

Abu Hanifa's Methodology of Systematic Codification of Law with Reference to Islamization of the Legal System

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Abstract

After the century-long vacuum in the systematic jurisprudence mainly caused by the absence of an 'authoritative legislative body', Abu Hanifa established a 'private legislature' with the help of forty men of extra-ordinary legal acumen of his time. Over three decades that legislature solved more than eighty thousand legal issues, both practical and speculative. The codification was without any political sanction and yet it achieved so much success that immediately after the departure of Abu Hanifa, when his chief disciple Abu Yusuf was appointed Chief Justice of Abbasid Empire, the legal outputs of that assembly turned into the positive laws of the land. The systematic codification of the positive laws of Islam started by Abu Hanifa was followed by the subsequent jurists which ultimately led to the creation of different schools of thought (majhab). The same vacuum has occurred in our time due to the advent of European colonialism which forcefully evicted the Islami legal systems from the Muslim lands and substituted them with their own secular legal system. This article ventures to focus on the initiatives taken by Abu Hanifa to fill the legal vacuum up and tries to find out to what extent his methodology can help in restoring back the dynamism of Islami legal thinking after the stagnation of two centuries.

Keywords : Private Legislature, Ijtihad, Qiyas, Ray and Shura.

Introduction

It is one of the basic characteristics of the divine books that they lay down, in most of the cases, the general principles and seldom provides any details. The contemporary prophets were vested with the responsibility of clarifying the ambiguity of those general principles. But, in the course of time, new problems arose for which no direct solution has been given; neither in the divine writs nor in the prophetic tradition. The learned men of the community were morally obliged to interpret the divine commandments with their intelligence and apply them in practical cases. It was the common scenario of the past nations who had been given divine writs. The same situation arose in the Last Revelation as well. The Qur'an contains only the abstract cardinal principles of do's and don'ts. It was the Prophetic tradition which gave those principles a concrete shape. As the Messenger of Allah, his explanations are of unquestionable authority. The Qur'an and its Prophetic interpretation jointly constitute the

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binding laws of Islam and represent the supreme will of Allah. After the departure of the Prophet Muhammad (SAAS), the responsibility of exposing and applying Islami Laws was vested upon the shoulder of the vicegerent of the Prophet (SAAS). The vicegerent was assisted by a Consultative Assembly (*majlish-e- shura*). This system of popularly elected vicegerency (*khilafah*) was subsequently replaced by monarchic dictatorship (*mulk*). Consultative Assembly was substituted by a body of submissive well-wishers having commands only upon the bodies of the citizenry, not upon their hearts. Therefore, they dared not to impose their own brand of interpretation of the divine writs upon the people. The general trend among the narrators of the Prophetic tradition was that, when asked about a problem, they tried to know whether this has actually happened or not. If the answer was 'no', they used to reply, 'let it happen and then ask'. If the answer was 'yes', they used to start narrating so many *AHadith* (Prophetic traditions) without drawing any conclusion. People's queries remained unsolved. In the absence of a well-articulated exhaustive legal compendium and the guidelines of a trustworthy Consultative Assembly, the judges also could not decide cases before them unanimously. This vacuum continued for almost half a century. Then, to fill that vacuum up, came forward a man with gifted intelligence and outstanding juridical mind. He was Abu Hanifa (RAA) (700 – 765 AC).

Political Scenario after the Rightly Guided *Khulafa*

Revolt and Crackdown

After the martyrdom of Ali Ibn Abi Talib, representative form of government turned into a hereditary kingship founded by Muawia. Muawia was followed by his son Yazid. Husain Ibn Ali, Abdullah Ibn Umar and Abdullah Ibn az-Zubair resisted this deviation from the very beginning and revolted against it which ultimately led them to martyrdom; but the resistance movement continued under the leadership of the descendants of Ali.¹

False Nationalism

During the Umayyad period (661-750 AC), a kin sense of Arabism grew stronger leading to the creation of a line of distinction between the Arabs and the non-Arabs and the deprivation of the equal rights of the latter which Islam has declared for all the Muslims.²

Influence of Alien Philosophy

Islam has, for the first time, inspired the Arabs to know the unknown; its very first command was 'Read'. Filled with that spirit, the Arabs, within a short time, conquered the lands of

¹ Zahrah, Abu. *Abu Hanifa: Hayatuhu wa Asruhu, A'ra'uhu wa Fiqhuhu*, Darul Fikril Arabi, Cairo, New Edition, (1991), p. 73.

