

12-1962

Meaning and Structure of Law in Islam

Salah-Eldin Abdel-Wahab

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Jurisprudence Commons](#)

Recommended Citation

Salah-Eldin Abdel-Wahab, *Meaning and Structure of Law in Islam*, 16 *Vanderbilt Law Review* 115 (1962)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol16/iss1/5>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Meaning and Structure of Law in Islam*

*Salah-Eldin Abdel-Wahab***

The author proposes in this paper to introduce Islamic law to the reader in a quick survey that dwells on the fundamental origins and recalls the development of Islamic legal institutions. Such a survey will serve as an introduction to more detailed studies of each of the specific fields which will reveal the growth and maturity of that jurisprudence, its diversity and its similarity to our modern legal thinking.

I. IMPORTANCE OF THIS STUDY

Islam today represents one of the three great world-systems of law.¹ It is now the oldest in history, dating back more than thirteen consecutive centuries. Its most distinctive feature is that it originated as divine law embodied in God's Scripture, the Koran, and was then developed and nurtured by the native juristic mind of the Arabs. It was firmly accepted by many different races from Oman to Andalusia. In some areas, it has lasted until the present day, resisting to a large extent the wholesale importation of Western legal ideas in other parts of the Islamic world. Even in these latter territories, the revival of strong nationalistic feeling has resulted in a renewed interest in Moslem law and has encouraged an intensive review of Islamic legal theories with a view to adapting them to the modern way of life in order to replace the foreign-influenced notions of law.

In recent years the West has developed an increased interest in the Middle East, Pakistan, Southeast Asia, and some parts of Africa. Moslem law represents a cornerstone in the study of the philosophy of law in these areas and thus constitutes an indispensable tool of comparative jurisprudence.

As the late Mr. Justice Jackson pointed out:

Greater barriers have discouraged any general interest in Islamic law. Though our debt to Arabic culture is exhibited in the customary enumera-

*This article is a part of a comprehensive study on "Basic Concepts of Contract Law in Islamic Jurisprudence" on which the author is working at present. This study was made possible by a Rockefeller Foundation fellowship which the author received while he was at Cornell University.

**Licence-en-droit (Cairo); J.S.D. (Cornell); Assistant Attorney General before the Court of Cassation and Sometime Professor of Law in the Universities of the U.A.R.

1. 2 WIGMORE, A PANORAMA OF THE WORLD LEGAL SYSTEMS 535 (1928). The other two are the Romanesque and the Anglican legal systems. See also AWARD, ARBITRATION BETWEEN THE GOVERNMENT OF SAUDI ARABIA AND ARAMCO 54 (1958).

tion of our astonishing output of law reports, we long held the impression that the Muslim world had nothing to contribute to what was inside the covers. Islamic law was regarded as of speculative rather than of practical interest and received attention from a relatively few specialists and scholars. But a review of the reasons we have deemed such knowledge too alien to be useful to us may show that they *really are reasons why we should abandon the smug belief that the Muslim experience has nothing to teach us.*²

Moreover, there are many other reasons to believe that consideration of Islamic jurisprudence should prove amply rewarding in the comparative study of law. A legal system which still underlies the legal life and social conduct of some 400 million people (one sixth of the world population) cannot be ignored. The original solutions which it provides for problems of high complexity and its very advanced normative structure which consists entirely of works by jurists, not of government codes and statutes, are worthy of consideration.

It is noteworthy that the International Conference on Comparative Law held at the Hague on August 4-11, 1937, alluded to the unquestionable originality and distinctive character of Moslem law in the following resolution:

Le Congrès: conclut que le droit musulman a la possibilité de s'adapter lui-même et par lui-même aux besoins actuels de la vie. Cette évolution pourrait s'effectuer en vertu de trois principes fondamentaux la théorie de chatiment public comme pierre d'assise d'un code pénal moderne, les principes de l'appréciation équitable du juge et du chatiment privé comme point de départ d'un système moderne de responsabilité civile.³

In the civilian legal terminology, law is a written formula worded and rendered mandatory by the competent authority, expressing a rule of social conduct usually accompanied by a sanction. Only statutes—as distinguished from custom, doctrine, and court decisions—have the denotation of law. In the common law orbit, law was originally the product of court decisions, and legislation had, until recently, but a minor role in the juridical structure.

