion (a) does not aim at undermining the people's belief in Islam, (b) does not amount to incitement against the Law of Islam or to sedition against the established Government, and (c) does not offend against common decency."

From sub-clause (a) in the above article it follows that in an Islamic State there can be no room for missionary activities, by non-Muslims, directed at persuading Muslims to give up their religion and to embrace another. Though non-Muslims of one religious community shall be free to preach their religion to other non-Muslim communities within the state, they can obviously not be permitted to preach against the ideology on which the very existence of this state is based. Accordingly, we must have in our Constitution the following article:

"Whereas non-Muslim citizens shall be free to preach their religious beliefs within their own community and among communities belonging to other non-Muslim religions, all missionary activities directed at converting Muslims to another religion shall be deemed a cognisable offence and shall be punished by Law."

Here, again, we would have one of those "discriminatory" enactments alluded to at the beginning of our discussion: for while Muslims would be free to preach Islam to non-Muslims, the latter would not enjoy the same liberty with regard to the Muslim community. But, as I have already said, a certain amount of discrimination between Muslim and non-Muslim is unavoidable in an ideological, Islamic State. If Islam is to be the basis of our Constitution, an attempt to wean a Muslim away from his Islamic beliefs must evidently be considered as diametrically opposed to the spirit of the Constitution, and therefore as illegal. With all this, I fail to see why such an enactment should in the least affect the well-being of non-Muslim minorities in our state. Their freedom of religion, the sanctity of their places of worship, and their cultural interests will be fully protected by the state in consonance with the Qur'anic principle:

لا إكراه في الدين

'There shall be no compulsion in religion' (sūrah 2:256). This must be clearly reflected in the Constitution:

"The State guarantees to all its citizens full freedom and protection in the expression of their religious beliefs and in the exercise of their religious practices, as well as in the pursuance of all their legitimate, cultural interests. No non-Muslim citizen shall be compelled, directly or indirectly, to embrace Islam against his will and conscience; and forcible conversion of a non-Muslim to Islam shall be deemed a cognisable offence and shall be punished by Law."

A necessary corollary of the freedom of opinions and beliefs, guaranteed by Islam to Muslim and non-Muslim alike, is the citizen's right and the government's duty to have a system of education which would make knowledge freely accessible to every man and woman in the state. Islam's insistence on the value of knowledge and education is too well known to require further elucidation here. Both Qur'an and Sunnah are full of injunctions relating to acquisition of knowledge, and all of them are summarised to perfection in this saying of the Holy Prophet:

طلب العلم فريضة على كل مسلم

"The quest of knowledge is a compulsory duty on every Muslim" (Ibn Mājah and al-Bayhaqī, on the authority of Anas). It follows, therefore, that a state which owes its justification to the call of Islam and aims at establishing the Law of Islam as the law of the land, must make education not only accessible to but also compulsory on every Muslim man and woman; and because it is one of the fundamental tenets of such a state to make all the facilities of life available to its non-Muslim citizens as well, education must be free and compulsory for all the citizens without regard to their religion. Hence, the Constitution must contain the following clause:

"Throughout the domains of the State, education shall be free and compulsory for every citizen, male and female, from the age of.....to the age of.....years, and the Government shall make suitable provision for the establishment and the running of schools. Islamic religious instruction shall form an integral, compulsory part of the curriculum in so far as Muslims are concerned; while in all schools controlled by the

Government arrangements shall be made as well for the instruction of non-Muslims in the tenets of their religions, provided that the community or communities concerned so desire."

The above clause provides for elementary education up to the age of, say, fourteen years. A further, adequate provision should be laid down in the Constitution for making higher education (which must of course remain voluntary) as easily accessible to the poor as it is now to the rich.

The State and the Citizen

WE have seen that a Muslim is not only legally but also morally bound always to identify his personal interests with the interests of the Islamic State as a whole—and this in pursuance of the principle that such a state is "God's vicegerent on earth." But it is obvious that this absolute claim of the state to the citizens' allegiance must be reflected not only in duties imposed on the citizen with regard to the state, and not only in certain freedoms which the state concedes to the citizen, but also in certain positive duties of the state with regard to its citizens.

One of these duties of the state is the protection it has to afford to the citizens. In accordance with the general tenets of Islam, the Apostle of God has stated in his famous sermon at 'Arafāt, on the occasion of his Farewell Pilgrimage, that "your lives and your possessions shall be as sacred among you as the sacredness of this very day [of ḥajj]" (Muslim, on the authority of Jābir b. 'Abd Allāh). This, taken together with other injunctions of Qur'an and Sunnah, calls for the incorporation in our Constitution of the following clause:

"The lives, persons and possessions of the citizens are inviolable, and none shall be deprived of his life, freedom or property, except under the Law."