² Ibid, p. 74.

ancient heritage and dominant civilization and “in only a few decades Arab scholars assimilated what had taken the Greeks centuries to develop.”³ Though the movement of assimilation began at the middle of the Umayyad period, it reached its peak during the Abbasidd period. This assimilation was not devoid of disadvantages. Some people superficially studied the new philosophy of the Greeks, the Zoroastrians and the Hindus, gave it the status of a supreme revelation and started scrutinizing the viability of Islamic laws in the light of that false standard⁴ which ultimately gave birth to different deviant sects under the umbrella of Islam.⁵

Abu Hanifa was said to have seen⁶ Anas Ibn Malik, the attendant (*khadim*) of the Prophet (SAAS), and as such he is regarded as one of the ‘tabiun’ (Successors to the Companions). He attended the lectures of the great tabiuns like Ata Ibn Abi Rabah, Hammad Ibn Abi Sulaiman and Nafi, the freed slave of Ibn Umar and, in turn, his lectures were attended and transmitted by the eminent jurists (*fukaha*) and traditionists (*muhaddithun*) of his time like Abdullah Ibn al-Mubarak, Waki Ibn al-Jarrah, Chief Justice Abu Yusuf and the encyclopedic writer Muhammad Ibn al-Hasan Shaybani.⁷

The Jurists who Influenced Abu Hanifa

He achieved his legal erudition from Hammad Ibn Abi Sulaiman⁸ who, in turn, achieved mastery over jurisprudence from Ibrahim Nakhyi. Hammad was the most brilliant jurist and

³ Hitti, Philip K. *History of the Arabs*, Sixth Edition, London, Macmillan & Co. Ltd. Reprinted 1958, pp. 306-307.

⁴ This is not a unique case in history. Under the influence of the victorious Greeks the followers of the Old Testament leaned towards Greek way of thinking and took their lifestyle as their own and whenever any of the teachings of Moses seemed contradictory with the Greek standard of thinking, they always preferred the latter over the former. History has repeated itself in the past two centuries when the European materialistic civilization conquered the Muslim lands, a great portion of the Muslims assimilated the Godless European thoughts and standards and used it as the yardstick of judging truth and falsehood; to them anything repugnant to European standard is false, though it might have been ordained by Allah and His Messenger!.

⁵ Zahrah, p. 78.

⁶ Khatib Baghdadi, Abu Bakr Ahmad ibnu Ali ibnu Saabit. *Tarikhu Madinatil Salam*, Dr. Bishar Awwad Maruf ed. Darul Garbil Islami, Beirut, First Edition (2001), vol. 15, p. 445.

⁷ Ibid.

⁸ Abu Hanifa studied under his special care for eighteen years. See : Khatib, p. 457.

the best debater among the disciples of Ibrahim Nakhyi.⁹ Abu Hanifa was in constant touch with Hammad for long eighteen years i.e. until the latter's death in 737 CE.¹⁰ During this period he frequently shared his legal opinions with the great jurists of his time like Zayd Ibn Ali *alias* Zain al-Abedin¹¹, Jafar Sadik¹² and Nafs-e-Zakiyyah¹³. Regarding his comprehensive study of the methodology of the leading jurist Companions, Abu Hanifa says, "I have learnt the laws deduced by Umar, Ali, Abdullh Ibn Mas'uud and Abdullah Ibn Abbas from their respective disciples".¹⁴

Choosing the Discipline of Jurisprudence

Being inspired by a statement of Sha'bi, Abu Hanifa decided to spend his time in search of knowledge. At that time, there were three important circles of knowledge. They were (1) circle of fundamentals of theology, (2) circle of narration of the Prophetic traditions and (3) circle of deduction of positive laws from the Qur'an and the Sunnah.¹⁵ He further discovered that the companions of the Prophet (May Allah Be Pleased with Them) were interested in legislation and different chapters of positive laws; they discussed it whenever they met each other, taught the people and encouraged them to learn it, sought and delivered judgments on legal issues and that the successors of the Companions did the same.¹⁶ Reviewing the necessity and consequences of each discipline he decided to depart from theological debates and to get expertise in the field of jurisprudence. To him this science is "indispensable for the performance of obligations and the establishment of *deen*".¹⁷