Islamic law, on the contrary, is of divine origin. Law is a creation of God, intervening in the form of a communication (*Khitab*) concerning human actions, and relating to acts, words, and even thoughts

2. Foreword to KHADDURI, *LAW IN THE MIDDLE EAST* vii (1958). (Emphasis added.)

3. VOEUX ET RESOLUTIONS DU SIXIÈME CONGRÈS INTERNATIONAL DE DROIT COMPARÉ 53-54 (1938). Translation: "The congress concludes that Islamic law has the power to adapt itself and by itself to the needs of modern life. This evolution can be effectuated by virtue of three fundamental principles: the theory of public punishment as cornerstone of a modern penal code, the principles of equitable discretion of the judge, and private punishment [*daiya*] as a starting point of a modern system of civil responsibility."

of capable persons. This communication expresses God's authorization or prohibition that certain acts be accomplished and determines the consequences of such acts in case the command or the prohibition is violated.

The basic premise in the science of law (*Fikh*) is faith (*Iman*). The foundation on which it rests is belief in God. The recognition of God (*Tasdik*) is a mental act, and the manifestation of faith (*Shahada*) is a material act accomplished by words in the form of avowal (*Ikrar*). Belief in the existence of God is a necessary knowledge (*Daruri*) and intuitional (*Badihi*). Maturity of spirit is indispensable to perceive in its clarity the evidence, visible in the universe, of a supreme intelligence, creator and regulator of life and things. This maturity arrived at, the recognition of God is irresistible and unavoidable. It is inborn in man as an impulsion of the heart (*Tanbih el Kalb*). Lastly, law is founded upon reason; thus the foundation and justification of law in the *Sharia*⁴ should be searched for in the mind and the wisdom of man.

The domain of law is the whole field of human actions. Its aim is not to glorify the lawgiver, as God does not need to be glorified, but to promote the goodness of man in both the spiritual and the secular spheres. From the spiritual viewpoint, *Sharia* aims to discipline the human life in such a way that man may be able after his death to attain the proximity of the perfect being, God; from the secular viewpoint, *Sharia's* goal is to regulate human actions according to the necessities of living in human society.

Rights (*Kukuk*) and obligations (*Wajibat*), two terms generally correlative, are the means by which the law accomplishes its function. Right is the privilege recognized by the law to limit a person's activity by compelling him to act in a prescribed manner. Originally, all rights belonged to God, who gives them to individual persons as a privilege. Societal life however, places the individuals in a status of mutual independence. Thus, God permits one person to acquire a right over another and limit as such this latter's freedom. Nevertheless, the activity of such a debtor does not suffer any fundamental restriction; primordial liberty is considered as integral. According to the majority of jurists, that is the reason why the *ibaha*, status of liberty and free activity, is the original characteristic of human conduct.

The scope of law comprises all manifestations of the will which the legislator has laid down for the addressees.

The essential function of the law is to define the character of human actions, and to determine their effects and consequences.

4. *Sharia* is the body of formally established sacred law in Islam, both spiritual and secular. See p. 120 *infra*.

Any declaration is law, whether or not formulated in terms of command, provided that it has the character of an affirmative proposition. Accordingly, if the legislator declares that a contract is concluded the moment the offeree has accepted it, the principle of freedom of contracts, laid down by God, becomes an imperative law. A simple statement (*Khabar*) or a story told is not to be treated as law for the simple reason that it was stated in the Koran. On the other hand, not every failure to fulfill an imposed duty or obligation results in a penalty.

Penalties may be divided into two categories. The first category, called *hudud*, consists of sanctions prescribed for a limited number of severe violations or crimes, such as adultery, murder, or robbery; the *cadi* (judge), insofar as these penalties are concerned, has no discretionary power once he is convinced that the crime or the violation has been committed. The second category, called *taizir*, comprises lesser sanctions in connection with which the judge is free to determine the punishable act and its penalty.

The authority of the law rests, however, on human conscience and not on public authority.⁵ The legislator has left to man freedom of conduct, but to encourage the observance of the right ways God has promised a reward in the future life (*thawab*). Thus at the same time a man may be dissuaded from disobeying by the threat of a penalty which can be inflicted in this world (*ikab*) and one to be inflicted in the future life (*azab*). This attribute of the legislative system of Islam results in some important consequences:

a) Islamic law applies to the Moslem as such, whether he resides in an Islamic country (*Dar-el-Islam*) or not. His conscience continues to be bound by Islamic law even though he is a member of a social community which is not governed by Islamic law. In case of a violation under this principle the Moslem becomes a wrong-doer (*athem*).

b) On the other hand, Islamic law does not apply to a non-Moslem who does not believe in the unity of God. He is not bound by the law since he does not recognize the Islamic legislator's authority; consequently, he cannot claim the law's protection. There is, however, a distinction in this regard between a non-Moslem who is residing abroad and is a citizen of a country having no peace treaty with the Moslem country (*harbi*) and a non-Moslem residing on the Moslem territory and thus enjoying Islam's protection (*zimmi*). A man in the latter category lives under what is called *ahd-el-zimma*, i.e., the pact of peace. He is not bound by Islamic law insofar as his religious beliefs are concerned; he can drink alcohol and eat pork

