Dr. S. M. Qureshi, Memorial Lectures
Shariah, Ummah and Modernity
Islamic Research Institute, Islamabad, Karachi, 1987



Dr. Halil Inalcik reading his paper *Qanun and Shari'ah*. The Vice -Chancellor Dr. Jameel Jalibi is on his left while Dr. Hashmi is on his right.

Halil INALCIK

First Paper

## *ḲĀNŪN* and the *SHARĪ'AH*

The function started with the recitation from the Holy Qur'an. Prof. Dr. Mehbub Elahi Hamdard recited the following *āyāt* from *sūrah al-Mā'idah:*

أَفَحُكْمَ الْجَاهِلِيَّةِ يَبْغُونَ ۚ
وَمَنْ أَحْسَنُ مِنَ اللَّهِ حُكْمًا لِقَوْمٍ يُوقِنُونَ ۝
يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَتَّخِذُوا الْيَهُودَ وَالنَّصَارَىٰ
أَوْلِيَاءَ ۘ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ ۚ وَمَنْ يَتَوَلَّهُمْ
مِنْكُمْ فَإِنَّهُ مِنْهُمْ ۗ إِنَّ اللَّهَ لَا يَهْدِي الْقَوْمَ
الظَّالِمِينَ ۝ فَتَرَى الَّذِينَ فِي قُلُوبِهِمْ مَرَضٌ
يُسَارِعُونَ فِيهِمْ يَقُولُونَ نَخْشَىٰ أَنْ تُصِيبَنَا
دَائِرَةٌ ۚ فَعَسَى اللَّهُ أَنْ يَأْتِيَ بِالْفَتْحِ أَوْ أَمْرٍ
مِنْ عِنْدِهِ فَيُصْبِحُوا عَلَىٰ مَا أَسَرُّوا فِي أَنْفُسِهِمْ
نَادِمِينَ ۝

"Is it then the *ḥukm* of *jāhilīyyah* (Ignorance) that they are seeking? Who is better than Allah for *ḥukm* (laws) to a people who have certainty (in their belief)?"

"O you who believe! Take not the Jews and the Christians for friends. They are friends one to another. He among you who takes them for friends is (one) of them. Lo! Allah guides not wrongdoing folk.

"And thou (O Muḥammad) seest those in whose heart is a disease race toward them, saying: We fear lest a change of fortune befall us.

"And it may happen that Allah will vouchsafe (unto thee) the victory, or a commandment *(amr)* from His presence. Then they will repent of their secret thoughts." (5:50-52).

Dr. Jameel Jalibi Sahib
Dr. Yusuf Abbas Hashmi,
Excellencies, Laides and Gentlemen,

## Prologue

I am greatly honoured by the invitation of the University of Karachi to deliver these lectures in commemoration of the great scholar and educationist Prof. Dr. Ishtiyak Husayn Qureshi.

I had the unique opportunity to know him many years before he left this world for eternity. It was in the year 1953 when the first conference on Islamic Culture was held in Princeton. Prof. Qureshi, then Minister of Education, was one of the distinguished participants of the conference.

I never forget the memorable moment during the deliberations of the conference when he revealed his unique personality. During a discussion an orientalist began to make comments on the Holy Qur'an as if it is purely the product of a social-historical event. I was sitting beside Prof. Qureshi. I could see that he was deeply disturbed by this mundane, sacriligious approach to the word of Allah. First he made remarks to bring the deliberations to the true spiritual nature of the subject. Then losing his patience, he stood up and said in an indignant deep voice: "We Muslim delegates cannot continue to attend the conference as long as the Holy Qur'an is treated as a piece of literary work". These words were uttered with that profound faith and devotion that makes man great. Ishtiyak Husayn Qureshi was a humble slave of Allah and a great man.