Formation of a 'Private Legislature'

To fill the vacuum of systematic jurisprudence, Abu Hanifa led a 'private legislature'. From two respects that assembly was far superior to the legislative assemblies of the most

⁹ Jahabi, Shamsuddin Muhammad ibnu Ahmad ibnu Usman. *Siyaru A'lamin Nubala*, Muassasatur Risalah, Beirut, 11th Edition (1996), vol. 5, p. 231.

¹⁰ Khatib, p. 457.

¹¹ The eponym of Zaydi school of thought.

¹² One of the leading Imams of Twelver Shi'i sect.

¹³ He is best known for his rebellion against the early Abbasi king Mansur to restore the true khilafah (representative and consultative form of government). His movement was heavily financed by Abu Hanifa.

¹⁴ Zahrah, p. 27.

¹⁵ Zahrah, p. 21.

¹⁶ Zahrah, p. 22.

¹⁷ Zahrah, p. 22.

'civilized' countries of the world. First of all, the legislative assemblies of the modern states are mainly composed of persons having little or no knowledge, knowledge of jurisprudence. Secondly, the modern lawmakers scarcely have the public trust in them.¹⁸ On the other hand, Abu Hanifa's private legislature was composed of thirty six outstanding scholars; twenty eight of them were competent for judiciary, six of them capable of giving legal opinions on any matter and the remaining two (i.e. Abu Yusuf and Zufar) were competent to train judges and juriconsults.¹⁹ All of them were revered by the masses for their honesty and integrity.

Working Procedure of the Assembly

Generally a problem, practical or hypothetical, was used to be raised in the meeting of the contemporary Islamic scholars. All of the present scholars tried their best to answer the question in the light of the Qur'anic verses and the Prophetic Sunnah. Abu Hanifa usually spoke at the last moment. In most of the cases, the committee members became well-convinced with the solution of Abu Hanifa. Sometimes, one topic continued for several weeks, even for more than a month, and then came the conclusion. Several scribes²⁰ wrote down the decisions, unanimous or diversified.²¹ By this process, within a period of forty years, more than eighty thousand²² legal problems were solved. For this systematic derivation of positive laws from the original sources with the greatest use of individual reasoning, he is regarded as the 'pioneer'²³ in this discipline.

System of Codification

Abu Hanifa was the first to systematize this branch of knowledge. The Companions and their Successors have not dealt with this discipline in systematic chapters and sections; rather, they relied upon their strength of perception and they converted their hearts into protected boxes of knowledge. Growing after them, Abu Hanifa found that knowledge was in a scattered state and felt the fear that the next generations would not be able to derive sufficient benefits from

¹⁸ Afeefi, Sayyid. *Hayatul Imam Abi Haneefah*, Al Matba'atus Salafiyyah, Cairo (1350 H), pp. 138-9.

¹⁹ Kardari, Ibnul Bazzaz. *Manaqibul Imamil A'zam*, Da-eratul Ma'arifin Nizamiyyah, Hyderabad, Deccan, (1321 H), vol. 2, p. 125.

²⁰ According to Tahabi there were forty influential writers in the committee of Abu Hanifa's 'Private Legislature'. See Qarshi, Ibnu Abil Wafa. *Al Jawahirul Mudiyyah fee Tabaqatil Hanafiyyah*, Hijr, Riyadh, 2nd Edition (1993), volume 3, p. 586.

²¹ Gawji, Wahbi Sulayman. *Abu Hanifa an Nu'man : Imamul Ayimmatil Fuqaha*, Darul Qalam, Damascus, 6th Edition (1999), p. 64.

²² Gawji, however, mentions the number as five lacs. p. 142.

²³ Gawji, pp. 142-3.

it. That is why he compiled this branch of knowledge in organized parts and chapters; starting with purity followed by Salat, then all types of rituals, then bilateral and multilateral transactions and ending with chapters on inheritance.