5. Some aspects of human conduct which are prohibited are characterized by *gubh* (unsuitability) and some which are called for are defined by *husn* (beauty or suitability).

without being liable to punishment. The *Zimmi*, however, must pay a certain tax, called *Giziah*, to be entitled to his rights under the pact of peace.

c) The sovereignty lies in God Himself; it is, however, enforced by the Community of Moslems (*Umma*) which is presided over by an elected representative called the *calif*.⁶ This calif is a simple mandator, subject to the law exactly the same as all other members of the community, who is empowered to administer the law according to its letter and sense. He is the delegate of the *Umma* in functioning the law for the good of the community. One attribute of the *Umma* is not delegated to the calif. This is the legislative power, which continues to be invested in the *Umma* as a delegate of God.

Wider in scope than law in its modern conception, the complexity of Islamic law is also evident. In modern law, an act is either lawful or unlawful. The law takes no account of the decency, morality or the ethical side of the act. Not so in Islamic law. The *Sharia* regards a certain act under different circumstances to be mandatory (*fard*), recommended (*mandub*), permissible (*halal* or *ja'iz*), reprehensible (*makruh*), or forbidden (*haram*).

The vast body of Islamic legal learning consists entirely (and this is its remarkable feature) of works by jurists, not of government codes and statutes. However, it includes varying styles of exposition—sometimes a compact codified summary,⁷ sometimes a collection of legal opinions (*fatawa*),⁸ sometimes a philosophical or analytical treatise,⁹

6. RAY, LAW GOVERNING CONTRACTS BETWEEN STATES AND FOREIGN NATIONALS 7 (1960).

7. Khalil, expounder of the Malki School of Jurisprudence, may serve as an example of this style.

8. This *fatawa* was much used by the *Cadis* as a reference book, though it is not studied in the schools. One of the most famous collections is the *Fatawa Al Hindia*, a book once in wide vogue in India, composed about 1650.

9. As an example of the analytical discussion of theory, it suffices to refer to *Hedaya* by Burhan Eldin Ali, written in 1200 A.D. representing the *Hanafi* school, dominant in Turkey, India, Iraq, Northern region of the U.A.R. (Syria), and Afghanistan.

We may give an illustration taken at random from the *Hedaya*: "A trust, upon becoming valid (that is absolute, according to the various opinions of our doctors, as here stated, according to Hanifa, in consequence of the grantor's declaration to Abou Yousef, by his subsequent decree, and according to Abou Yousef, by his simple declaration, and according to Mohammed (one of the disciples of Abou Hanifa) by his declaration and delivery to a trustee), it passes out of the possession of the grantor; but yet it does not become the property of any other person; because, if this were the case, it would follow that it is not in a state of detention, but may be sold in the same manner as other property; and also, because if the person or persons to whom it is assigned were to become the proprietor of it, it would follow that it could not afterwards pass out of his possession in consequence of any condition stipulated by the former proprietor of it,—whereas it is not so, for if a person were to declare a trust of a dwelling house (for instance) to the poor of a particular tribe, and the poverty of any one of these were afterwards removed, the right in it passes to the others, which it could not do if this person were a proprietor." ALI, THE HEDAYA: *Book xv of Trusts* (1200 A.D.).

and sometimes a commentary.

The two regulators of human behavior in Islam, theology and law, ought to be distinguished. *Sharia* is in fact a comprehensive catalogue of God's commands and recommendations laid down for the guidance of man. Matters of daily life (how to eat, when to wash and play, what to wear, etc.) are treated meticulously and at length as matters of strict legal significance. Law in the eyes of Moslem scholars was not in fact an independent or empirical study. It was the practical aspect of the religious and social doctrine preached by Mohammed. In the Koran and the *Hadith*, the two aspects are interwoven. Ultimately they were distinguished by relative terms: *ilm* (positive knowledge), denoting theology, and *fih* (understanding), denoting law. At a later date, Moslem jurists, in trying to distinguish between the spiritual and the secular side of the *Sharia*, called the first *ibadat* and the latter *mu'amalat*, denoting social relations.