In studying Islamic institutions basically two different approaches are made. Strict religious interpretation calls for a commentary based on the immutable, eternal precepts of Islam as embodied in the Qur'an and *Sunnah*. On the evidence of these fundamental sources it is asserted that "Sovereignty belongs to Allah; the universe is in reality the kingdom of the one God. Thus, there is only one source of law". His law governs the entire universe, including human society and the state.

At the outset we must admit the fact that as far as the unity and continuity of Islam is concerned this strict *sunnī* interpretation played a crucial part throughout Islamic history. Islam preserved its unity in time and space only through such *'ulemā* as Al-Shāfi'ī, Mālik and Ibn Taymīyyah. By defining what is authentic Islam they safeguarded Islam from disruptive inroads in various historical settings. There is no doubt that Islam owes its continuity and solidity as a unique system of beliefs to those who zealously pursued this line. At all times, in introducing new laws the law maker felt compelled to take the opinion of the religious authority to make sure that his law conformed to the law of Islam. This school of thought believed that no reform can be permitted outside the interpretation of the prime sources by great *imāms*. Being an Islamic state the Ottoman empire followed and pursued this fundamental principle.

It appears that in enacting legal rules or even in taking important political decisions the first Ottoman sultans consulted the *fakīhs*, and later on they established the office of *Shaykh al-Islām* for the purpose. However, in the first period of Ottoman history, that is between 1300 and 1600, certain areas in public administration were reserved as exclusive domain of the Sultān's legislative activity. In this particular field, the *sharī'ah* or dogmatic interpretation was not considered sufficient to explain a variety of institutions, including Sultanic *kānūns*[1]. Here, as an alternative method, the use of empirical historical approach was considered indispensable.

Generally speaking social-historical method is concerned with the actual conditions and historical processes which give rise to a particular institution. It is to be noted that Islamic jurisprudence itself was not unfamiliar with an empirical method in expanding the corpus of Islamic law. Under the principle of *ijmā'* it is confirmed that the *sharī'ah* was developed by the infallible authority of the Muslim community, or society itself. In the nineteenth century those modernist Muslim *'ulemā* and thinkers who advocated the opening of the gate of *ijtihād* strove to give its widest application to this dynamic principle of Islamic jurisprudence. As is well known, those authorities who particularly favoured the principles of *ijmā'*, *istiḥsān* and *istiṣlāḥ* belonged to the Ḥanafī school of law which was the Ottoman official *madhab*. Ottoman legist, Muḥammad Al-Fanārī was considered one of those authorities who expanded the principle of *istiṣlāḥ*. To give an example, Ottoman *Shaykh al-Islām* Abu's Su'ūd approved the *waḳfs* in cash which were widely established in the sixteenth century Ottoman society. His reasoning was that thousands of poor people, *'ulemā*, students and poorhouses benefitted from this institution and its abrogation would have caused widespread damage to the Muslim community(2).

Thus, the principle of *istiṣlāḥ*, public welfare, was used to approve the institution of cash *waḳfs*, whereas Mehmed Birgivī, a Ḥanbalite, vigorously attacked him on the grounds that cash *waḳfs* involved *ribā* so it was against the *sharī'ah*. In their legal decisions and reform measures the Ottoman legists and bureaucrats always referred to the principle of *istiṣlāḥ* or the welfare of the Muslim community to keep pace with the needs of the society and state.

In brief, some *'ulemā* evidently adhered to the evolutionary principle in the Islamic law particularly when welfare of the Muslim community was in question.



But what is more, in Islamic history, at least after a certain period, there existed laws made and enforced exclusively by the sole authority of the Sulṭān or civil political authority And an independent source of law implied an independent political authority. Indeed the fundamental question is whether or not political power as a separate entity is a necessity in Islam. In other words, whether or not Islamic prescriptions really needed to have in force an external compelling authority. In actuality, there were periods when under the rule of a non-Muslim state an Islamic community and the *Sharī'ah* continued without having a political authority of its own. However, in later times in Islamic history the question was discussed for the necessity of a temporal power, or the state.