Avoidance of Artificial 'Legality'

He memorized every Hadith relating to law, relentlessly searched for any Hadith which contains any legal issue and thereby became the most knowledgeable person regarding the legal principles, express or hidden, in Hadith.²⁴ Abu Yusuf, the Chief Justice of Abbasid Empire and one of the leading disciples of Abu Hanifa, opined that in his legal analysis he, instead of taking resort to strict artificial 'legality', always adopted the way which was more salvation-giving in the life hereafter.²⁵

Unique Example of Non-profiteering

Abu Hanifa came of a business family. He maintained legendary form of trustworthiness in business transactions. As stated earlier, he avoided artificial legality and was always inclined to which was more salvation-giving in the life hereafter. The Qur'an says, "O you who believe, Do not devour one another's property unlawfully except it be a business (transaction) with your mutual consent".²⁶ Simple reading of this verse reveals that for the validity of a business transaction it is sufficient to prove mutual consent. But a closer look to, and careful reading of, the verse from the beginning will reveal that mere existence of mutual consent is not enough for the validity of a business transaction. First of all, it must not be the result of an unlawful behaviour such as compulsion, fraud, hiding information and misuse of the ignorance of other party and only then comes the issue of mutual consent.²⁷ Muhammad Asad correctly explains, "the believers are prohibited from devouring another person's possessions wrongfully even if that other person – being the weaker party – agrees to such a deprivation or exploitation under the stress of circumstances".²⁸ The best explanation of this prohibition can be found in Abu Hanifa's behaviour with a seller. One day a woman came to Abu Hanifa with a silk cloth to sell it to him. He asked her, "How much". "One hundred" – she replied. He said, 'It is worth more than one hundred'. The woman said, 'then two hundred ... three hundred ... upto four hundred'. Abu Hanifa said, 'it is worth more'. The woman exclaimed,

²⁴ Khatib, p. 464.

²⁵ Ibid, p. 466.

²⁶ The Qur'an, Suratun Nisa 29.

²⁷ That is why Muhammad Asad has translated this verse in this way, "Do not devour one another's possessions wrongfully – not even by way of trade based on mutual agreement". See : Asad, Muhammad. *The Message of the Qur'an*, Dar Al Andalus, Gibraltar, 1980, p. 108.

²⁸ Asad, p. 108.

'Are you joking.. Abu Hanifa replied, 'No, bring an expert'. The expert came and confirmed Abu Hanifa's position. Then the cloth was sold for five hundred.²⁹ In this instance Abu Hanifa could have easily bought the cloth with one hundred, but he did not do so, because, in that case it would have amounted to exploiting other's property by using his ignorance.

Involvement with the Revolutionary Forces

With the forceful taking allegiance in favour of crown prince Yazid Ibn Muawiyah, the Islamic system of khilafah (the elective and consultative form of government) came under serious challenge. Husain Ibn Ali, Abdullah Ibn Umar and Abdullah Ibn Zubair resisted this deviation from the very beginning. This resistance and revolutionary movement took away their lives, but the spirit of revivalism continued in the descendents of Ali.

Abu Hanifa passed 52 years of his life in the deviated form of government under the Umayyads. During that period (in 121 H / 738 AC) Zaid Ibn Ali (the grandson of Husain) raised the banner of rebellion to topple the regime of Umayya king Hisham Ibn Abdil Malik with a view to reviving the right form of government. Like all other dictators, the Umayya ruling authority left no stone unturned to crush the rebellion. In that critical situation Abu Hanifa wanted to join the revolutionary forces under the leadership of Zaid Ibn Ali, but, due to some unavoidable circumstances, he could not physically participate in the rebellion, yet he gave his full support to Zaid declaring him "the valid leader".³⁰ Abu Hanifa considered the Umayyads as usurpers and devoid of any valid authority from the perspective of Shariah.³¹ The revolutionary movement of Zaid was heavily financed by Abu Hanifa.³² Whenever he remembered the murder of Zaid, he used to weep.