II. NATURE OF THE LAW

From the previous short exposition of the fundamental principles of Moslem law, it clearly appears that it is wider in scope than the modern Western law. While the latter is defined as that which could be enforced by the courts, Islamic law takes the whole of human action for its field. The great mother books in the different schools of Moslem jurisprudence usually deal with religious devotions such as prayer, almsgiving, fasting, and pilgrimage, as well as legal problems in the modern sense such as family law (*i.e.*, marriage, divorce, paternity, guardianship, inheritance, and wills), contracts, torts, crimes, public law problems (*e.g.*, the law of peace and war), the rules of evidence and procedure, and a variety of other questions. It thus covers every conceivable field of law, public and private, internal and international, together with matters which we do not presently consider to be within the realm of law at all.¹⁰

It may be helpful to take a quick look at this law with the eye of a student of Western jurisprudential theories.

Under the positive theory of Hobbes and Austin, law is viewed not as advice, but as a command from a political superior to political inferior, an expression of sovereignty. Islamic law would satisfy such a jurisprudential theory if we could conceive the term "Political Superior" in terms of God Himself.¹¹ According to Islamic jurisprudence, God is the leader of the community. The *Umma* is the trustee of such leadership and the calif is the delegate empowered to administer the community affairs. Thus, the sacred character of Islamic law does not affect the fact that it is positive law at the same time. It is not

10. MOUSSA, *MOSLEM JURISPRUDENCE* 107 (1958).

11. ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* 6 (1959).

only an *ought* law for a perfect society, but also an *is* law or law applicable *in facto* in Islamic society.¹²

If we turn to Kelsen's theory of the hierarchy of legal norms which prescribe what ought to occur in certain circumstances, Islamic law would coincide with it. The Koran, in so far as the authority of law is concerned, is the constitution of the Islamic community or state which no applied legal rule should contradict. It is the basic supreme norm in the Islamic society. Secondly comes the *Sunna*, the Prophet's traditions, which is considered a second source of revelation. As long as there is a solution to the problem provided by one of these two sources, the judge is bound to adopt that solution. Where no solution is to be found in these two sources, *ijm'ah*, the concensus of Moslem jurists, serves as the next level of legal norms. If this source also fails to answer the question involved, *ijtihad* is the only way out. There are many kinds of *ijtihad*: *Quias* or analogy, *Istihsan* or equity, *Istislah* or public good, and *Istidlal* or inference. This hierarchy of legal norms in Islam is quite clear and uncontroversial. No other legal system has so detailed a hierarchy of legal norms to offer as Islamic law.

It is more difficult to try to adapt Islamic law to the historical school of jurisprudence in which law, like language, custom, and usages, is viewed as a product of the social evolution of a given society—a single facet of the whole life of a nation. Islamic law, which was created by Islam, was to some extent influenced by the pre-Islamic raw material. This raw material, however rudimentary it may have been, established some legal relationships which Islam did not change.¹³ The Arabs were a commercial people who had dealings and trade with other nations: Syria, which was at that time a Roman territory; Iraq, where Persian law prevailed; and Yathreb (Medina later), where Jewish tribes with their own legal rules used to live. Such commercial relations, along with the Bediun customary law, resulted in a body of law which covered many fields such as sale of goods, mortgages, leases, loans, partnerships, and aleatory contracts. Thus, if Islam could be regarded as a great social event in the life of the Arab nation, then Islamic law from a historical viewpoint is, at least in the field of private law, an endorsement of much of the old customary law already existent in the Arab society.¹⁴ But to the Moslem, from a religious point of view, the Koran is a self-sufficient

12. Nevertheless, the interpretation of Islamic law differs from interpreting any man-made positive law. Moslems are ordered, in case of dispute, to refer to God and his Prophet, *i.e.*, to consult the Koran and the *Sunna* and abide by their spirit.

13. The relationships which were not against the needs of the new Islamic society were affirmed by Islam. The Koranic verse runs as follows: "God permits sale of goods but forbids usury."

14. SCHACHT, *LAW IN THE MIDDLE EAST* 28 (1955); ANDERSON, *op. cit. supra* note 11, at 6.

code or constitution which lays down a new religion and a new law with no connection whatsoever with a pre-existing regime; and, as such, the historical theory of jurisprudence is not justifiable in Islam. This last view is supported by the fact that the Koranic legislation on various matters deviated from the old customary rules out of dissatisfaction with prevailing conditions, as demonstrated by laws improving the position of the woman, prohibiting the taking of interests, laying down new rules concerning estates and wills, and establishing a sound theory of a state which implanted the first seeds of democracy in history. Moreover, it is not society which affects Moslem law, but rather it is law which society must follow and obey.