But this clause alone does not exhaust the state's responsibilities in respect of its citizens—for it is only a passive responsibility concerned with the safeguarding of something already in existence. In order to justify its claim to the citizens' unquestioning allegiance, the state must, in addition, assume a more active responsibility for their welfare: in other words, the state is responsible for the economic facilities which the citizens enjoy. Nothing could illustrate this principle better than the following saying of the Holy Prophet:

"Behold, every one of you is a shepherd, and every one of you is

responsible for his flock. Thus, the people's *Imām* [i.e., the government] is a shepherd, and is responsible for his flock; and every man is a shepherd over his household, and is responsible for his flock; and the woman is a shepherdess over her husband's household and his children, and is responsible for them; and the servant is a shepherd over his master's property, and is responsible for it. Behold, every one of you is a shepherd, and every one of you is responsible for his flock" (Al-Bukhārī and Muslim, on the authority of 'Abd Allāh b. 'Umar.)

The reader will not have failed to observe that in this *ḥadīth* the government's responsibility with regard to the citizens has been put on par with a father's or a mother's responsibility with regard to their children. Just as the father is a "shepherd"—that is, a guardian—morally and legally bound to ensure the maintenance and well-being of his children, the government is morally and legally bound to ensure the well-being of the citizens whose affairs it administers, and to see to it that no person's standard of living falls below a certain level deemed as equitable. For, though we Muslims believe that human life cannot be expressed in terms of economics alone—the ultimate values of life being spiritual in character—we are not entitled to look upon spiritual truths as something divorced from the physical facts of our existence. Islam demands a society that would be equitable not only "in spirit" but also in respect of all the material requirements of human life. It follows, therefore, that a state, in order to be truly Islamic, must arrange the affairs of the society in such a way that every individual man and woman should enjoy that minimum of economic security without which there can be no real freedom and, in the last resort, no spiritual progress. This, of course, does not mean that the state should or even could, ensure easy and carefree living to its citizens: it means no more and no less that in an Islamic State there should be no soul-grinding poverty side by side with affluence; secondly, that all the material resources of the state should be harnessed to the task of giving every one of its citizens the feeling that, provided he is prepared and able to work, he has a right to a decent standard of living; and, thirdly, that this right of his should be fully safeguarded by virtue of a constitutional enactment.

No state can be called Islamic unless it affords complete economic security to all its citizens—for, as the Apostle of God has said, "The Faithful are to each other like the parts of a building, each of them strengthening the other" (al-Bukhārī and Muslim, on the authority of Abū 'Mūsā). And he said: "He is not a Faithful who eats his fill

while his neighbour remains hungry by his side" (al-Bayhaqī, on the authority of Ibn 'Abbās). And he said: "The Faithful are like one body: if its eye suffers, the whole body suffers; and if its head suffers, the whole body suffers" (Muslim, on the authority of an-Nu'mān b. Bashir).

This, then, is the deepest sociological lesson of Islam: there can be no happiness in a society that permits some of its members to suffer undeserved want while others have more than they need. If the whole society suffers want owing to extraordinary circumstances—as the whole Muslim community suffered in the early days of Islam after the *hijrah* to Madinah—that want may become a source of spiritual strength and future greatness. But if the resources of a community are so unevenly distributed that certain groups within it live in affluence while the majority of the people are forced to use up all their energies in the search of their daily bread, poverty becomes the most dangerous enemy of spiritual progress, and occasionally drives whole communities away from God and into the arms of soul-destroying materialism. It is undoubtedly this that our Holy Prophet had in mind when he uttered these words: "Poverty may easily turn into unbelief (*kufr*)." Accordingly, the Islamic State, as God's vicegerent on earth, must see to it that equity prevails and that every citizen—man, woman and child—shall have enough to eat and to wear and shall have a decent home in which to live. This does not mean that *wealth* should be abolished: it only means that *poverty* must be abolished: for poverty in the midst of plenty is a negation of the very principle of brotherhood by which Islam stands and falls. In pursuance of this Islamic ideal, our new Constitution must contain the following provision:

"It falls within the responsibility of the State to ensure to every one of its citizens a right to (a) productive and remunerative work while of working age and in good health, (b) free and efficient health service in case of illness and (c) a provision, by the State, of adequate nourishment, clothing and shelter in cases of disability arising from illness, unemployment due to circumstances beyond individual control, old age or under-age. No citizen shall suffer undeserved want while others have more than they need; and every citizen shall be protected from such undeserved want by means of a free and compulsory State Insurance carrying an equitable subsistence-minimum, to be determined by Law in accordance with conditions prevailing."