At the very outset of Abbasid Kingdom, Muhammad Ibn Abdillah (commonly known as Nafs-e- Zakiyyah) along with his brother Ibrahim Ibn Abdillah rebelled against the regime of King Mansur and the imperial forces crushed the rebellion by killing the two brothers. During those stormy days Abu Hanifa became extraordinarily vocal in favour of the rebellion while some of his followers became so much terrified.³³

²⁹ Haytami, Ibnu Hajar. *Al Khairatul Hassan fi Manakibil Imamil A'zami Abi Hanifata An Nu'man*, Matba'atus Sa'adah, Cairo, (1324 H), p. 45.

³⁰ Makki, Muwaffaq ibnu Ahmad. *Manaqibul Imamil Azam*, Da-eratul Ma'arifin Nizamiyyah, Hyderabad, Deccan, (1321 H), vol. 2, p. 260.

³¹ Zahrah, p. 31.

³² Makki, pp. 260-261.

³³ Barr, Ibnu Abdil. *Al Intiqa fee Fadailil Ayimmatis Salasatil Fuqaha*, Maktabul Matbuatil Islamiyyah, Aleppo (1997), p. 323.

Non-cooperation with the Tyrannical Regime

After his erudition in the legal field spread up, he was told by Ibn Hubaira (d. 132 H / 748 AC), the Iraqi Governor and the deputy of the last Umayyad dictator Marwan Himar (d.132 H / 750 AC)³⁴ to accept the judgeship of Kufah-once the capital and now the hub of the scholars. On his denial, Abu Hanifa was inflicted with one hundred and ten lashes (ten lashes per day), but he was persistent on his denial. Observing it, Ibn Hubaira released him.³⁵

Later on, Ibn Hubaira offered him the office of treasury. On his denial, he was inflicted with several lashes again.³⁶

In 750 AC the Abbasid Revolution was successful which displaced the Umayyads. The change was more of dynasty than of character. Instead of reviving the popular electorate, the Abbasids became the neo-dictators. The second Abbasid dictator Abu Zafar Mansur (reigned 754-775 AC) brought Abu Hanifa to Baghdad,³⁷ the new capital and ordered him to herald his judiciary. Abu Hanifa denied it stating that he was not competent for that post. Mansur replied, "You have lied". Abu Hanifa said, "The king has already delivered his verdict against me which renders me unfit for judiciary, because he has attributed lies to me. If I am a liar, I am not fit for that post. And if I am a truthful man, I have already informed that I was not competent for that post". Mansur was speechless due to the ready wit of Abu Hanifa. He sent him back to jail.³⁸

No Counter Slang

In deduction of positive laws from some given sources, it is neither possible for a jurist to please everybody, nor should he aim at it. Opponents might not be happy with the deduction, they may, though they should not, use slang words, but in no way should the jurist lose his temper and use counter slang towards his opponents. He should expose the truth and should 'not fear the censure of anyone who censures them'³⁹. Abu Hanifa was quite successful to abide by this sacrificing norm. Once reviewing a legal question answered by the famous tabiyi (follower of a Companion) Hasan Basri, Abu Hanifa opined that Hasan Basri was mistaken. Hearing this, a person rebuked him, "O the son of an adulteress! Do you say that Hasan Basri was mistaken?" Abu Hanifa was not angered; he just confirmed, "By Allah!

³⁴ Jahabi, vol. 6, p. 207.

³⁵ Khatib, vol. 15, p. 445.

³⁶ Ibid, p. 446.

³⁷ Ibid, p. 445.

³⁸ Ibid, pp. 450-451.

³⁹ The Qur'an, Suratul Ma-idah, : 54.

Hasan Basri was mistaken and Abdullah Ibn Masu'd was right" and then started praying, "O Allah! Broaden our hearts are for those who are angry with us".⁴⁰

Instances of Some Ready Wit

Somebody had made a testament in favour of Abu Hanifa in his absence. Later on, he came to know about it through another person. In order to get judicial recognition over that property, both of them went to the court of Ibn Shubrumah. After taking the testimony of the witnesses, the Judge asked Abu Hanifa "Would you swear that your witnesses are speaking the truth". Abu Hanifa answered that he could not swear because of his absence during the making of testament. The Judge said, "You lost the case". Abu Hanifa now posed the counter question, "If a blind man is hit by some miscreants and the spectators bore witness against the perpetrators, would you compel the blind man to swear that his witnesses are speaking the truth while he (because of blindness) could not see the happening"? The Judge gave his verdict in favour of Abu Hanifa without swearing.⁴¹

