INTRODUCTION.

SECTION I.

THE APPLICABILITY OF THE MUSSULMAN LAW.

IN India, the Legislature has preserved intact the laws of the Mussulmans in all matters relating to inheritance and dispositions of property. Excepting the special Statutes which are of general application and which are properly speaking municipal laws, there is no *lex loci* in this country. In India, the law is, in the main, personal. This not only adds to the difficulty of legislation, but considerably enhances the risk of failure in the administration of justice. In the case of the Mahommedan Law especially, clothed as it is for the most part in the garb of an unfamiliar language, it is often extremely difficult to ascertain and apply its principles. And it is apparently on this account that often a certain reluctance is evinced to give effect to the rules of the Mussulman Law; and English Law and sometimes even Hindu Law are invoked either to cut down or to explain away the meaning of the Mahommedan Law.(1) These indirect endeavours to repeal the laws of the Mussulmans seem to be in direct conflict with the spirit of British legislation.

The British Government at the commencement of its ascendancy in this country assured to the inhabitants of India by a solemn Act of Parliament the full enjoyment of their laws and customs. One of the objects of that Act,(2) as stated in the preamble, was "that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges." Had the question been *res integra*, it would have been fairly open to contention, whether it was ever the intention of the Legislature to make any change in the personal laws of the inhabitants of this country, of whatever race or creed. Regard, however, being had to the decision in the case of *Musleah* v. *Musleah*(3) and other cases

(1) See the case of *Moosabhai* v. *Yacoobbhai*, [1904] I. L., 29 Bom., 267, 276.

(2) 21 Geo. III, cap. 71.

(3) Fulton's Rep., p. 420.

it would appear that the tendency of the Courts has been to restrict the operation of the personal laws, in the main, to Hindus and Mahommedans. The provisions of 21 Geo. III, cap. 71, s. 17, have been re-enunciated in later Statutes and are now substantially embodied in Act XII of 1887, and "constitute one of the most important guarantees given to the people of India by the British rule."(1) The attempt to restrict the operative effect of section 17 to "succession and inheritance," is as distinctly opposed to the wording of the section itself as to the entire course of decisions and the intention of the Legislature. The word "dealing," in fact, would include dispositions. Besides, the Legislature has declared in express terms, that when there is no special enactment governing any particular question, the Courts of Justice should be guided by rules of equity and good conscience, and two well-known Judges of the High Court of Calcutta, STEER and LEVINGE, JJ., have held that it is in conformity with equity and good conscience, that, as between Mahommedans, all questions relating to dispositions of property should be governed by the Mahommedan Law. In *Zohorooddeen Sirdar* v. *Baharoollah Sirdar*,(2) those learned Judges expressed themselves in the following terms :—

"It is contended by the pleaders for the plaintiff, special respondent, that the Mahommedan Law is not applicable to contract of the nature before the Court; that according to section 15, Regulation IV of 1793, it is only on questions of inheritance, marriage, and caste that the Court is called upon to decide in conformity to the Mahommedan Law, and that the present matter before the Court, not being of the nature above expressed, is to be decided by the ordinary rules of equity and good conscience. In answer to this it may be remarked that the Courts of this country have invariably applied in practice, the Mahommedan Law to a variety of cases other than those coming under the denomination of inheritance, marriage, caste, and even if immemorial and recognized practice did not legalize the action of the Courts, it cannot be said that when this Court administers to Mahommedans their own law, they do otherwise than administer justice according to equity and good conscience."

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(1) Mr. Justice Mahmood in *Mazhar Ali* v. *Budh Sing*, [1884] I. L., 7 All., 202.

(2) 1864, Gap Number W. R., 187.

A similar contention was raised in the case of *Yusuf Ali* v. *the Collector of Tippera*,(1) but the learned Judges (GARTH, C. J., and MACDONELL, J.) decided the question before them on the basis of the Mahommedan Law.

It has been emphatically recognized by the Bombay High Court that the Mahommedan Law should be applied in the construction of deeds dealing with property executed by Mahommedans, whatever may be the language in which the disposition is made.(2) And in the case of *H. H. Azimunnissa Begum* v. *Clement Dale*,(3) Mr. Justice Bittleston dealing with the question whether 13 Eliz., cap. VI and 27 Eliz., cap. IV, were applicable to Hindus and Mahommedans, expressed himself thus: "In Morton's Col. Rep., 358, there is a *semble* that the Statute (which is *in pari materia*), 13 Eliz., cap. V, appears to be considered as extending in India; and in a case arising entirely between British subjects other than Hindus or Muhammadans, I am disposed to think that in accordance with the reasoning in *Freeman* v. *Fairlie* (1 Moo., I. A., p. 305) and the *Mayor of Lyons* v. *The E. I. C.*, id., p. 175, the Statute 27 Eliz. ought also to be so considered. But the gift in this case was by a Muhammadan to a Muhammadan, and any question as to its validity must, I think, be decided by Muhammadan Law. It is true that the defendant is not a Muhammadan but an European British subject, and the persons from whom he claims, *i.e.*, the Nawab's creditors, were also in one case, *viz.*, as respects Turnbull's Gardens, not Muhammadans, but East Indians, who would be governed by English Law; but this cannot affect the plaintiff's title. The provisions of the charter of the Supreme Court is that 'in the cases of Muhammadans, their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined by the laws and usages of the Muhammadans; and when one of the parties shall be a Muhammadan by the laws and usages of the defendant.' But that does not mean that whenever the defendant in a suit is an European British subject, no law but the law of England

(1) [1882] I. L., 9 Cal., 138.

(2) *Gangabai* v. *Thavar Mulla*, [1863] 1 Bom. H. C. R., 71, *per* SAUSSE, C. J. See also *Fatima Bibee* v. *The Advocate General*, [1881] I. L., 6 Bom., 42, *per* WEST, J.; and *Gosain* v. *Gosain*, [1854] 6 Moo. I. A., 81.

(3) [1868] 6 Mad. H. C. R., 455.

shall be applied to ascertain the validity of any past transactions which may be brought under consideration in the suit. Its only effect, as I apprehend, is this, when a dealing takes place between two parties of whom one only is Muhammadan, and a suit is brought in respect of that transaction, the dispute between these parties is to be decided according to the law of the defendant. The transaction on which the plaintiff's title depends, was, however, between Muhammadans only, and though the donor afterwards dealt with persons not Muhammadans, and not subject to Muhammadan Law, the plaintiff was no party to any such dealing, and she cannot by the Nawab's acts be rendered subject (as regards her property) to any other than the Muhammadan Law."

In *Moonshee Buzloor Ruheem* v. *Shumsoon-nissa Begum*,(1) the Judicial Committee of the Privy Council dealing with certain remarks of the Judges of the Sudder Court of Calcutta, refusing to follow the Mahommedan Law in that case, made the following observations:—

"Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India, and particularly to the enactment already referred to (Reg. IV of 1793, Sec. 15), which directs, that in suits regarding marriage and caste, and all religious usages and institutions, the Mahommedan Laws with respect to Mahommedans, and the Hindu Laws with regard to Hindus are to be considered as the general rules by which Judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mahommedan community than to learn by a judicial decision that their law, the application of which has been justly secured to them, is to be over-ridden upon a question which so materially concerns their domestic relations."

Section II.

The Growth of Mussulman Jurisprudence.

Of all systems of law, the Islâmic system furnishes, from an historical point of view, the most interesting phenomenon of growth. The small beginnings from which it grew up, and the comparatively

(1) [1867] 11 Moo. I. A., 551.

short space of time within which it attained its wonderful development, mark its position as one of the most important juridical systems in the civilised world.

The grand superstructure of Islâmic jurisprudence is founded on the Koranic laws and the traditional sayings of the Prophet, but much of the coping stone was supplied at Bagdad, in Bokhâra, in Syria, in Andalusia and Persia. I have, in another place,(1) referred to the resemblance that exists between the family laws of Islâm and the Rabbinical Law. Similarly, many of the conceptions of the Saracenic jurists, who flourished in the full tide of Moslem development and ascendancy, bear a strong and startling analogy to the rules of the Roman Civil Law on cognate subjects. Often the analogy is so startling as to make the careful and critical student ask himself whether it arises from mere accidental coincidence, or is the result of mutual action and reaction? Considering the close proximity of the two nations and their frequent contact in schools and colleges, as in the field and in the hall, it is impossible to suppose that Byzantine ideas exercised no influence on the legal conceptions of the Arabian jurists.

Shiah and Sunni schools of Law.

The unhappy schism, which at this moment divides the Islâmic world into the two great sects of Shiahs and Sunnis, owed its origin to secular causes which led ultimately to a wide divergence in their juridical conceptions. It originated with dynastic questions and grew into a separation on doctrinal and legal points. The great Sunni sect is divided in its own bosom into four schools; and the doctrinal and legal differences among them are as great as between the Shiahs and any one of the Sunni schools, and yet they are not regarded by each other with the same bitterness as collectively they regard the Shiahs. The reason is plain, and is to be found in the reception which the two sects accorded to the doctrine of the *Imâmate.*

The Imâmate.