Islamic law also parallels the Natural Law school of jurisprudence. It is generally an eternal norm which Moslems are necessarily required to follow. It satisfies both characteristics of Natural Law: *First*, it is discoverable to a large extent by human reason, as it was not until the last part of the first century or the beginning of the second century that Islamic jurisprudence really began to flourish by resorting to *Ijtihad*. The four orthodox schools of Moslem jurisprudence (*Hanafite*, *Malkite*, *Shafite*, and *Hanablite*) represent the most advanced and best developed technical legal thought of their times.¹⁵ *Second*, Islamic law as a divinely ordained law represents, at least to the Moslem, the absolute truth inherent in the nature of things. Ethical quality exists side by side with divine revelation as God orders the good because it secures the welfare of the community and forbids evil because it is evil and because it is against the public good.¹⁶

The sociological school is mainly concerned with the relation of law to contemporary social institutions: the essential characteristic of law is that it will actually represent the common interactions of men in their daily lives. Islamic law probably does not fit comfortably into the framework of the sociological theory, since it is not a social creation but a divinely prepared model law which ought to be followed by man's conscience or, otherwise, enforced by the state. However, enforceability is not a necessary characteristic.

A. INDIVIDUALIST FEATURE OF ISLAMIC LAW

The fact that Islamic law generally aims at the public good does not detract from its fundamental individualistic character. Mr. Coulson¹⁷ says that "Because a properly constituted political authority,

15. "Legal reasoning was inherent in Muhammadan law from its very beginnings." SCHACHT, *ORIGINS OF MUHAMMADAN JURISPRUDENCE* 269 (1950).

16. MOUSSA, *op. cit. supra* note 10, at 115; *Contra*, ANDERSON, *op. cit. supra* note 11, at 7.

17. Coulson, *The State and the Individual in Islamic Law*, 6 *INT'L & COMP. L.Q.* 49, 51 (1957).

representing the rule of divine wisdom, guarantees the welfare of the subject in this world and in the world to come, it follows that the interests of the State and not those of the individual will constitute the supreme criterion of the law." I am afraid that such an approach is incorrect and, to borrow Professor Schacht's statement, "fails to appreciate the particular relationship between strict legal doctrine and the practice of *siyasa shar'iyya* which has always prevailed in that field."¹⁸ The modifications introduced by the Koran into the agnatic system of inheritance that prevailed in Arabia before Islam were designed to give fixed shares in the estate to some classes of relatives previously excluded from succession; the manner in which this inheritance system functions is strictly individualist as every heir succeeds directly to his individual share. The institution of *Wakf*, which had been utilized in Islam, is based on an individualist idea, as the founder's will is the law to be applied, as such, with no restrictions. Islamic law is exclusively individualist insofar as the right of every single member of the community to share public responsibility with the calif is recognized. Any individual has the right to correct the calif and to attack his decision if he commits an error.¹⁹ Moreover, positive Islamic law, on the whole, is a system of subjective rights and personal privileges of all individuals as demonstrated by the texts dealing with principles of "original freedom" and the inviolability of life, property, and honor.

III. CLASSIFICATION OF LAWS

The classification of laws aims to define the still obscure notion of Islamic legal order.

The first classification distinguishes between laws with certain effect (*hukm yakini*) and laws having presumptive effect (*zanni*).

Three groups of legal rules are of divine origin: the Koran is a direct revelation, *Sunna* (*hadith*) is inspired, and the rules of *Idjma'a* are considered, by virtue of an absolute presumption, as responsive to God's intention.²⁰ Beside these revealed legal rules, the rule individually set forth by the Moslem jurist (*mudjtahid*), benefits from a

18. Schacht, *Islamic Law in Contemporary States*, 8 AM. J. COMP. L. 133, 138 n.2 (1959).

19. Omar was sitting judge when an inheritance case came up before him. Two full-blooded brothers asked for their shares in their brother's estate. Omar, after reciting the Koranic verse which expressly gives a share in the estate to a half-blooded brother from the mother's side, moved to dismiss the case. A woman from the audience stepped out and said: "Omar, before you dismiss the case, think that probably the plaintiff's father was only a piece of stone thrown in the sea, aren't they, then, half-blooded brothers?" Omar said his famous sentence: "Omar is wrong and a woman corrected him." He gave the plaintiffs their shares considering them, a fortiori, half-blooded brothers from the mother's side. Since then, this case has been called *The Stone Case*.

20. The Prophet said, "My people will never agree in error."

simple presumption of relative legality. The laws of the first three categories—Koran, *Sunna*, and *Idjma'a*—are necessarily just and consequently bind to an absolute belief in their sincerity. On the other hand, *Idjtihad* as the personal reason of a jurist may be correct or may be erroneous, and it holds no necessary binding force on the Moslem. But if a Moslem is convinced by a jurist's opinion on a question reserved for the domain of *Ijtihad* or doctrine, he will not be religiously responsible if this opinion turns out to be erroneous. If the judge misinterprets a Koranic verse, a rule of the *Sunna*, or a rule laid down by *Idjma'a*, he or the judge who succeeds him must annul the decision. Conversely, a rule set forth by a qualified jurist (*mujtahid*) cannot, in principle, be reviewed as nobody can be definitely sure that it is erroneous.