In still later periods, the question came up as an issue of vital importance for Islam and the Islamic community. In the eleventh century in particular when the *Sunnī* Islam was in great danger under the attacks of the *shī'ī* sects and the crusaders the existence and all the necessary underpinnings of a strong cliphal power was accepted as a necessity for the survival of Islam itself.

However, the establishment of an independent temporal power signifies also the foundation of an independent law making authority. On the other hand, cases were coming up for which the legal principles of the *Sharī'ah* afforded no direct basis for solution. There were special cases, in particular in the area of public affairs, that no *Sharī'* authority could produce a proper answer, and thus, had to be taken care of exclusively by the civil authority. Even when such Sultanic rulings were interpreted as contrary to the *Sharī'ah* they were still enforced as necessary for the maintenance of the civil authority, and ultimately for the well-being of the Muslim community. They were recognized under the name of *ḳānūn*(3) or *ḍawābiṭ* that is, state-laws as an entirely independent department of law side by side with the *Sharī'ah*. Historically speaking, the parallel development of the Sultanic

of the Caliphate appears to have gained momentum with the Iranian Buwayhid and then Turkish Seljukid domination in the tenth and eleventh centuries. Thus, while the old Sassanian concept of state based on the notions of absolute power and *'adālah* (justice) became prevalent in Islamic political theory, powerful Turkish dynasties brought in an actual independence of power; and the central Asiatic traditions of *beg-Qaġan* (Lord-Emperor) and *tőrű* (Imperial Code) were introduced and firmly established as the foundation of state authority in the Middle Eastern lands. In other words, in the tenth and eleventh centuries the concept of state and law in Islamic lands underwent a profound change in favour of an independent civil authority and its law making power. Turkish rulers asserted their absolute independence in the matters of public authority and assumed the right to organize public administration in accordance with their own concept of state and law. In form, such laws were interpreted as Sultanic orders on practical matters and theoretically neutral, or it was claimed never contrary to the spirit of the *Sharī'ah*. Sultanic orders formulating general rules constituted an area of civil law side by side with the *Sharī'ah*, though no such laws in codified form reached us until the Ottomans The new trend found its reflection even in the books written by great *faḳīhs* such as Al-Māwardī and Abū Manṣūr Al Baghdādī during the period. Al-Māwardī maintained the necessity of secular power *(Ḳuwwa al-Saltanah* or *amārah)* as a means to ensure the implementation of the *Sharī'ah (tanfiḏh al-aḥkām)*, and the perfection and survival of the Muslim community[4]. He speaks of *ḥirāsat al-Dīn* (guardian-ship) and *Siyāsat al-dunyā* separately. In other words, for the welfare of Islam and the Islamic community, or in Islamic terminology *maṣlaḥa*, public interest, was recognized as a principle justifying an independent political authority and its competence to make laws. The argument was used again in the Ottoman times to defend the independent nature of the Sultanic authority and its independence to make Sultanic laws.



On the other hand, empirical theories on politics gave rise to an independent non-religious literature known as *siyāset nāme*, *naṣīḥat nāme*, etc. which made part of ethics based on non-Islamic sources. Ḍiyā'al-Dīn Bārānī's (Barni)[5] work, though not as popular as Niẓām al-Mulk's *Siyāsatnāme*, *is* a remarkable product of this Irano-Turkish theory of kingship and law. Barnī's theory to explain the necessity in Islamic state of the state legislation as an independent department of law is derived from the theory of power state as the prerequisite of an orderly religious social life. It is argued that for the survival and good order of the Muslim community and for the enforcement of the *Sharī'ah* itself a ruler with absolute power is a necessity. And "royal government", Barnī asserts[6], "contrary to the Islamic Sunna can only be carried on by following the policies of Khusrau Parwiz, and the great emperors of ancient Iran". "The prophethood" he adds "is the perfection of religion and kingship is the perfection of worldly good fortune. These two perfections are opposed and contradictory to each other, and their combination is not within the bounds of possibility" §.