The question of the *Imâmate,* that is, "the spiritual headship of the Mussulman Commonwealth," forms the distinctive feature of difference between the Sunnis and the Shiahs, and gives a characteristic complexion to the juridical doctrines of the two schools. The Shiahs repudiate entirely the authority of the *Jamâ'at* (or the universality of the people) to elect a spiritual chief, who should supersede the rightful claims of the persons indicated by

(1) Mahommedan Law, Vol. II, p. 2.

the Founder of the Faith, whilst the Sunnis regard the decisions of the assemblies, however obtained, as of œcumenical importance. The question came up for discussion and settlement immediately on the decease of Mohammed when it became necessary to elect a Caliph or successor to the Prophet to assume the leadership of Islâm. The Hâshimites, the kinsmen of Mohammed, maintained that the office belonged by right to Ali as one who had been pointed out by the Prophet as his successor. The other Koreishites, who were traditionally hostile to the Banû Hâshim, insisted upon proceeding by election. Whilst the Banû Hâshim were engaged in the obsequies of Mohammed, Abû Bakr, who by virtue of his age and position at Mecca, held a high place in the estimation of the Arabs, was elected to the office of Caliph by the votes of the Koreish.

The first Caliph of Islâm.

Abû Bakr died in the third year of his Caliphate(1) and was succeeded by Omar (*Ibn-ul-Khattâb*). Under this Caliph the conquest of Syria, Egypt and Persia was achieved by the Moslems. Upon his decease the Caliphate was offered to Ali on condition that he should govern in accordance with the precedents established by the two former Caliphs. Ali declined to accept the office on those terms, declaring that in all cases respecting which he found no positive law or decision of the Prophet, he would rely upon his own judgment. This notable declaration forms another point of difference between the Shiahs and the Sunnis. The Caliphate was then offered to Osmân who consented to the terms imposed by the electoral body.

The legal divergence.

The legal divergence between the Sunni and the Shiah schools dates virtually from this epoch. The willingness of Osmân to follow implicitly the precedents established by Abû Bakr and Omar, without any question as to their applicability to the ever-varying exigencies of human life, impressed a distinctive character upon the Sunni doctrines. Both Abû Bakr and Omar had during their Caliphates deferred to Ali's exposition of the law; and judgments were invariably given according to his interpretation of the traditions. Osmân seems to have set a different example. This well-intentioned but weak chief, governed entirely by his secretary and kinsman Merwân, afterwards a Caliph himself,

(1) August 634, A. C.

was killed, after a short and troubled reign, by the revolted Egyptian soldiery led by Mohammed, the son of Abû Bakr. Upon his death Ali was elected to the Caliphate. His accession was the signal for two fierce revolts on the part of the opposite faction. The one which was headed by Ayesha, the daughter of Abû Bakr, was suppressed without much difficulty; the other was more successful. Osmân had, during his lifetime, appointed one of his kinsmen M'uâwiyah, the son of Abû Sufiân, to the Governorship of Syria. This ambitious chief perceived in the murder of Osmân an opportunity for his own aggrandisement; and the insurrection raised by him proved, indirectly, the cause of the many disasters which have befallen Islâm. Defeated in several consecutive battles, he appealed to arbitration which was agreed to by Ali with the object of avoiding further bloodshed. Abû Mûsa al-Ash'aâry was appointed arbitrator on behalf of the House of Mohammed, and 'Amr ibn-ul-'Aâs on behalf of M'uâwiyah. 'Amr persuaded Abû Mûsa that, with the view of healing the wounds which the differences betwen Ali and M'uâwiyah had inflicted on the Moslem world, it was necessary to set aside both chiefs and elect another Caliph. Abû Mûsa agreed to the suggestion, and on the people assembling to hear the verdict of the arbitrators, he pronounced the deposition of both M'uâwiyah and Ali. He was followed by 'Amr ibn-ul-'Aâs, who declared that he agreed with Abû Mûsa in deposing Ali, but that he confirmed M'uâwiyah in his office. The boldness of the artifice, and the shamelessness with which it was carried into execution struck with dismay all those who had seen in the arbitration a means for preventing further bloodshed in Islàm. This proceeding of 'Amr ibn-ul-'Aâs exasperated the Fâtimides, and both parties separated vowing undying hatred towards each other. Ali was shortly after assassinated whilst engaged in prayers in a mosque at Kufa.(1) His assassination enabled M'uâwiyah to consolidate his power both in Syria and Hijâz.

M'uâwiyah.

Until the accession of this chief to the office of the Caliphate, which the stern virtues of the early Caliphs had sanctified and adorned, no distinctive appellation was assigned to or assumed by either party. The partisans of Ali were known simply as the Banû-Hâshim. Under M'uâwiyah, the followers of the House of Mohammed

(1) Mr. Justice Arnold calls Ali, "the most heroic of that time, most fruitful in heroes;" 12 Bom. H. C. R., 323.

began to be called "Shiahs" or "adherents;"(1) whilst the partisans of M'uâwiyah were called *Amawis*.(2) When the Abbasides acquired the dominion, the party which advocated the principle of election in preference to hereditary succession adopted the name of *Ahl-us-Sunnat wa'l Jamâ'at* ("People of the Traditions and Assembly").(3) The Fâtimides adopted green, the colour of the Prophet, as the symbol of their cause; the Banû Ommeyya, on the other hand, assumed white for their standard. Up to this time the divergence between the two factions was chiefly political and dynastic. Their doctrinal and legal differences began now to assume the type and proportions they retain at the present moment. The Shiahs reject not only the decisions of the Œcumenical Councils, but also all traditions not handed down by Ali or his immediate descendants—those who had seen the Prophet and held familiar intercourse with him.

The Koran.

Though the Mahommedan Law purports to be founded essentially on the Koran, most of the rules and principles which now regulate the lives of Moslems are not to be found there. It undoubtedly contains the germs of the fundamental principles, which regulate the various relations of life; the religious, civil and criminal laws which provide for the constitution and continuance of the body politic; and even of political rules and social economy. The absence of a systematic arrangement, which has frequently been considered as its greatest defect, is explained by the circumstance that it was gradually built up during the lifetime of the Prophet. The moral principles and the legal rules, which make up the work, were enunciated, not simultaneously as a completed Code of Law, but in accordance with the exigencies of the moment and the passing requirements of each special case arising in the midst of a simple and primitive society.

Shiah doctrine.

According to the Shiah doctrine, the oral precepts of the Prophet are in their nature supplementary to the Koranic ordinances, and their binding effect depends on the degree of harmony existing between them and the laws of the Koran. Thus, those traditions which seem to be in conflict with the positive directions in the

(1) In the *Jawâhir-ul-Kalâm*, the term "Shiah" is explained as meaning "a propagator of the true doctrine."

(2) From Ommey'a an ancestor of M'uâwiyah; in other words, the Ommeyades.

(3) See *The Spirit of Islâm*, p. 528, (pop. Ed. p. 286) where I have fully explained the subject.

text are considered to be apocryphal. The process of elimination is conducted upon certain recognised principles founded upon logical rules and definite data. These rules have acquired a distinctive type among the M'utazalas, who have eliminated from the *Hadîs Kudsî* (the holy traditions) such alleged sayings of the Prophet as appeared incompatible and out of harmony with his developed teachings, as explained and illustrated by the philosophers and jurists of his race.

The Sunnis, on the other hand, base their doctrines on the entirety of the traditions. They regard the concordant decisions of the successive Caliphs and of the general body of *ulema* (*Ijmâ'a-ul-Ummat*) as supplementing the Koranic rules and regulations, and as almost equal in authority to them.

The sources of the Mussulman Law.

According to the Sunni doctrines, the sources of the Mahomedan Law are invariable in their order and limited in their number. With reference to these fundamental bases of jurisprudence, as they are called, there is little or no divergence among the several branches of the Sunni school, though they differ much in their mode of interpretation and exposition of the laws. (1) The Koran; (2) The *Hadîs* or *Sunnat* (traditions handed down from the Prophet); (3) the *Ijmâ'a-ul-Ummat* (concordance among the followers); and (4) the *Kiyâs*, (analogical reasoning), constitute the bases upon which Sunni jurisprudence is essentially founded. The *Hadîs* (pl. *Ahâdîs*) embraces (*a*) all the words, counsels, and oral laws of the Prophet (*Kawl*); (*b*) his actions, his works, and daily practices (*Fyl*); (*c*) and his silence (*Takrîr*) implying a tacit approbation on his part of any individual act committed by his disciples. The rules deduced from these subsidiary sources vary considerably in respect of the degree of authority which is attached to them. If the rules, or traditional precepts, are of public and universal notoriety (*Ahâdîs-i-mutwâttireh,*) they are regarded as absolutely authentic and decisive. If the traditions, though known publicly by a great majority of people, do not possess the character of universal notoriety, they are designated as *Ahâdîs-i-mashhûra*; whilst the *Akhbâr-i-wâhid*, which depend for their authenticity upon the authority of isolated individuals, have little or no value attached to them. Thus, every tradition purporting to be handed down by the contemporaries and companions of the Prophet, regardless of their actual relationship to him, is considered to be authentic and

genuine, provided certain arbitrary conditions, framed with the view of testing the value of personal testimony, are complied with.