Once Dahhak Ibn Qays Khariji (who rebelled against the Umayyads) entered Kufah and told Abu Hanifa to repent for his validating the human arbitration (as happened during the battle of Siffin). Abu Hanifa asked whether he wanted to kill him or to debate the issue. Dahhak opted for debate. Abu Hanifa asked, "If we disagree on a particular point during the debate, who will decide among us"? Dahhak said, "Choose anyone you want". After choosing a supporter of Dahhak, Abu Hanifa wanted to know whether Dahhak is pleased with the selection. Dahhak replied, "Yes. Now let's start the debate". Abu Hanifa said, "The debate is already over, because you yourself have validated the human arbitration".⁴²

It has been mentioned earlier that King Abu Ja'far Mansur (reigned 754-775) called Abu Hanifa in his royal palace with a view to convincing him to herald his judiciary. Abu Hanifa straightly denied it and reasoned, "I am not fit for judiciary". Mansur commented, "You have lied". Abu Hanifa concluded, "If I am speaking the truth, I have already declared me unfit for judiciary. On the other hand, if Mansur is speaking the truth, then his very statement made me unfit for judiciary, because he has dubbed me as 'liar', and a liar is totally unfit for judiciary".⁴³

Abu Hanifa and the Study of the Qur'an

As the Qur'an is the foremost and the ultimate authority for any legal question, Abu Hanifa spent a lot of time in studying the Qur'an. The more one studies it, the more he discovers new

⁴⁰ Khatib, p. 481.

⁴¹ Khatib, pp. 486-487.

⁴² Zahrah, p. 55.

⁴³ Khatib, pp. 450-451.

implications in it. It is reported by his biographers that in his lifetime 'he completed the study of the Qur'an seven thousand times'.⁴⁴ Some reports say that during the month of every Ramadan Abu Hanifa completed the study of the Qur'an sixty times,⁴⁵ once at day and once at night.⁴⁶ One may be surprised with this information and others may raise the question of feasibility of recitation of the whole Qur'an within such a short period, but they generally fail to understand that the approach of a jurist and a layman to the recitation of the Qur'an is quite different. A layman recites the Qur'an for general guidance and, therefore, he need not hurry in recitation. On the other hand, a jurist studies the Qur'an with a view to exploring new clues or indications for the legal issues before them and this process is quite similar to scanning a book which takes shorter time in comparison with the time required for normal/general recitation.

Relation with the Prophetic Sunnah

Once he was asked, "Do you contradict the sayings of the Prophet (SAAS)?" He replied, "May Allah curse upon him who contradicts the Prophet (SAAS). Through him he has bestowed honour upon us and has saved us."⁴⁷ "I have not contradicted him" says Abu Yusuf CJ "except I found after a deep thinking that his position is better safety-ensurer in the life hereafter. Sometimes I used to incline towards a particular Hadith and find that Abu Hanifa has taken resort to a more authentic Hadith".⁴⁸ However, his dealing with the Prophetic Sunnah was, to a great extent, different from that of the general traditionists (*muhaddithun*). Whenever a Hadith was presented before him, he started discovering the reasons (*illah*) underlying the primary laws (*ahkam*) in it and then he deduced secondary laws (*masail*) compatible with the primary laws in terms of the reason. To him, the relation between a jurist (*faqih*) and a traditionist (*muhaddith*) is that of doctor and a druggist.⁴⁹ Abu Hanifa achieved the status of both a *faqih* and a *muhaddith*.⁵⁰ He memorized every *Hadith* in which a point of law was involved.⁵¹

⁴⁴ Makki, vol. 1, p. 230.

⁴⁵ Khatib, p. 488.

⁴⁶ Makki, vol. 1, p. 230.

⁴⁷ Barr, p. 259.

⁴⁸ Gawji, p. 169.

⁴⁹ Zahrah, p. 70.