"It became necessary for the rulers of Islam to follow the policy of the Iranian Emperors (unbelievers in God) in order to ensure the greatness of the True Word, the supremacy of the Muslim religion, the power of Truth, the suppression and overthrow of the opponents and enemies of the Faith, the execution of the oders of religion and the maintenance of their own authority"[7]. This statement about royal authority is the key to the whole theory of kingship of Barnī. Descending from Turkish noble family and a counsellor to Muḥammad b. Tughluḳ Barnī wrote *Fatāwā-i-Jahāndārī*, *Principles of Government* in about 1359. According to Moḥammad Habib, the

§ When for a full period of ten years the *nabī/rasūl* as Allah's *nā'ib* (vice-gerent) and *khalīfah* (representative) exercised governance and power in the dominion of his own creation he demonstrated to all the political *pundits* that the combination of *risālat* and wordly government was possible and that the spiritual and the mundane flourished in his *sunnah* with perfection without any contradiction

well known Aligarh scholar, Barnī "is the first theoretician to justify secular laws among the Musalmans"(8). Actually Barni's source can be traced back to the revival of old Iranian royal literature of advice under Sulṭān Maḥmūd Ghaznawi, and quite similar ideas are to be found in the Turkish *Kutadġu Bilig*, ("The Auspicious Knowledge"), written in 1071. Apparently both works had their common source in the Ghaznavid Iran. In order to strengthen their masters' authority Iranian bureaucrats were zealously focusing their attention to the Iranian theory of kingship during this period, and *pandnāmah, naṣīḥatnāmah* literature flourished in Islamic lands particularly following this period of Iranian ascendency. Even Ghazzālī, we know, wrote a treatise in the same genre.

Two centuries after Ḍiyā'al-Dīn Barnī, another Turkish historian and statesman, Tursun Bey(9), expounded a similar theory saying that "every human society, including the Islamic community, had to submit to a civil authority for survival. If *siyāset (siyasa)* is based on wisdom *(ḥikmet)*, he says, "It accomplishes a perfection which resides in the very nature of man and leads to happiness in the two worlds, here and hereafter. This type of policy is called divine policy *(siyāset-i ilāhī)* and the person who establishes it is called *'nāmūs'* § or in the language of the religious men *sharī'ah*. Its founder is called the Prophet. But if this authority *(tadbīr) is* not at this level and is based only on reason *(ta'bīr-i 'aḳl)* with the purpose to achieve simply the order of this world as was the case with Genghis Khān it is called Sulṭānic *siyāset (siyāsat-i -Sulṭānī)* or imperial *yasaġ (yasaġ-i pādishāhī)*. In other language we call it *'urf*.

§ *Nāmūs*, meaning 'law', being an abstract noun, may not be used for a human being. We may address him as *dhū al-nawāmīs*, Editor.



"The establishment of whichever of these two depends absolutely on the presence of a king *(Pādishāh)*. It is not necessary to have for every age a law maker in religion *(shārī')*, i.e., a prophet, because a divine law, for instance Islam, suffices for the worldly and spiritual harmony (among men) to the last day. But the presence of a *Pādishāh"*, he continues, "is absolutely necessary in every age. Because the worldly affairs *(maṣlaḥa)* in every age need to be taken care of, there should be an absolute authority *(wilāyah)* in disposing ordinary affairs of this world. If his authority ceases to operate, men cannot continue to live under the best of the conditions but perhaps they will all perish"(10).