(3) *Ijmâ'a-ul-Ummat* implies general concordance. Under this collective name are included all the apostolic laws, the explanations, glosses, and decisions of the leading disciples of the Prophet, their successors and the principal jurists on theological, civil and criminal matters.

(4) *Kiyâs*, the exercise of analogical reasoning, forms the principal point of difference among the four sub-divisions of the Sunni school of jurisprudence.

Sources of the Mussulman Law: Shiah doctrine.

The Shiahs do not admit the genuineness of any tradition not received from the *Ahl-ul-Bait*, ("the People of the House,") consisting of Ali and Fâtima and their descendants, and repudiate entirely the validity of all decisions not passed by their own spiritual leaders and Imâms. In the application of private or analogical reasoning, and in drawing conclusions from the ancient precedents, they also differ widely from the Sunnis.

Until the Seffavian sovereigns made the Shiah creed the State-religion of Persia, it was the religion of a persecuted and hated sect. The persecutions to which the Shiahs have been, from time to time, subjected,—have created a marked impression upon their legal conceptions regarding the connection between the secular and the spiritual power,—the Church and the State.(1) Partly in consequence of the mysterious disappearance of their last Imâm, and the existing belief that he is still alive and will re-appear to overthrow the enemies of Islâm, and partly owing to the frequent repression from which they have suffered, the Shiahs have dissociated the secular from the spiritual power. Nevertheless the *Mujtahids* (the expounders of the law) exercise in Shiah countries an amount of authority which is not possessed even by the Sheikh-ul-Islâm in Turkey.

Doctrine of escheat.

The effect of this separation of the spiritual from the temporal power is most clearly marked in the doctrine of escheats. According to the Shiahs there is no escheat to the *Bait-ul-Mâl* (the Public Treasury).(2) The idea of *Bait-ul-Mâl* is "abhorrent" to the Shiah creed. All escheats, which occur only in cases where the deceased leaves no possible heir, go to the spiritual Imâm, and in his absence

(1) L. D'Ohsson, *Tableau Generale de l'Empire Ottoman*, p. 76.

(2) See *The Spirit of Islâm*, 2nd Ed., p. 316.

(*ghîbat*) to his representative the Mujtahid, who distributes the proceeds among the poor of the intestate's native city.

The Shiahs are divided into several sub-sections; for example, the *Asnâ 'Aasharias* or *Imâmias*, (the followers of the twelve Imâms), the *Ismailias*, the followers of Ismail, one of the sons of Imâm Jaafar as-Sâdik (the sixth Imâm),(1) the *Zaidias*, the *Batinias* (the allegorists), &c. They differ from each other not so much on the interpretation of the law as on doctrinal points. The school of the M'utazalas, an offshoot from the Shiah branch, bears the closest analogy to the early Medinite School of the Fâtimide Imâms. The rise of M'utazalaism forms one of the most interesting features in the history of Islâm.(2) It originated in the secession of Wâsil bin-'Aatâ, a contemporary of Abû Hanîfa, from the doctrines taught by Imâm Hassan al-Basrî (of Bussorah). Shiah sub-sections.

Hassan was educated in the school of the early Fâtimide philosophers, and the liberality of his views contrasted remarkably with that of his age. Wâsil had imbibed his knowledge at the same source, but he separated from Hassan on the question of free-will and predestination, and founded a school of his own. His disciples have, from the fact of his secession, assumed the designation of *M'utazalas* or *Ahl-ul-'Itizâl* (Dissenters or Protestants). Proceeding upon the lines of the Fâtimide philosophers and appropriating the principles which they had laid down, Wâsil formulated the doctrines which constituted the basis of his difference from patristicism generally. His impulsiveness often led him to overstep the bounds of moderation in his antagonism to intellectual tyranny, yet the general rationalism of his school rallied round his standard the most advanced and cultured minds. Imâm Zamakhshari, (the author of the *Kashshâf*,) Abu'l Hassan Ali al Mas'ûdi,(3) "Imam, historian and doctor," Mirkhond and Khondemir, authors of the *Rouzat-us-Safa* and *Habib-us-Siyar*, were all M'utazalas. There can be no doubt, that the moderate M'utazalas represented the views of Ali and the most liberal and learned of his early descendants, for the doctrines of the Fâtimides bear the

(1) The *Jamaa-ush-Shittât*.

(2) See *The Spirit of Islam*, 2nd Ed., p. 385.

(3) The "far-famed" author of the *Murûj-uz-zahab*, "the Meadows of Gold." This great writer who has been styled the Herodotus of the East, was not only a philosopher, a historian and a geographer, but a voluminous writer on Shiah traditions.

closest analogy to those of the school founded by Wâsil and reformed by Zamakshari.(1) It is a well-known fact that the chief doctors of the M'utazalas were either Fâtimides themselves or were educated under the Fâtimides.

The M'utazala doctrines.

The M'utazalas maintain that justice is the animating principle of human actions, justice being the embodiment in action of the dictates of reason. They maintain further that there is no eternal, immutable law as regards the actions of man, and that the divine ordinances which regulate his conduct are the result of individual and collective development; that, in fact, the commands and the prohibitions, "the promises and the threats," which have been promulgated among, or held out, to mankind, have invariably been in consonance with the progress of humanity, and that the Law has always grown with the growth of the human mind. The doctrines of the *Ahl-ul-'Itizâl* were adopted by Abdullah al-Mâmûn. He and his two immediate successors strived to introduce the Mutazalite philosophy and theology throughout the Moslem world. Unfortunately, for Islâm, Patristicism proved too powerful even for those sovereign pontiffs, and the triumph of a factitious orthodoxy, opposed to all improvement and progress, under the bigot Mutawakkil, led eventually to the downfall of the Caliphate.

The Imâmias.

The Indian Shiahs are chiefly *Asnâ 'Aasharias* or *Imâmias*. The *Asnâ 'Aasharias* are divided into two sub-sections, the *Akhbâri* and the *Usûli*, namely, (*i*) those who adhere to certain principles of interpretations laid down by the *Mujtahids* (the jurists of their school), and (*ii*) those who absolutely deny the influence of authority in matters of opinion unless such authority should be in harmony with the dictates of reason and judgment.(2) The *Usûlis* allow the exercise of *Kiyâs* (private judgment) on every legal question, and, as will be seen hereafter, coincide in this respect with the principal Sunni school. In their acceptance of the doctrine of evolution they approach most closely the Mutazalas.

The Khojahs.

The Khojahs, who are to be found in the Bombay Presidency, belong like many of the Borahs, to the *Ismailia* sect. Although

(1) The great author of the *Kashshâf*, a most important, learned, and well-reasoned commentary on the Koran "a production the like of which," says Ibn-Khalikân, "had never before appeared on the interpretation of the Koran." Imâm Zamakhshari was born in 1075, A. C. and died in 1144, A. C.

(2) See *The Spirit of Islâm*, 2nd Ed., pp. 318 et seq.

on questions of succession they have been held to be governed by Hindu customs, it does not appear that the same rule is applicable to their dispositions. It is to be presumed that in those cases they would be subject to the law of the sect to which they belong. And as the Ismailias have no separate legal system, that would be the general Shiah law.

The Borah.

A majority of the Borahs are Ismailias. They do not, however, follow the Imâm of the Khojahs. Their spiritual preceptor is said to be in Yemen. Their dispositions appear to be governed by the general Mussulman law.

The Sunni Borahs of certain parts of Gujarat, who were originally Rajput converts, are quite apart from the *Ismailia* Borahs.(1)

Shiahism.

In A. H. 905 (A. C. 1499) Shah Ismâil Saffavi, the great founder of the Seffavian dynasty, adopted the Shiah doctrines as the national religion and law of the Persians, which have continued so from that period until the present time, notwithstanding the violent efforts of the Afghan usurper Ashraf and the cruel Nadir Shah to substitute the Sunni creed. Until the return of Humâyûn from Persia in the year 1555, the Shiahs were confined chiefly to the kingdoms of Bijapur and Golconda. The Bahmani and Aâdil-shâhi sovereigns were Shiahs, and with the doctrines of the Persians they had also borrowed Persian culture. When Humâyûn returned to India after the death of Shèr Shah Suri, he is alleged to have come back pledged to introduce the Shiah doctrines in return for the Persian support. Whatever truth there may be in this report, there can be no doubt that many learned men accompanied Humâyûn to India and established themselves there. Shiahism began to spread among the people, though the State-religion continued to be Sunni. Shah Shujah, Shah Jehan's second son, was a Shiah. In 1847, King Amjad Ali Shah made the Shiah religion the State-religion in Oudh. Thus the bulk of the Mussulman population in that province is Shiah. Similarly, in the District of Moorshedabad Shiahs constitute a preponderant majority.