The above clause implies the creation of a social insurance scheme

on a vast scale, to be financed by means of comprehensive taxation of the well-to-do and the rich, both through *zakāt* and through additional taxes on property—for the Apostle of God has said: "There is indeed a duty (*ḥaqq*) on property apart from *zakāt*" (at-Tirmidhi, and Ibn Mājah, on the authority of Fātimah bint Qays). And lest some of my readers suppose that the idea of a social insurance scheme is a "modern invention", I would remind them of the fact that it was in full swing many centuries before its present name was coined, and before even the need for it became apparent to the Western nations: namely at the time of the first four Caliphs of Islam. It was 'Umar the Great who inaugurated in 20 A.H. a special government department, called *diwān*, for the purpose of holding a census of the population at regular intervals; and on the basis of this census annual pensions were fixed for (a) widows and orphans, (b) all persons who had been in the forefront of the fight for Islam during the life-time of the Prophet, beginning with the *umahāt al-mu'minin*, the *ahl al-bayt*, the Badr fighters, the early *muhājirs*, etc., and (c) all disabled, sick and old persons. The minimum pension payable under this scheme amounted to 250 *dirhams* annually. Gradually even newborn children were to be given a regular allowance, payable to their parents or guardians; and during the last year of his life 'Umar said on more than one occasion, "If God grants me life, I shall see to it that even the lonely shepherd in the mountains of Ṣan'a' shall have his part in the property of the *ummah*." (For a ready reference see Ibn Sa'd, vol. III/1, pp. 213-217.) 'Umar went even so far as to make experiments on thirty people with a view to finding out how much food a single individual needed to maintain full health and vigour; on the conclusion of these experiments he ordained that every man and woman in the country should receive every month a certain quantity of wheat, sufficient for two square meals a day, from the state treasury (*ibid.*, pp. 219-220.) Before 'Umar could complete this grand scheme of social insurance, he fell a victim to the murderer's dagger.

Conclusion

AND here ends our discussion of the fundamental, *ṣhar'i* principles which must be included in the Constitution of Pakistan if Pakistan is to become an Islamic State not merely in name but in fact. As the reader has seen, I have not attempted to prepare the "draft" of a Constitution, for I believe that this work must be done in "mutual consultation"—in other words, by the properly elected Constituent

Assembly. What I have endeavoured to do is no more and no less than to show that the Qur'ān and the Sunnah offer us a definite, clear-cut outline of Political Law, leaving it to the *ijtihād* of the time concerned to fill in the details. The existence of such a Political Law in the Two Sources of Islam is the most weighty argument against those who would like to subordinate the future Constitution of Pakistan to other, non-Islamic concepts of the State on the plea of "modernity." By doing this, they not only deny, by implication, Islam's claim to ideological completeness, but also militate against the idea of Pakistan as such: for, if Islam is not to be the guiding and form-giving principle of our state, why have a "Muslim" state at all?

But this is just what many of our so-called intelligentsia are unable to grasp. They do not realise that a state devised in the name and for the sake of a religious community must be, in the very nature of things, an ideological state: otherwise the innermost purpose of our creating a state is defeated.

It appears to me, therefore, that the main problem now facing the members of Pakistan's Constituent Assembly is to avoid thinking in Western terms of State and Nation, and to think in Islamic terms instead. As it is, many of our educated men and women blindly follow Western patterns of thought in the naïve belief that everything which comes from the West is more "up-to-date" than anything that was manifested centuries ago; and this belief—due to a faulty knowledge of, and lack of interest in, Islam—leads them to a light-headed application of Western terminologies and concepts to all that happens or could happen in their own, Muslim society. For example, whenever an occasion arises to assert—usually for non-Muslim consumption—the principle of equality and political liberty underlying Islam, those westernised friends of ours take it for granted that the Islamic concept of the State entirely coincides with Western views on Democracy; alternatively, when they discuss the principle of economic equity so often and so strongly stressed throughout the Qur'ān they blindly assume that the Islamic idea of equity is nothing but a prelude to some sort of Marxian Socialism: and, in either of these cases, they argue that Islam could not be "modern" if it did not conform to those most modern expressions of Western thought! It hardly ever occurs to them to find out, for themselves and by themselves, whether Islam does not perhaps offer an independent alternative both to Capitalistic Democracy (which, being based on privileges of wealth, is very far indeed from true democracy) and to Marxism (which denies the spiritual values in life and aims at reducing human society to the status of an ant-heap or a bee-hive); and so they go on think-

ing in Western terms even when they talk in Islamic terms for the benefit of the "common man." For, in spite of his general ignorance, that common man is, more often than not, really interested in Islam as a practical possibility. He may be lax in the performance of his religious duties; he may frequently do things which are absolutely forbidden by Islam: but usually there is in some secret corner of his heart a glowing spark of love for Islam, waiting only to be awakened into a blazing flame of creative enthusiasm. Most of our "advanced thinkers", on the other hand, hardly ever consider Islam as a practical proposition for our immediate future. Even though some of them have preserved a certain sentimental attachment to it, their Western education and mode of life often induce them to relegate Islam to the realms of "impractical idealism", and to follow, in their practical politics, the lead of Western thought with the same blind perseverance with which a flock of sheep follows the leading ram.

Apart from the obvious warning held out by the social and political picture of the West—internecine struggles and wars, social demoralisation, the economic injustice of Capitalism and the abolition of all personal liberty inherent in Communism—apart from all this, there is another, no less weighty reason for us to avoid imitating the political forms so characteristic of the Western world: and that reason is the opportunity, never before offered to a Muslim people in modern history, to start from a clean slate and to demonstrate, to ourselves as well as to the millions of wavering, defeatist Muslims in other parts of the globe, that the Law of Islam is not merely a subject for dry-as-dust books and unctuous sermons, but a living, dynamic programme of human life: a programme sovereign in itself, entirely independent of momentary "constellations," and therefore practicable at all times and under all conditions: a programme, in short, that would not only not hamper our society's development but would, on the contrary, make it the most progressive, the most self-reliant and the most vigorous of all existing societies.