In simple words, Tursun, in complete agreement with Barani,. reproduces the long established view in the Islamic world that the *sharī'ah* had to depend on the presence of a civil authority without which everything was in jeopardy. It is to be noted that Bārānī gave side by side the Iranian Emperors and Turkish Khans as examples of perfect kings. The Turkish contribution to the new Islamic concept of state consisted not only in the absolute independence of the Sultanic authority but also in the interpretation of law and justice. From the earliest times of historical record Turkish *Qāġānship* (monarchical sway) of Central Asia was founded on a *tōrū* of *yasāḳ* or imperial code of law proclaimed by the Qāġān at the same time as his Qāġānship §. In other words, the imperial power was believed to establish itself by the proclamation of a *tōrū* or *yasāḳ*. The evidence of it goes back to the Orkhon Kök-Türk inscriptions(11) of the eighth century

§ The imperial laws promulgated by Genghis Khan were known as *turah-i-genghisi*. Editor.

A.D. and the practice can be observed as late as the reign of the Ottoman Sulṭān Meḥmed II (1451-1481), the conqueror of Constantinople and the real founder of the Ottoman empire. Meḥmed II proclaimed two *ḳānūnnāmes* as the fundamental laws of the realm[12]. These law books contained no direct *Sharī'ah* principle but emphasized the concern to establish public institutions of the empire.

Side by side with the Iranian theory of kingship the Turkish concept of state and law is expounded in the *Kutadġu Bilig*[13], a royal advice book written for a Karakhanid Sultan in 1070.

Kingship, it said, stands on the foundation of "tőrű"[14]. The King organizes his realm and its people through a *"tőrű"* "Two things" it added, "consitutute the foundation of a realm, wisdom and tőrű". At another place it says "kingship is good thing, but *tőrű* is better". In the Turkish conception of state the Qāġan's law is inseparable from the *kut*, that is, divine grant of good fortune to have kingship. The Turkish notion of the divine origin of sovereignty was readily identified with the Islamic concept of sovereignty, and evidently contributed to the absolute character of the Sulṭānic power in the Turkish Islamic sultanates. There is no doubt that the introduction of these new notions into the politically decaying Islamic world gave a new impetus to the public life in Islam. Over a time the Sulṭānic law as the instrument to reorganize Islamic state and guarantee the implementation of the *Sharī'ah* became part and parcel of the Islamic culture. It realized its most developed form in the Ottoman empire, the most centralized and autocratic Islamic state in the history of Islam; and there is no exaggeration in suggesting that if Turkey today is the only Islamic country under a secular political system and follows a course different from other Islamic states this is largely due to this Ottoman background. It should be added that other Islamic communities under dynasties of Turkish origin had similar experience in their history.



Works such as *Tűzűkāt-i Tīmūrī*, whoever be responsible for their composition, can be linked to the old Turco-Mongol tradition and compared to the *ḳānūnnāme* of Meḥmed the Conqueror. Also the *Āyin-i-Akbarī*, though like *Kutadġu Bilig* it mainly followed the Iranian tradition, may be put in the same category with respect to its form and function.

As to technique of making a state-law, many of the so-called *'urfī-laws* or *ḳānūns* were originally the local *'urf wa 'ādāt* followed and practiced by the people for generations[15]. What the ruler did was simply to legalize them in a Sultanic order. Thus, the Sultan's *'urf*, or temporal power was the key factor to convert local *'ādāt* into laws. In the state organization the Sultanic power was responsible for converting into state laws the practices and concepts which had come down from ancient Iranian and Turkish sources.

It appears that there was a parallelism between the Muslim-Turkish states founded in India and the Ottoman Empire. This parallelism was quite natural if we remember that both had the same origins in Central Asia.

I tried to show how Ottomans and other Turkish states before them were able to find solutions to the problems occurring in the field of public interest by using laws-*ḳānūns* based on *'urf u'ādāt* and the ruler's authority. But they all recognized the supremacy of the *Sharī'ah*.

To sum up, in the Ottoman Empire and earlier Muslim states there was an independent law-making activity to meet new situations concerning mainly public life.

Since the enforcement of the *Sharī'ah* itself was dependent on the presence of an *ulu'l-amr* that is political authority, the *'ulemā* concluded that laws necessary to consolidate political power be made part and parcel of the Islamic state.