Another classification distinguishes laws according to their object, contrasting imposed laws (*taklyfia*) with posed laws (*wadiya*). The *hukm taklifi* is the obligation imposed by God on men in the form of a request of a more or less imperative nature, but which always supposes the possibility of accomplishment of the required act. God will not ask man to render an impossible or even rigorous act: "God does not impose an unbearable charge over man," runs the Koranic verse. The terms in which the invitation is formulated indicate the degree of the binding character of its accomplishment (*fard*, *wujoub*); or, on the contrary, the prohibition (*haram*) of its commission; or lastly, the character of being lawful (*halal*), the act being permitted (*mubah*), recommended (*mandub*) or disapproved (*makruh*). The *taklyfia* (imposed) laws qualify the measure of human liberty by the restrictions which they impose through indicating the rights and the duties to the creator. They formulate, as such, solutions to the general problem of the legality of man's acts and therefore determine the quality of human acts and their effects. The *wadiya* (posed) laws interpret and initiate the effect of acts already established as obligatory, prohibited, or permitted by an imposed law. They simply recognize the constitutive elements of the legal situation thus created. Therefore, it is by *wadiya* (posed) laws that the pronouncement of the formula of repudiation was recognized as the immediate cause of the extinguishment of the reciprocal rights and duties between two spouses; that the death of the deceased is assigned as the origin of inheritance rights of the heirs; that an offer and an acceptance give birth to the rights of the buyer and root out the seller's rights in the thing sold; that maturity is a condition of validity of an act of voluntary alienation of property. Thus, the *wadiya* laws fill in the gap of causality and the problem of the connection of the *taklyfia* laws and the legality of human actions.

Lastly, a third classification suggests itself in view of the very

distinction between spiritual and secular sides of Islamic law. First, the institutions concerning the future life and relating to acts of devotion are called *ibadat*. Second, all that is left is called *muamalat* (*negatia juris*). The latter covers the various types of relationships that a man can have as an individual: *e.g.*, marriage relations (*nekah*); penalties for crimes or violations (*ukubat*, which includes *hudud* and *taazir*); law of inheritance (*faraid*).

IV. OBJECT OF THE LAW

The object of law is that human action which has a legal significance—the jural act and the rights and obligations which derive therefrom. To define the jural act is to evaluate its legality from both spiritual and secular sides. Jurists analyze the content of rights and obligations, trying to classify them into different types. We shall first treat jural acts, their classifications and qualifications, and thereafter consider rights and obligations and their classifications.

A. JURAL ACTS: CLASSIFICATIONS AND QUALIFICATIONS

The jural act, *shari* in this connection, means in its broadest sense the human act which the law takes into consideration; it may be compounded of several natural acts (*hissi*), both physical (*fi'l al jawareh*) and mental (*fi'l al'akl*), which are envisaged as making one single act. It contains, then, not only the *negotium juris*, but also the human act which produces legal effects. The physical acts include:

- (1) The expression (words, writing, and signs).
- (2) The movement of the body or its parts (*jwareh*).
- (3) Walking, beating, and abstention (*tark*).

The mental acts escape the jurisdiction of human courts, and man is not responsible for them except to his God, provided that no manifestation of such a mental act is made. The jural act—or its elements—must be extrinsic and should have a separate existence insofar as the law is concerned.

Jural acts (*facto shari'i*), as such, may be divided into different classes:

1. *Voluntary and forced, according to the state of the spirit of their author before or at the moment of their accomplishment*—The effect of the will on the legal character of the jural act will be considered when dealing with circumstances which effect the capacity of the person, *e.g.*, a mental disease. The voluntary act, considered as an outlay of the will (*tasaruf*), and the privileges exercised according to the law are jural acts.

2. *Constitutive, informative, and dogmatic acts (pertinent to beliefs)*—The aim of the *constitutive* or *creative* acts is the creation of legal

relationships such as sale of goods, marriage, and lease. The *informative* act is one which makes known an event. Typical of such acts are testimony before the court (*shahada*), the avowal (*ikrar*), which is a testimony against oneself, and the narration of a *hadith* (one of the Prophet's sayings or doings). The veracity of such informative act may be always challenged in contrast to the creative act whose legal effect can never be doubted. The *dogmatic* acts are those acts concerning the practice of Islamic religion and, as such, lie outside the scope of our study.