⁵⁰ This unique success of Abu Hanifa was acknowledged by A'mash, a famous traditionist. See : Qari, Mulla Ali. *Manaqibul Imamil A'jam*, p. 484, quoted in Gawji, p. 175.

⁵¹ Gawji, p.176.

Use of 'Ray' (Personal Opinion)

Sometimes a serious allegation is made against Abu Hanifa that he used personal opinion (*ra'y*) and avoided the Sunnah of the Prophet. In most of the cases the allegation is baseless. In the presence of authenticated Sunnah, no Muslim can avoid it in favour of uncontrolled reasoning. How can this be imagined in the case of a prominent jurist of high caliber such as Abu Hanifa?⁵² Imam Sha'rani quotes a statement of Abu Hanifa where he says, "By Allah, he imputes a lie upon us who says that we prefer an analogy (*qiyas*) upon a clear text of the Qur'an and the Sunnah (*nass*). Is there any necessity of analogy in the presence of *nass*?"⁵³ However, there are some merits behind this allegation. The bone of contention was regarding the 'extent' of the use of personal opinion (*ra'y*). Even the companions of the Prophet were divided on this issue. Where there was no clear text from the Qur'an and the Sunnah, the most prominent jurist companions used their personal opinions. Some of them felt doubt of their memorization of the statements or the judgements of the Prophet (SAAS); therefore, they decided not to narrate the Prophetic statement presumptuously, rather they gave verdicts on the basis of their personal opinion.⁵⁴ However, many companions remained silent and regarded those who give verdicts with personal opinions as "giving judgements regarding Allah's Ordinance without any authority (*yuftuna fee dinillahi bighairi sultan*)".⁵⁵

In short, they were unanimous on the binding authority of the authentic Sunnah but differed as to the extent of the use of personal opinion in the absence of any Sunnah. In that situation, one group strictly confined themselves within the contents of Sunnah and did not take resort to personal opinion except in case of grave emergency⁵⁶, while the other liberally used personal opinion and whenever they found that their opinion was contrary to authentic Sunnah, they returned to the Sunnah.⁵⁷

⁵² Abu Zahrah has mentioned a dialogue between Abu Hanifa and Imam Baqir wherein the latter wanted to know from the former whether he forsook the Sunnah in favour of Qiyas. Abu Hanifa set three examples and gave a witty answer showing that he followed the established Sunnah, though the reasoning demanded their solutions in other ways (*Abu Hanifa: Hayatuhu wa Asruhu, A'ra'uhu wa Fiqhuhu*, pp. 64-65).

⁵³ Gawji, p. 138.

⁵⁴ Zahrah, p. 84.

⁵⁵ Zahrah, p. 84.

⁵⁶ According to Abu Zaharah, this group hated personal opinion so much that he has equated it with 'eating of pork by a Muslim under duress and grave compulsion' (*ibid*, p. 86).

⁵⁷ Zahrah, p. 89.

Authority of the Opinions of the Companions

The early jurists preferred the opinions of the Companions over those of their own. Abu Hanifa is reported to have said, “When I do not find any solution in the Book of Allah and the Sunnah of His Messenger (SAAS), I accept the opinion of His Companions and do not turn to the statements of others. But when the matter comes to the statement of Ibrahim, Sha’bi, Hasan, Ibn Sirin and Sayeed Ibnl Musayyib (all of them are prominent *tabiuns* – the students of the Companions), then I have the right to use my own reasoning (*ijtihad*) as they have used their own”.⁵⁸

Emphasis on Commercial Jurisprudence

It is reported about Umar, the second khalifah that he used to carry a stick with him and go to the market. He frequently asked the businessmen whether they knew the legal provisions (particularly the issue of *riba*) pertinent to their respective businesses. If they gave negative answers, he bit them with the stick and prohibited their entrance into the market until they are well-acquainted with the relevant laws. Himself a successful businessman, Abu Hanifa gave a lot of emphasis on commercial jurisprudence. Makki Ibn Ibraheem, one of the teachers of Imam Bukhari, says, “I was carrying out my businesses. Then Abu Hanifa said to me that administration of business without the knowledge of relevant laws may vitiate the whole business transaction”.⁵⁹ He died in the prison.⁶⁰