On the other hand since the 11th century there were also laws and institutions originating directly from Iranian and Turkish traditions which became prevalent with the rise of Islamic Sultanates in Iran and India.

Bureaucrats in the service of great Sulṭāns presented these practices and notions in a series of "advice to king" literature. These played a central role not only in edifying the rulers but also provided guidance to bureaucrats and statesmen. A very extensive law-making activity, indpendent from the *Sharī'ah* under the Ottomans essentially followed the notions provided by this literature. Thus in public life the importance of *Ḳānūn*-making side by side with the *sharī'ah* cannot be minimized.



## FOOTNOTES

1. For *ḳānūn* and *ḳānūnnāme* see *Encyclopaedia of Islam*, second edition, vol. IV, 556-566 (H. Inalcik).
2. See H. Inalcik, *The Ottoman Empire, The Classical Age 1300-1600*, London: Weidenfeld and Nicolson, 184.
3. See "Ḳānūn", EI², 559-560.
4. *Al-Aḥkām al-Sulṭānīyya*, 77-78.
5. *Fatāwā-yi Djihāndārī*, ed. Dr. A. Saleem Khan, Lahore. Research Society of Pakistan, University of Punjab, 1972; for analysis of the next see M Habib, and Dr. Afsar, *Political Theory of Dehli Sultanate;* Allahabad, Kitab Mahal (n.d.).
6. M. Habib and Afsar, 39.
7. *Ibid.*
8. *Op. cit.* 139.
9. *The History of Mehmed the Conqueror*, Text Published in Facsimile with English Translation by H. Inalcik and R. Murphey, Minneapolis and Chicago: *Bibliotheca Islamica*, 1978, Text: 7b-14 a.
10. *Ibid.* 9 a.
11. Text published and analyzed by Talat Tekin, *A Grammar of Orkhon Turkic*, Mouton: The Hague 1968; H. Inalcik, "Kutadgu Bilig'de Turk ve Iran Siyaset Nazariye ve Gelenekleri", in *Resid Rahmeti Arat Icin*, Ankara: Turk Kulturunu Arasturma Enstitusu, 1966, 270.
12. See "Ḳānūnnāme", EI², 562-563.
13. Yusuf Khass Hajib, *Wisdom of Royal Glory (Kutadgu Bilig), A Turco-Islamic Mirror for Princes*, Trans. Robert Dankoff, Chicago: The University of Chicago Press 1983.
    In Persian the book has been translated under the caption *"Sa'ādat bakhsh 'ilm"*, while Dr. Muhammad Sabir has translated "The Auspicious Knowledge" (vide *Hijra Celebrations*, Area Study Centre, Peshawar, 1981, 1, 80) Editor.
14. See my "Kutadgu Bilig. . ." mentioned in note 11, 265-269.
15. See H. Inalcik, "Suleiman the Lawgiver and Ottoman Law" *Archivum Ottomanicum*, vol. 1. (1969), 111-114.

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بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِيْمِ

ثُمَّ جَعَلْنٰكَ عَلٰى شَرِيْعَةٍ مِّنَ الْاَمْرِ فَاتَّبِعْهَا
وَلَا تَتَّبِعْ اَهْوَآءَ الَّذِيْنَ لَا يَعْلَمُوْنَ ﴿١٨﴾

الجاثية ٤٥

"Certainly We have set thee (O Muhammad) on a clear road of (Our) Commandment; so follow it, and follow not the whims of those who know not".

— *Surah al-Jathiyah, ayat* 18



Dr. I.H. Qureshi Memorial Lectures

# SHARĪ'AH, UMMAH and KHILĀFAH


Lectures by

Dr. Halil Inalçik

Dr. Muḥammad ʿAbd al-Raʾūf

Dr. Ismāʿīl Rājī al-Fārūqī

edited by

Yusuf Abbas Hashmi



Dr. Ishtiaq Husain Qureshi Chair

University of Karachi