3. *Acts which extinguish legal effects, such as revocation of offer, oath, and rescission*—These can be distinguished from acts which give rise to legal effects (*ithbatat*), such as gifts and sale of goods.

B. RIGHTS AND OBLIGATIONS

This is so broad a topic in Mosleim jurisprudence that we cannot expect to cover it here in an exhaustive way. Nevertheless, we shall treat rights and obligations in Islamic jurisprudence in a way which will make it clear to the reader that there is a complete and mature understanding of the notion of right and obligation in Islamic law, though it may be drastically different from modern theories.

Notion of Rights and Obligations

The concepts of right and obligation are both derived from the notion of duty (*wajib*). The definition of each duty results from characterizing every human action, which is a basic premise in classical Islam. While its original character has never been lost, the importance of the legal affects of the jural act (*shari'i*) is indicated more and more with the development of human dealings.

The right (*hakk*) generally includes all patrimonial rights, real or personal, as well as non-patrimonial rights. The obligation (*wajib*) is all that which the law and usages require. It is called *Iltizam* when it is created by two concurring wills or by a unilateral declaration of the will. The term *Akd* expresses literally the idea of a contractual relationship. The obligation of paying damages (*Al-Iltizam bil daman*) is treated under the topic of *responsabilité* which covers the areas of both contracts and torts.

All this would be confusing unless we analyzed the object of obligation.

The object of the obligation can be, first of all, a debt (*dein*) of a sum of money or of *choses fongibles*. It is, therefore, considered as an incorporeal thing (*mal hukmi*) attached to the capacity and the personality (*zimma*) of the debtor. This latter is obligated to pay, *i.e.*, there is an obligation to give.

The object of the obligation may also be a specific thing or a thing

determined in its individuality (*ain*) which the debtor is obligated to deliver, *i.e.*, there is an obligation to do something.

It remains to mention that abstention can exceptionally be an object of an obligation.

Classification of Rights

Rights are grouped into three main categories: rights of God, rights of man, and common rights.

1. *Rights of God (hukuk Allah)* are rights which are referred to God by the existence of penalties which secure them against violations. The criterion of these rights is public welfare, and they cannot belong to a given individual. But, as they are useful to the community as a whole because they maintain the force of religious sentiment and because they safeguard the social tree, they may be considered as public rights, and their protection constitutes a duty of the state. These rights are:

I. Acts of devotion (*ibadat*), such as the faith in God (*Iman*) and the obligations that derive therefrom: prayer, fasting, alms-giving, and pilgrimage.

II. The right to inflict penalties (*hudud*) whether complete (*kamila* or *khalissah*), as the penalty for adultery, theft, or defamation, or incomplete (*kasira*), such as the incapacity of the murderer to inherit from his victim. It is called incomplete because it does not impose any physical harm on the accused and does not deprive him of what he owns.²¹

III. Rights which have both characters of devotion and of penalty, such as expiations to be accomplished by youth, emancipation of slaves, nourishment, and clothes remitted to poor people. These are imposed by the law for doing some blamable acts or abstaining from accomplishing certain obligations.

2. *Rights of Man (hukuk al-ibad)* are rights in which a private or individual interest is the core.²² They are too many to be exhaustively enumerated, but they can be classified—according to whether their object is a physical thing, or considered as such by the law, or an act of another person—into independent and dependent rights:

- a) The right in the security of the person (*nafs*)
- b) The right in the reputation (*harmah*)
- c) The right of ownership and various rights in rem

21. Moussa, *op. cit. supra* note 10, at 213.

22. Such as the seller's right in the price of what he sold, and the buyer's right in the ownership of what he bought, etc.

- d) The rights deriving from contracts and the right to accomplish acts consistent with the law (*tassarufat*)
- e) The family rights, which can be divided into marital rights (*zawjia*); rights of guardianship (*wilaya*); rights of children and poor parents to alimony (*nafaka*); inheritance rights (*wiratha*).

The protection of such rights is left to the complete discretion of the person to whom these rights belong and upon whom their violation inflicts harm. This means only that the right of filing the complaint belongs exclusively to the owner of the right; the right to impose penalties for the violation committed, if there is place for penalties, belongs to the public authority, *i.e.*, the state.

3. *Common or Mixed Rights* are rights which have both public and private characters. This category of rights is divided into two classes: common rights in which the right of God is dominant and common rights in which the right of the person is dominant. An example of the first category is the right to punish him who falsely accuses another of fornication or a woman of adultery.²³ This is a crime which hurts the community because one of its members becomes an object of scorn, while at the same time it inflicts harm on the defamed person as he loses the public esteem. The defamed person, therefore, is not permitted to pardon the offender, and after his death, his heirs cannot succeed him in claiming their right to punish the offender. At the same time the individual character of the right appears in such a case by the falling of the penalty.