Section III.

The Sunni Schools of Law.

The four principal schools of law among the Sunnis, named after their founders, originated with certain great jurists to whom

(1) See Vol. II, p. 14.

has been assigned the distinguished position of *Mujtahid Imâms*, namely, Expounders of Law *par excellence*. By virtue of their learning and their eminence, they were entitled not to be bound in the interpretation of the law by any precedent, but to interpret it according to their own judgment and analogy (*kyâs*). Though the doctrines of these schools are essentially the same as regards fundamental dogmas (*usûl*), they differ from each other in the respective weight allowed to *kyâs*, and the application of private judgment in the interpretation and exposition of the law.

Imâm Abû Hanîfa.

The founder of the first distinctive juridical school among the Sunnis was Abû Hanifa. He was born in the year 80 of the Hijra (Hegira), during the reign of Abdul Malik ibn Merwân, was educated in the Shiah school of law and received his first instructions in jurisprudence from the Imâm J'aafar as-Sâdik (the sixth Imâm of the House of Mohammed). He received his knowledge of the traditions from Abû 'Abdullah ibn al-Mubârak and Hâmid ibn-Suleiman. This great jurist often quotes the Fâtimide Imâm as his authority. On his return to his native city of Kûfa, though he continued to remain a zealous and consistent partisan of the House of Ali, he seceded from the Shiah school of law and founded a system of his own diverging completely on many important points from the doctrines of the Shiahs; and yet so close is the resemblance between his exposition of the law and their views, that there is no reason to doubt the source from which he derived his original inspiration. The latitude, which he allowed to private judgment in the interpretation of the law, seems to be unquestionably a reflex of the opinions of the Fâtimide doctors. Abû Hânifa died in the year A. H. 150.(1) The school, which he founded, goes by the name Hanafi, and is in force among the major portion of the Indian Mussulmans, among the Afghans, Turkomans, almost all Central Asian Mahommedans, the Turks and Egyptians. In fact, his school owns by far the largest number of followers. Abû Hanîfa's teachings were amplified, illustrated, and explained by his two great disciples, Abû Yusuf and Mohammed.

Imâm Abû Yusuf.

Abû Yusuf [Y'aakub ibn Ibrâhim al-Kûfi] was born in A. H. 113 (A. C. 731), and died at Baghdad in A. H. 182 (A. C. 798). He was a pupil of Abû Hanifa and was first appointed to the office of Kâzi of Baghdad by the Caliph al-Hâdi; subsequently he was raised to

(1) A. C. 699-769.

the dignity of Kâzi-ul-Kuzzât or Chief Justiciary of the Empire by the Caliph Hârûn ar-Rashîd, being the first who held that high office.

A collection of the decisions of Abû Yusuf was published under the auspices of the Vizier of Hârûn, J'aafar ibn Yayha Barmaki, (the Barmecide), and hence called the *Fatâwai Barâmika*. It is frequently referred to by the text-writers.

Imâm Mohammed.

[Abû 'Abdullah] Mohammed [ibn Hussain ash-Shaibani] was born at Wâsit in Mesopotamia in A. H. 132 (A. C. 749) and died at Rai in A. H. 187 (A. C. 802). The Imâm Mohammed, as he is most generally called, was a fellow-pupil of Abû Yusuf under Abû Hanîfa, and on the death of the latter pursued his studies under Abû Yusuf. He has left a number of works upon which commentaries have been written by some of the foremost jurists of the Hanafî school.

After Abû Hanîfa and his two above-named disciples, the next in authority among the Hanafî Sunnis are the Imâm Zuffar [ibn-ul Hâzil], Chief Judge at Bussorah (Basra), where he died in A. H. 158 (A. C. 774), and Hassan bin-Ziyâd. These lawyers were contemporaries, friends and pupils of Abû Hanîfa.(1)

The respective authority of 'the masters.'

With reference to the respective authority of these masters of the Hanafî system, opinion seems to have become more crystalised in later times than was the case at the beginning. Sir William Jones says " that although Abû Hanîfa be the acknowledged head of the prevailing sect, and has given his name to it, yet so great is the veneration paid to Abû Yusuf and the lawyer Mohammed, that, when they both dissent from their master, the Mussulman Judge is at liberty to adopt either of the two decisions which seems to him the more consonant and founded on the better authority."(2)

This statement, however, needs amplification and some degree of qualification.

In the *Durr-ul-Mukhtâr*(3) the rule is stated in the following terms :—The Kâzi (Judge) like the Mufti (jurisconsult) has to adopt (*lit.* take) the opinion (قول) of Abû Hanîfa absolutely

(1) D'Ohsson I, p. 18. For matters in which Imâm Zuffar's veiws are adopted for decrees, see Mahommedan Law Vol. II, p. 602. They are not, however, exhaustive.

(2) Sir William Jones' works, Vol. III, p. 510; 1 Harrington's *Analysis*, p. 228.

(3) Hooghly Ed., p. 523.

(على الاطلاق) [*viz.*, whether the disciples agree with him or not]; and after him that of Abû Yusuf; and after him that of Mohammed, and after him that of Zuffar and Hassan bin Ziyâd." But this broad statement is applicable only when the Kâzi does not possess the capacity of drawing conclusions (ادراک).

The respective authority of 'the masters' —contd.

In the *Hamâdia* also it is similarly stated that "the *Fatwas* (decisions) are given primarily according to the doctrine of Abû Hanîfa, next according to Abû Yusuf, next according to Imâm Mohammed, next according to Zuffar, and then according to Hassan ibn Ziyad. It is said that if Abû Hanîfa be of one opinion and his two Disciples of another, the Mufti is at liberty to choose either, but the preceding rule must be observed when the Mufti is not a scientific jurist [and therefore not competent to judge of the opposite opinions]. This view is expressed in the *Kinia*. Imâm Sarakhsi has declared it safe to rely upon Abû Yusuf in judicial matters, and the learned have followed him in such cases, though if there be a difference between the two Disciples whoever agrees with Abû Hanîfa should be preferred. The joint opinion of the Disciples may also be adopted, though different from that of Abû Hanîfa, if the difference appear to proceed from a change of human affairs [lit. a change of men and alteration of times]; and modern lawyers are agreed that the doctrine of the Disciples should be adopted for adjudication in matters of civil justice."

In the *Jâm'aa-ul-Fusalain* the same rule is expressed in the following words:—And if on any doctrine 'our masters' differ, in that case if either of the Disciples should agree with Abû Hanîfa, that opinion should be taken because that would appear to be the correct view. And if both the Disciples differ from Abû Hanîfa, then it must be considered whether their divergence arises from change of circumstances and the requirements of justice, in that case the doctrine (قول) of the Disciples should be adopted on account of the alteration in the conditions of mankind. In matters of business (مزارعت) and transactions (معاملت) their opinions should be accepted as on this there is a concurrence of the moderns. Besides this, jurists have laid down that the Kâzi should come to a decision by drawing conclusions upon analogical reasoning."

Dealing with the duties of the *Mufti*, Kâzi Khân speaks thus: "if it is a question on which our masters are disagreed, then it

must be seen whether any of the disciples is in agreement with Abû Hanîfa. In that case, the opinion of Abû Hanîfa and of that disciple who agrees with him should be adopted, because the arguments are strong on their side.....If both disagree with Abû Hanîfa, then it must be considered whether their disagreement arises from change in the times, and decision should be pronounced in accordance with [the requirements of] justice, and the doctrine should be adopted which keeps in view the changed conditions of people, (احوال الناس). *In matters pertaining to contracts and civil transactions*, and *such like, their* [the disciples,] *views should be adopted.*"(1)

Respective authority of 'the masters'—contd.

But, although the respective authority of the "masters" is sometimes enunciated in rather wide terms, a careful study of the law shows that considerable latitude is left to the Judge to follow the rule which is most consistent with justice, the changed conditions of society, the requirements of particular localities and the needs of the inhabitants. And, accordingly, although in doctrinal matters and in what may be called ecclesiastical discipline, the opinion of Abû Hanîfa is supreme, there is no hard and fast rule regarding secular questions. On some his pronouncement is accepted as furnishing the governing principle,(2) in others that of the Disciples if they agree in differing from him.(3) Where the Disciples differ among themselves and there is no express statement of Abû Hanîfa on the point to incline the balance, it is open to the Judge to accept and give effect to the exposition most consistent with the requirements of justice. In some cases where even Abû Hanîfa agrees with one, the individual opinion of the other is accepted and enforced.

Again, in certain matters the doctrine of one is regarded by consensus as of greater authority than that of the other. And when there is no general agreement with regard to a particular exposition, in some localities the views of Abû Yusuf are accepted, in others those of Mohammed.(4)

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(1) *Fatâwai Kâzi Khân*, Vol. I, p. 1.

(2) For example, on the question whether the wife is entitled to refuse cohabitation for non-payment of dower by the husband, see Vol. II, pp. 494—9.

(3) For example, on the subject whether a man is liable to punishment if he contracts a marriage with a woman knowing that she was prohibited to him; see Mahommedan Law Vol. II, p. 375.

(4) They are fully stated in the following pages.

Reason for conformity to principles.

Again, it must be observed that the statements regarding the respective authority of the Hanafî "masters" occur chiefly in the chapters which deal with "the duties of the Kâzi," and are directed in the main to secure uniformity and adherence to principles and to prevent a capricious exercise of discretion on the part of the Judge. It is for this reason that a Kâzi who is not endowed with the capacity of analogical reasoning or deducing conclusions, is directed to adopt the principle laid down by one "master" or the other.

Limitation for claims.

Although the Mussulman Law proper does not recognise a period of limitation for claims, it became common in later times for the sovereigns (Sultans) to lay down rules regarding the length of time after which in respect of certain matters no action could be brought. For example, it is stated that "in Rûm (the Turkish Empire) the Sultans had ordered no claims should be heard after 15 years, except in the matter of inheritance and wakf,"(1) the object, according to Tahtâwi, being to avoid "deceit and tricks."

The legal works which have for the last eight centuries been regarded as binding authorities among the Hanafîs are generally divided into two groups, *viz.*, (*a*) Text-books, and (*b*) Digests of Decisions which pass under the name of *Fatâwa*.

Hanafî text-writers

Among the Hanafî jurists and text-writers the following are the most noted :—

Abû Bakr Ahmed ibn Omar al-Khassâf, who was the author of the most celebrated of several treatises known by the name of *Adâb-ul-Kazi* (*the Duties of the Kâzi*). He died in A. H. 261 (A. C. 874). The most esteemed commentary on Khassâf's *Adâb-ul-Kâzi* is that of Omar ibn Abdul Aziz bin Mâja commonly called Hussâm Shahîd, who was killed in A. H. 536 (A. C. 1141). Al-Khassâf will be frequently referred to in the following pages.

Abû J'aafar Ahmed ibn Mohammed at-Tahâwi is one of the numerous commentators on the *Jâm'aa-as-Saghîr* of Imâm Mohammed. He also compiled a synopsis of the Hanafî doctrines called the *Mukhtasar-ut-Tahâwi*. Both works are quoted as authorities, but they are not easily available in India. At-Tahâwi died in A. H. 321 (A. C. 933).

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(1) *Durr-ul-Mukhtâr*, Hooghly Ed., p. 533.

Al-Kudûri (Abû Hussain ibn Ahmed Mohammed) is another eminent jurist. His *Mukhtasar*(1) is a work of great weight and authority in India. "Indeed it is in such general repute that Hâji Khalîfa, when speaking of those several works which are emphatically designated by autonomasia, 'Al-Kitab' or 'the Book,' says that, if in matters connected with jurisprudence such expression be used, it signifies the *Mukhtasar al-Kuduri*."(2) It is a general treatise on law and contains upwards of twelve thousand cases. It is only natural that a work of such celebrity should have been commented upon by numerous writers : several of the commentaries upon it are quoted in the *Fatâwai Alamgiri*. Al-Kudûri died in A. H. 428 (A. C. 1036).

There is a well-known commentary on the *Mukhtasar al-Kuduri*, entitled *al-Jouharat-un-Nayyirèh*, sometimes called *al-Jouharat-ul-Munîrah*. Barthe says that this work, though of later date than the *Hedâya*, is more valuable in some respects. I have made use of the *Jouharat-un-Nayyirèh* as well as of the other commentary on the *Mukhtasar* called *Sirâj-ul-Wahâj*.

Shams-ul-Aïmmah Abû Bakr Mohammed as-Sarakhsi, the author of several commentaries upon the *Jâmaa-al-Kabîr* and the *Jâm'aa-as-Saghîr* of the Imâm Mohammed and other works, whilst in prison at Uzjand, compiled a law-book of great merit entitled the *Mabsût*. He was also the author of the most generally quoted of his many works entitled *al-Muhît*, compiled from the *Mabsût*, the *Ziyâdât* and the *Nawâdir* of the Imâm Mohammed. The *Muhît* of Sarakhsi is regarded with great veneration in India, and is frequently referred to in the *Fatâwai Alamgiri*.

Burhân-ud-din Mohammed ibn Ahmed also wrote a *Muhît* which though known in India is not so highly esteemed as the *Muhît-us-Sarakhsi*. The work of Burhân-ud-din Mohammed is commonly known as the *Muhît-ul-Burhâni* and is taken principally from the *Mabsût*, the *Jâm'aas*, the *Siyar* and the *Ziyâdât* of the Imâm Mohammed. The author also utilised the *Nawâdir* of the same doctor in composing his work.

The Shaikh 'Aalâ-ud-din Mohammed as-Samarkandi composed a compendium of Al-Kudûri's *Mukhtasar* which he entitled the *Tuhfa-ul-Fukahâ*. The work of Aalâ-ud-din was commented upon

(1) Frequently referred to in the *Fatâwai Alamgiri*.

(2) Morley's *Digest*, I. Introd., p. cclxv.

by his pupil Abû Bakr ibn Masûd al-Kashâni who died in A. H. 587 (A. C. 1191). This comment is entitled *Badâia as-Sanâia*. Both the text and its comment are frequently referred to as authorities.

Hanafî Text-writers.

The *Hedâya* is one of the most celebrated treatises on Hanafî Law. It is a commentary on the *Badâia-al-Mubtada ;* and both the text and comment are from the pen of Burhân-ud-din Ali ibn Abû Bakr al-Marghinâni (of Marghinân in Ferghâna), who is said to have spent thirteen years in compiling the *Hedâya*. He died in A. H. 593 (A. C. 1196).

The *Hedâya* has been illustrated by a large number of commentaries, the first of which was written by Hamîd-ud-din Ali al-Bokhâri, who died in A. H. 667 (A. C. 1268) and is a short tract entitled the *Fawâid*. The glosses of the *Hedâya*, which are most reputed in India, are the *Nihâya*, the *Inâya*, the *Ghâit-ul-Bayân*, the *Kifâya*, and the *Fath-ul-Kâdir*.

The first of these, the *Nihâya*, was composed by Hisâm-ud-din Hussain ibn Ali, who is said to have been a pupil of Burhân-ud-din Ali. It is important as supplying the omission of the Law of Inheritance in the *Hedâya*, although the chapter on this subject is supposed not to be equal in authority to the *Farâiz-us-Sirâjia*.

There are two commentaries on the *Hedâya* entitled the *Inâya*, but the one more commonly known by that name was written by the Shaikh Akmal-ud-dîn Mohammed ibn Mahmûd, who died in A. H. 786 (A. C. 1374). The *Ghâit-ul-Bayân* and the *Kifâya* are by the same author, Imâm-ud-din Ameer Kâtib bin Ameer Omar. Both works are extremely valuable and give not only the author's own comments and observations, but also the substance of other commentaries. The *Kifâya* was finished according to Haji Khalîfa in A. H. 747 (A. C. 1347). Both these works have proved of great assistance to me in the compilation of the following pages.

By far the most important of these commentaries is the *Fath-ul-Kadir*. It is a commentary merely in name, for it contains the opinions, dicta and decisions of the highest Judges and *Muftis* explaining, illustrating and elucidating the principles of the Hanafî Law as stated by Burhân-ud-din Ali. It also shows the development in the legal conceptions of Jurists and Judges in the course of two centuries. Morley speaks of this work in these terms :— "The *Fath ul-Kadîr l'il-'aajûz ul-Fakîr* by Kamâl-ud-dîn al-Siwâsi,

commonly called Ibn Hammâm who died in A. H. 861 (A. C. 1456) is the most comprehensive of all the comments on the *Hedâya*, and includes a collection of decisions which render it extremely useful."

I have largely utilised this work and refer to it frequently in my compilation. The *Hedâya* was translated into Persian by a number of Moulvis under the auspices of Warren Hastings and was subsequently rendered into English from the Persian translation by Mr. Hamilton.

Another work which I have made use of for the purposes of my compilation, and which is regarded as a work of considerable authority in India, is the *Ramz-ul-Hakâik*, a commentary on the *Kanz-ud-Dakâik*, a book of great reputation among the Hanafîs of India, by Allâmah al-Aini Badr-ud-dîn Mahmûd. Another commentary on the *Kanz-ud-Dakâik* highly thought of in Sunni countries is the *Bâhr-ur-Râik* by Allâmah al-Zain ul-Aâbidîn ibn Nujaim al-Misri who died in A. H. 970=A. C. 1562.