An example of the second category is the right of retaliation for homicide and voluntary cuts. The right of the individual to recover for the damages caused is dominant in the execution of the penalty; he himself or his heirs can accept a certain amount of compensation called the *diyya* to drop the penalty.

Classification of Obligations

Obligations can be classified, according to their origin into:

1. Obligations imposed by the law:
 - a) toward God, *i.e.*, toward the community, such as practicing the religion and paying taxes;
 - b) toward man, as those which derive from family relations.
2. Obligations deriving from declarations of man's intentions, such as avowal and obligations which result from contractual relationships.

²³ In the *Shariah* school of jurisprudence, such rights are dominantly private and therefore the results that derive are completely to the contrary.

3. Obligations pertaining to any injury to others' rights concerning security, honor, execution of lawful acts, family, property, etc.

The obligations of the first two categories are correlative to human actions (*fard*); the obligations of the third are prohibited actions (*haram*).

V. THE ALLEGED DEBT OF ISLAMIC LAW TO ROMAN LAW²⁴

It has been alleged by some notable scholars that Islamic law has borrowed most of its institutions from Roman law and that it could be called "Roman law of Justinian in an Arab dress." Sheldon Amos, Savvas Pasha and Goldziher are the three writers who are most responsible for such disparaging statements. The procedure of most of these scholars and their followers was to string together a list of resemblances, which seem to this writer too often imaginary,²⁵ and then find in those resemblances proof of their asserted borrowing. There was no penetrating scientific and historical study of the interrelation between Roman law and Islamic law.

It is true that Moslem philosophers like Al-Farabi, ibn-Tufayl, Avcinna, and Averros had close contacts with Greek philosophy and translated into Arabic a great many books of Plato and Aristotle. They proudly admitted these translations and proudly contributed to the progress of such philosophy. Such is a creative borrowing. No such borrowing took place with respect to Islamic law.

Without going too deeply into this problem, which could and should be the subject of a lifetime study, there is ample evidence to indicate that such alleged wholesale borrowing has never taken place:

1) *Sources of the Law*: The sources of legal rules in both legal systems are utterly different. It is the divine command on which the Islamic system stands, while in Roman law there is nothing to match such religious pronouncements. On the other hand, there is nothing in Islamic law that corresponds to the *lex*, *plebiscitum*, *senatum consultum*, *principum placitum*, *magistratum edictum* of Justinian's classification.

2) *Development of Jurisprudence*: The development of Islamic jurisprudence was unique in its character and had no relation whatsoever to the evolution that Roman law had gone through. Although the founders of the four great *Sunni* schools of jurisprudence belong to the second century of *Hijra* (eighth century), it is certain as well

24. This title is borrowed from Professor Vitz-Gerald's article in 67 L.Q. REV. 81 (1951).

25. Vitz-Gerald, *supra* note 23, at 81; MOUSSA, *op. cit. supra* note 10, at 84-103, MAHMASSANI, PHILOSOPHY OF LAW IN ISLAM 487 (1952) (in Arabic).

as logical that an enormous mass of jurisprudential work must have preceeded them. Such foundations were laid not in Syria and Egypt or even Baghdad where the jurists might have been in contact with the Byzantine Empire, but in Medina, in the heart of the Arabian Peninsula.

3) *Structure of Jurisprudence*: The legal structure of Islamic jurisprudence is far from similar to that of Roman law:

a) Roman law was based on formalism. Contracts were not concluded unless certain formalities and procedures using scales, hammer, and piece of unminted bronze had been gone into by the parties. Consequently, the principle of the autonomy of the will, which has been dominant in Islamic law since the beginning, was completely ignored in all stages of Roman law.

b) The principle of the division of rights into *rights in rem* and *rights in personam*, which was basic in Roman law and is a characteristic of all legal systems that are derived from Roman law, is unknown in Islamic law.

c) The power agent, unknown in Roman law, was developed in Islamic jurisprudence in its early days.

d) Islamic law does not recognize any institution similar to that of the Roman *patria potestas*; nor did Roman law recognize polygamy, the husband's right of repudiation, male privilege in inheritance, the wife's independence in administering her own income, the death illness which affects the deceased's capacity to alienate property before he dies, and the impediment to marriage based on suckling (*reda'ah*) peculiar to Islamic law.

It is unfortunate, then, that eminent men have leaped so readily to the conclusion that Islamic law is derived from Roman law. The resemblances between the two legal systems are merely coincidences which prove that justice and reason appeal to all civilized peoples.