Another work of authority is the *Tas-hîl*, a commentary on the *Latâif-ul-Ishârât* by Imâm Badr-ud-din Mahmûd. I have also made use of this book.

The most celebrated of the law-works published in Turkey is the *Multaka-ul-Abhar* by the Sheikh Ibrahim ibn Mohammed al-Halabi(1) (of Aleppo), who flourished under Solyman the Magnificent, and died in A. H. 956 (A. C. 1549). This work, which is an universal code of the Hanafî Law, contains the opinions of the four chief Mujtahid Imâms and illustrates them by those of the principal jurisconsults of that school. Throughout Turkey, it is more frequently referred to as an authority than any other treatise on jurisprudence. I have frequently referred to this work also.

The *Multaka-ul-Abhar* was published in the original Arabic at Constantinople in A. H. 1251 (A. C. 1835), and a commentary on it entitled the *Majmaa-ul-Anhar* by Abdur-Rahman ibn Shaikh Mohammed, commonly known by the name of Shaikh Zadèh, was published at the same metropolis in A. H. 1240 (A. C. 1824). This commentary is extremely valuable and interesting as it represents the views in vogue among the *Ulemas* of modern Turkey. The *Majmaa-ul-Anhar* has been of great use to me in the compilation of the present work.

(1) D'Ohsson compiled his own magnificent Digest from this work.

Mulla Khusru,(1) who is one of the most renowned of the Turkish jurisconsults, completed his great work called the *Durrur-ul-Akhâm* in A. H. 883 (A. C. 1478). As an authority it is second only to the *Multaka-ul-Abhar*, and is frequently referred to in the later works.

The Digest.

The other class of law-works, *viz.*, the *Fatâwas* (collections of decisions) which I have made use of are the *Fatâwai Kâzi Khân*, the *Fusûl-i-Imâdia*, the *Kiniat-ul-Munia*, the *Fatâwai-Zainia*, the *Fatâwai Durr-ul-Mukhtâr*, the *Fatâwai Alamgiri* and the *Fatâwai Ankirawia* and the *Radd-ul-Muhtâr*.

The first is thus spoken of by Morley :—"The *Fatâwai Kâzi Khân*, or collection of decisions of the Imâm Fakhr-ud-din Hassan Mansûr al-Uzjandi al-Farghâni, commonly called Kâzi Khân, who died in A. H. 692 (A. C. 1195), is a work held in the highest estimation in India and indeed is received in the Courts as of equal authority with the *Hedâya* of Burhan-ud-din Ali with whom Kâzi Khân was a contemporary : it is replete with cases of common occurrence, and is therefore of great practical utility, the more especially as many of the decisions are illustrated by the proofs and reasoning on which they are founded." As Kâzi Khân was himself a judge as well as a jurist, his decisions are of great value.(2)

The *Fusûl-ul-Imâdia* consists of two portions :—The first composed by Abu'l Fath Mohammed bin Abû Bakr al-Marghinâni who died at the end of the 7th century of the Hegira ; the other by Imâm Jamâl-ud-din bin Imâd-ud-din.

The *Kiniat-ul-Munia* is a collection of decisions of considerable authority by Mukhtâr bin Mahmûd bin Mohammed az-Zâhidi Abû ar-Rija al-Ghaznunî surnamed Najm ud-din who died in A. H. 658=A. C. 1259.

The *Fatâwai Zainia* contains decisions by Zain al-Aâbidin Ibrâhîm bin Nujaim al-Misri (the Egyptian), the celebrated author of the *Bâhr-ur-Râik* and the *Ashbâh wan-Nazâir*. They were collected by his son Ahmed about A. H. 970=A. C. 1662.

The *Durr-ul-Mukhtâr* is a commentary on the *Tanwîr-ul-Absâr* of Shaikh Shams ud-din Mohammed bin Abdullah al-Ghâzzi (A. H. 995=A. C. 1586), itself a work of great authority and merit.

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(1) Died in A. H. 885 (A. C. 1480).

(2) D'Ohsson places Kâzi Khân on a higher footing than the author of the *Hedâya*.

The *Durr-ul-Mukhtâr* was written in A. H. 1071=A. C. 1660 by Mohammed Aalâ ud-dîn bin Shaikh Ali al-Hiskafi and is full of important decisions.

The *Fatâwai Alamgiri* is a digest of cases compiled under the orders of the Emperor Aurangzeb Alamgir (hence the name). It is a work of a comprehensive nature and of great authority in India, and is referred to in Western works as *the Hindièh*. In the original, the names of the authorities from which the decisions are collected are invariably given with many of the reasons and often with comments by the compilers, the learned Muftis of the Court. Mr. Neill Baillie, who has paraphrased portions of the *Fatâwai Alamgiri*, has omitted altogether the authorities and often a large amount of important matter with the comments and reasons, with the result that the reader, unable to get at the original, finds a certain amount of incoherency and sometimes divergences which do not appear in the Arabic.

The *Fatâwai Ankirawia* is a collection of the decisions of Imâm al-Ankirawi by the Shaikh-ul-Islâm Mohammed bin al-Hussain who died in A. H. 1098=A. C. 1686.

By far, however, the most practical and well-reasoned work of this class is the *Radd-ul-Muhtâr*,(1) a commentary on the *Durr-ul-Mukhtâr*, by Mohammed Amin (the Syrian) who flourished under Amurath IV. The *Radd-ul-Muhtâr* is certainly esteemed now-a-days as the best authority on Hanafî Law. It contains a critical *résumé* of previous decisions, the opinions of the most important earlier legists, with a full account of the recognised and accepted principles in modern times. I have greatly utilised this work in the following pages. Another commentary on the *Durr-ul-Mukhtâr*, which I have also quoted in this book, is the *Tuhfat-ul-Akhiâr*.

Imâm Mâlik—second Sunni school.

The founder of the second school of law among the Sunnis was [Abû Abdullah] Mâlik ibn Âns, whose tenets are in force in Northern Africa, especially in Morocco and Algeria. He died in the year A. H. 179 during the reign of Hârûn ar-Rashîd. The best known writer on the tenets of this school was Sîdi Khalîl, whose encyclopædic work has been translated into French by M. Perron under the patronage of the French Government.

(1) Called among the Indian Mahommedans, the *Shâmi* or *Syrian*, on account of the author being a native of Damascus.

Imâm Shâfeï—third Sunni School.

Shâfeï was the founder of the third school. He was born at Ghizah in Syria in the same year in which Abû Hanîfa died. He died in Egypt in the year A. H. 204 (A. C. 819) during the Caliphate of Al-Mâmun. He was a contemporary of the Shiah Imâm Alï ibn Mûsa ar-Razâ. Shâfeï's doctrines are generally followed in Northern Africa, partially in Egypt, in Southern Arabia, in Java and the Malayan peninsula generally, and among the Mussulmans of Ceylon and the Malabar coast. His followers are also to be found among the Borahs of the Bombay Presidency. Among the Shâfeï works of repute are the following :—

(1) The *Mukhtasar* of Abû Khoja ;

(2) The *Takrîb* of Shams-ud-din Abû Abdullah ibn Kâsim al-Ghazzi.

(3) The *Muharrar* of Abu'l Kâsim Abd-ul-Karîm ibn Mohammed ar-Râfi ; and

(4) The *Minhâj-ut-Tâlibin* of Mohi-ud-din Abû Zakaria Yahya ibn Sharaf an-Nawâwi (who died in A. H. 676). This work has recently been published with a learned translation into French by M. Van Den Berg, under the authority of the Dutch Government.

It is a noticeable fact that Shâfeïsm is spreading among the Indian Mussulmans.

Imâm Ahmed bin Hanbal—fourth Sunni School.

The fourth school was originated by Ibn Hanbal. He flourished during the reigns of al-Mâmûn and his successor M'utasim b'illah. These two Caliphs were M'utazalas. Ibn Hanbal's extreme fanaticism, and the persistency with which he tried to inflame the bigotry of the masses against the sovereigns, brought him into trouble with the rulers. He died in the odour of great sanctity in the year A. H. 241. Ibn Hanbal and his patristicism are responsible for the ill-success of Mâmûn in introducing the M'utazala doctrines throughout the empire, and for the frequent outbursts of persecution which deluged the Mahommedan world with the blood of Moslems.

Abû Hanîfa, Mâlik, Shâfeï and Ibn Hanbal are the founders of the four orthodox schools among the Sunnis (the *Mazâhib-i-arbaa*). Their doctrines, as already stated, are essentially the same as regards the fundamental dogmas (*usûl*), though they differ from each other in the application of private judgment and in the interpretation and exposition of the K ran.

Mâlik and Ibn Hanbal, almost entirely, exclude the exercise of private judgment in the exposition of legal principles. They are wholly governed by the force of precedents ; they do not admit the validity of recourse to analogical deductions, or of such an interpretation of the law whereby its spirit is adapted to the special circumstances of any particular case. Shâfeï less speculative than Abû Hanifa is more enlightened than Mâlik and Ibn Hanbal. His followers are however designated equally with the Mâlikis and Hanbalis, *Ahl-ul-hadîs* (traditionists *par excellence*).(1)

The *Ghair-mukallid.*

Within recent years a new sect has sprung up among the Sunnis of India, the members of which call themselves *Ghair-mukallidîn* or *non-conformists*. Their opponents sometimes designate them *Wahâbis*, which is neither correct nor just. The *Ghair-mukallid*, as his name implies, does not conform to any particular sect, but approaches most closely the Shâfeïs in doctrinal matters. Like them he pronounces, during prayers, the word *âmîn* in a loud voice (which is technically called *âmîn b'il-jahr*), and makes the ceremonial gesture of raising the hands *above* the ears at a particular point of the service, which is called *raf'aa-eddain*. These have been held to be "merely minor matters of difference not affecting the essentials of the service."(2) Apart from doctrinal differences a *Ghair-mukallid* is generally subject to the Hanafî school of law.

A Sunni Mahommedan belonging to any of these sects may validly perform his devotions under the leadership of a member of another sect.(3)

The exercise of private judgment, consecrated by the Prophet and adhered to strictly by his immediate descendants, had induced the development of a liberal spirit among the Fâtimides, and this had its legitimate influence on the mind of Abû Hanîfa. The value which he and his early disciples attached to the exercise of *Kiyâs* is proved by a series of passages given in the *Fatâwai-Alamgiri*. The followers of Abû Hanîfa are styled *Ahl-ur-rai wa'l kiyâs* (people of judgment and reason).

Ibn Khaldûn, one of the greatest critical scholars and jurists among the Mussulmans, speaks thus of the latitude given to reason

(1) See *The Spirit of Islâm*, p. 518.

(2) *Fazl Karim* v. *Haji Mowla Bukhsh*. [1891] L. R., 18 I. A., 59 ; s. c., I. L., 18 Cal., 448.

(3) *Ibid.*

or analytical judgment by the followers of the several Sunni schools. "The science of jurisprudence forms two systems, that of the followers of private judgment and analogy (*Ahl-ur-rai wa'l kiyâs*), who were natives of Irâk, and that of the followers of tradition, who were natives of Hijâz. As the people of Irâk possessed but few traditions, they had recourse to analogical deductions and attained great proficiency therein, for which reason they are called the followers of private judgment; the Imâm Abû Hanîfa, who was their chief, had acquired a perfect knowldge of this system and taught it to his disciples. The people of Hijâz had for Imâm, Mâlik ibn Ans and then ash-Shâfeï. Some time after, a portion of the learned men disapproved of analogical deductions, and rejected that mode of proceeding; these were the *Zâhiris* or *literalists* (followers of Abû Daûd Sulaiman), and they laid it down as a principle that all points of law should be taken from the *Nusûs* (text of the Koran and traditions) and the *Ijmâa* (universal concordance of the ancient Imâms)."

The exercise of private judgment.

The early Hanafî jurists declared in explicit terms the necessity for the exercise of private judgment in the exposition of the law and the administration of justice. And in this they approached closely the doctrines of the Usûli Shiahs.

Râzi-ud-Din Nishâpuri has declared in his *Muhît*, "If the concurrent opinion of the Companions be not found in any case which their contemporaries may have agreed upon, the Kâzi must be guided by the latter. Should there be a difference of opinion between the contemporaries, let the Kâzi compare their arguments and adopt the judgment he deems preferable. If, however, none of the authorities referred to be forthcoming and the Kâzi be a person capable of analogical deduction (*Ijtihâd*), *he may consider in his own mind what is consonant with the principles of right and justice and applying the result with a pure intention to the facts and circumstances of the case, let him pass judgment accordingly.*" Abû Bakr ibn Masûd al-Kâshâni has stated in the *Badâia*, "Where there is neither express statement of the law nor concurrence of opinions for the guidance of the Kâzi, if he be capable of legal disquisition and have formed a decisive judgment in the case, he should carry such judgment into effect by his sentence although other scientific lawyers may differ in opinion from him, for that which upon deliberate investigation appears to be right and just is accept-

ed as such in the sight of God." And again, a third passage may be quoted to the same effect from the last mentioned work: "If in any case the Kâzi be perplexed by opposite proofs, let him reflect upon the case and determine as he shall judge right, or for greater certainty let him consult other able lawyers; and if they differ, after weighing the arguments, *let him decide as appears just.*"(1) These dicta furnish the amplest reply to the absurd attacks which have often been levelled against Islâm, that it does not contain within it any elasticity or the germs of development, for its laws are stereotyped and cramped.

Unfortunately, the conception which has obtained a hold on the Sunni world, that *Ijtihâd*(2) or authoritative exposition of law by analogical deductions or the exercise of judgment, ceased in the third century of the Hegira, has exercised a most pernicious effect on the progress and advancement of the Mahommedan communities governed by the Sunni doctrines. The modern Sunnis recognise three degrees of *Ijtihâd.*(3) The jurists of the first order are supposed to have possessed a total independence in the exposition of the law. They constituted, as it were, a connecting link between the law and their own disciples, who had no right to question their exposition of the Koran, the *Sunnat* and the *Ijmâa*, even when apparently at variance with those elements or sources of jurisprudence. The *Mujtahids* of this high degree flourished in the first three centuries of the Hegira, and as they fixed the law upon certain defined lines the exercise of private judgment soon ceased to be acknowledged.(4) Some later doctors, az-Zâhiri and as-Suyûti, for instance, claimed the right, but public opinion having commenced to run in a channel made for it by authority rejected the claim advanced by them. Henceforth there is a complete subjugation of private judgment to blind precedent.

Those *Mujtahids*, who had arrived at the second degree of *Ijtihâd*, possessed the authority of solving questions not provided for by the authors of the chief sects, and were the immediate dis-

(1) *Fatâwai Alamgiri*, III, p. 583.

(2) The word *Ijtihâd* signifies in its most common acceptation, the striving to accomplish a thing, the making a great effort; but in speaking of a jurist it denotes the bringing into operation the whole capacity of forming a private judgment relative to a legal proposition.

(3) D'Ohsson, I, p. 7.

(4) *Fatâwai Kâzi Khân*, I, p. 13.

ciples of the acknowledged *Mujtahids* of the first class, who, in some instances, allowed their pupils to follow and teach opinions contrary to their own doctrines and occasionally even adopted their views.

Those who had attained the third degree of *Ijtihâd* were empowered to pronounce decisions upon their own proper authority, in all cases not provided for by the founders of the sects or their disciples. Their decisions were, however, to be founded upon a comparison of the Koran, the *Sunnat*, and the *Ijmâa*, taken conjointly with the opinions of the *Mujtahids* of the first and second classes, and they were not authorised to controvert their published doctrines either respecting the elements of the law or the principle derived therefrom. The *Mujtahids* of the third class were required to possess a perfect knowledge of all the branches of jurisprudence according to the doctrines of all the schools, and this class comprises a large number of doctors of greater or less celebrity, some of whom were raised to the rank during their lifetime, but the greater portion after their decease.(1)

As a title the term *Mujtahid* has long since fallen into disuse amongst the Sunnis.

The present stationary condition of the Mahommedan nations as compared with their rapid progress in the early centuries of Islâm, is due principally to this conception regarding *Ijtihâd*, and the general view that a person, who has not attained to that factitious eminence or empirical stage of juridical knowledge possessed by the *Mujtahids* of the first three centuries, can only construe principles with the help of precedents without the power of striking out new paths.(2)

Progress in legal conceptions.

In spite of these obstacles and limitations, the legal conceptions have steadily advanced, and old constructions have been abandoned in favour of views more in accord with the progress of social conditions. This statement is clearly supported by the frequent preference of the doctrines of the "moderns" (متاخرين), as also the liberty which is accorded to the Mussulman Judge to draw from the dicta of the Imâms and jurists his own conclusion most consistent with the requirements of justice, the changed cir-

(1) See Note II at the end of the Introduction.

(2) On this point see *The Spirit of Islâm*, pp. 284—289.

cumstances of the times or the conditions of society, or follow the doctrine most in accord with the above considerations.

Many of the rules included under the head of "the Duties of the Kâzi," relate to procedure. For example whilst under the Shâfeï and Hanbali systems the Kâzi is empowered to make an order against an absent person, under the Hanafí law "no decree can be passed against or in favour of the *ghâib*, and [if made] it would be inoperative, and on this is the *fatwa*, unless it is in the presence of his *nâib* (deputy), that is, the representative in fact of the absent, such as his *wakíl* (attorney) or *wasi* (executor) or the *mutwalli* of the *wakf*." According to Tahtâwi, "if evidence be taken in the presence of the *wakíl* and then he disappears and the principal appears or *vice versâ*; or if the evidence be taken in the presence of the *muris* [*i.e.*, the *propositus*] and he then disappears and the heir appears, or if one heir appears for another heir, in all such cases the decree is validly made against the absent person." The *Durr-ul-Mukhtâr* goes on to add that "where such a decree is passed against the absent or the deceased and not against the *wakíl* or the executor, the Kâzi should enter in his records (*sijil*) that he had made the decree against the absent defendant in the presence of his *wakíl* or against the deceased in the presence of his executor." "So one of the heirs can stand as a litigant for the rest, or a partner in debt (liability)(1) for the other partner; so can a stranger in whose hands is the property of an orphan stand as a litigant for the latter; so can one of the beneficiaries of a *wakf* stand for the rest if the *wakf* be established." "And it is lawful to pass a decree in the presence of a *wakíl* appointed by the Kâzi to represent the absent defendant....which may be done in five cases," among them being "when the defendant (*al-khasam*) conceals himself or is missing." "In all such circumstances the moderns have held the Kâzi has the power to appoint a *wakíl* and this is the opinion of the second (Abû Yusuf)."(2) "In the *Wahbânieh* it is stated all are agreed on this point. And the Kâzi can seal up the house of the absent as long as he thinks fit and then appoint a *wakíl*."

Procedure.

"And the power of selling the inheritance of an insolvent person (*mustaghrak b'id-dain*) belongs to the Judge and not to his heirs." But according to Tahtâwi "if the heirs offer to discharge

(1) *Sharîk-ud-dain.* (2) *Durr-ul-Mukhtâr*, p. 532.

the debt, the creditors should be compelled to accept the same."

Section IV.

The Shiah Jurists.

Shiah communities.

Among the Shiah communities also, the same blight has fallen over the ideas of men by the introduction among the common folk of the *Akhbârî*, in preference to, or supersession of, the *Usûli* doctrines. The freedom of judgment allowed by the latter school gave ample scope to social progress and moral development.

The *Akhbârî* submits himself implicitly to the law as enunciated by its constituted expounder called in Shiah countries the *Mujtahid*, and rejects all liberty of thought.

This suppression of the human mind has naturally given birth to that movement in Islâm, symptoms of which are perceptible on all sides and which are so full of the most hopeful auguries for the future of the Moslem world. Shâfeïsm seems to have shaken off its ancient fetters, and now stands forth in the presence of the Sunnis as the embodiment of those aspirations for moral regeneration and legal reform which are agitating so many minds in Islâm.

The Shiah jurists.

Among the Shiah jurists the following are the most eminent :—(1) Shaikh Mohammed ibn Mohammed ibn an-N'umân Abû Abdallah, who was surnamed al-Mufîd, because of his numerous pupils, born in A. H. 333 or 338, died in 413 ; (2) Shaikh Mohammed al-Hassan ibn Ali Abû J'aafar at-Tûsi, surnamed "the Shaikh of the Imamite faith" or shortly "The Shaikh" (A. H. 385—460). He was the most distinguished disciple of Shaikh Mufîd, and has left numerous works, which are regarded as authoritative and binding wherever the Shiah doctrines are followed ; among others the *Istibsâr*, the *Khilâf wa'l wifâk* ("Divergences and Concordances"), the *Nihâya fi-bahr ul fikh wa'l ferâyè*, and lastly the *Mabsût*, the most important and most erudite of all, and on which there exist no less than eighty commentaries and glosses. He was an enlightened and liberal-minded lawyer, and his views are far in advance of many of his successors. (3) Shaikh Syed Murtaza Abu'l Kâsim Ali ibn Abi Ahmed al-Hussaini, a descendant of the Prophet surnamed "al-Huda" ("the guide to the way of salvation"). He was also a pupil of Shaikh Mufîd and was one of the most prominent lawyers of his times. His views, which are decidedly

more in conformity with modern thought and the requirements of an advancing civilisation, are chiefly in force among the Usûlis. One of his works which I have utilised in the compilation of the following pages is the *Kitâb ul-Intisâr*.

Unfortunately, the narrow conceptions of Shaikh Najm-ud-din-Abu'l Kâsim Jaafar Abû Ali Yahyâ, surnamed "*al-Mohakkik*" "the learned," have gained ground among the Akhbârî Shiahs and stopped all growth. This doctor was born at Hilleh on the Euphrates in the year 602 of the Hegira. Al-Mohakkik exercised his magisterial and professorial functions until 676, at which time he died of a fall from the terrace of his house. He was buried at Najaf, near the tomb of the Caliph Ali. He is the author of the *An-Nâfè*, of several commentaries on the *Nihâya* of the Shaikh Tûsi, and of the well-known work called the *Sharâya-ul-Islâm fi-masâil ul-halâl wa'l harâm* ("the Mussulman Law regarding what is lawful and what is unlawful"), which has been paraphrased by Baillie and translated into French by Querry.

The author of the *Sharâya-ul Islâm*.

This work is divided into four parts: the first treats of religious duties; the second of contracts and synallagmatic obligations; the third, of unilateral acts, and the fourth comprises the prescripts relating to hunting, food, etc., and treats of the penalty applicable to crimes and delinquencies, from the point of view of canonical as well as civil law. It is hardly possible to exaggerate the baleful influence of this legist among the Shiah communities who have adopted his views. His literal views, which have paralysed all movement of the intellect, are chiefly in force among the Akhbârîs.

The *Sharâya-ul-Islâm*.

There are several commentaries on the *Sharâya* in existence. Among these the *Masâlik-ul-Afhâm* by Zain-ud-din Ali as-Sâili commonly called the Shahîd-i-Sâni (second martyr), and the *Jawâhir-ul-Kalâm* by Shaikh Mohammed Hassan an-Najafi are by far the most copious and erudite. This latter work, though called a commentary on the *Sharâya* of al-Mohakkik, discusses legal questions from an independent basis, gives the dicta of other jurists and displays a great amount of critical spirit. It also gives references to the opinions of the Caliph Ali and his immediate descendants.

Among other legal works of note are the *Sarâir* of Abi'l Makârim Mohammed ibn Idris al-Hilli, the *Ghunia* of ibn Zuhrâ, the *Makn'aa* and *Hedâya* of Abû Jafaar as-Sadûk, the *Nâsiria* of Shaikh

Syed Murtaza, the *Talkhîs-ul-Marâm*, the *Ghâyat-ul-Ahkâm* and the *Tahrîr-ul-Ahkâm* by Shaikh Allâmah Jamâl-ud-din Hassan ibn Yusuf ibn al-Murtaza al-Hilli. His *Irshâd-ul-Azhân* is also a work of great merit and learning and is quoted as an authority under the name of the *Irshâd-i-Allâmah*.

The *Jâmaa-i-Abbâsi* is a concise and comprehensive treatise on Shiah Law, in twenty books or chapters. It is generally considered to be the work of Bahâ-ud-din Mohammed Aâmili, who died in A. H. 1031 (A. C. 1621).

The *Mafâtîh* by Mohammed ibn Murtaza surnamed Muhsan, and the commentary on it by his nephew who was of the same name, but surnamed Hâdi, are modern works deserving of notice.

The *Rouzat-ul-Ahkâm*, written by a Mujtahid of Oude, consists of four chapters. The first chapter deals with the law of inheritance, most fully and perspicuously. All these works belong to the Akbâri school.

Another work of great merit is the *Jâm'aa-ush-Shittât*, which is a grand collection of decisions and dicta published within the last century in Persia by the leading Mujtahids of Teheran.

In the compilation of the following pages I have made use of chiefly, the *Mabsût*, the *Nihâya* and the *Istibsâr* of Imâm Jaafar Tûsi; the *Intisâr* of Shaikh Syed Murtaza and the *Hedâya* of as-Sadûk, the *Sarâir*, the *Ghunia*, the *Sharâya*, the *Jawâhir-ul-Kalâm*, the *Jâm'aa-ush-Shittât* and the *Sîrat-un-Nijât* of Shaikh Abu'l Hassan, chief Mujtahid of Teheran.(1)

In dealing with questions arising under the Mahommedan Law, it must always be borne in mind that in the Islâmic system the different schools and sub-schools are so intimately connected with the different persuasions, sects or communions to which they appertain, that when a person belonging to one communion or sect or sub-sect goes over to another, his status and the dispositions made by him, as well as the succession to his inheritance, are thenceforward governed by the rules of the school to which he now belongs. For example, a Shiah on adopting the Sunni persuasion would subject himself to the Sunni Law. So a Hanafî becoming a Shâfeïte or an Akhbâri becoming an Usûli would be governed by the Shâfeï or Usûl. principles as the case may be.

(1) Besides the works Sunni and Shiah to which I have referred in the Introduction, I have utilised a number of others which are mentioned in the Appendix.