Impact of Abu Hanifa’s Codification

It was very difficult for a man of ordinary prudence to foresee what benefit a private legislature like that of Abu Hanifa could bring about in the long run without any political sanction.⁶¹ But the piety, integrity and scholastic acceptability of the members accompanied by the leadership of Abu Hanifa gave that private legislature such acceptability among the judges, jurists, rulers and the masses that all other private and individual juristic efforts faded away. “Opinions of all other jurists” says Yahya Ibn Adam (d 818 AD), “had been cooled before the decisions of Abu Hanifa. It was his knowledge that spread up in different regions; the rulers and the judges started deciding cases in accordance with his decisions and the transactions were being regulated in the light of his decisions”.⁶² After Abu Yusuf, the

⁵⁸ Jundi, Abdul Halim, *Abu Hanifa: Batalul Hurriyyati wat Tasamuhi fil Islam*, Arab League, Cairo (2001), p. 144; Zaharah, pp. 93-94.

⁵⁹ Kardari, p. 322.

⁶⁰ Khatib, p. 450.

⁶¹ Mawdudi, Abul A’la. *Khelafot O Rajtontro (Representative Government and Monarchy)*, Adhunik Prokashoni, Dhaka (2005), p. 234.

⁶² Makki, p. 41.

prominent disciple of Abu Hanifa and one of the scribes of the decisions of Abu Hanifa during the meeting⁶³ had been appointed the chief justice of the Abbasid Empire, the codification of Abu Hanifa turned into the law of the land. The system of codification introduced by Abu Hanifa became the standard in the field of jurisprudence and all the subsequent schools of thought, irrespective of their uniqueness in individual judgements (ijtihad), followed Abu Hanifa as the role model.⁶⁴ Acknowledging this legacy of Abu Hanifa, Imam Shafi is reported to have said, "In the field of jurisprudence all the people are dependents on Abu Hanifa".⁶⁵

Now, let's examine to what extent the role model of Abu Hanifa can help us in re-Islamizing the derailed legal system of today.

Scenario of the Muslim States at the Advent of European Colonialism

Throughout history Islami Laws were halted for two times; for the first time with the unprecedented blow by Chengiz and Hulagu in the 13th century and, for the second time, with all grasping European colonialism from the later part of the 18th century. The halt created by Hulagu could not sustain for a long time because of the concerted efforts of the scholars. On the other hand, European colonialism spread at a time when Muslims were semi-dead in all the intellectual fields. European Colonialism brought about radical changes in almost all sectors of public life. The basis of education and legal systems was shifted from revelation to materialism.

The British Empire and the Legal System of the Sub-continent

In the middle of the 18th century, the British East India Company became ambitious and got involved with the local political games. After the Battle of Plassey (1757), they became the de facto ruler of Bengal. With victory in the Battle of Buxar (1764) and the subsequent dewani agreement with Emperor Shah Alam, their *de facto* position was turned into *de jure*. Under the Dual Government⁶⁶ system, Sadr Dewani Adalat (Highest Court of Appeal in civil matters) consisted of the Governor and members of the Council but being Englishmen they

⁶³ Kardari, p. 109.

⁶⁴ This can easily be seen by comparing the contents of the later books of jurisprudence written by the jurists of other schools of thought with the contents of the books written by Abu Yusuf and Muhammad ibnul Hasan Shaybani. The later jurists followed the role model of the Hanafi jurists, even in the titles and chronology of chapters.

⁶⁵ Khatib, p. 474.

⁶⁶ Dual Government was a form of rule at the dawn of British Empire in India where civil administration was run by the British East India Company and administration of criminal justice by the local rulers.

did not know about Islamic law and, therefore, appointed local officers namely Kazis⁶⁷ and Pundits⁶⁸, while Sadr Nizamat Adalat consisted of an Indian judge known as the Daroga-i-Adalat who was to be assisted by the chief *mufti* (jurisconsult) and three experts of Islamic law appointed by the Nawab on the advice of the Governor. With the passage of the Regulating Act, 1773 the era of royal charters gave place to the parliamentary enactments. The Supreme Court of Judicature was established at Fort William in Calcutta. By that time, there came into existence two distinct and independent judicial systems. One was the Company's system in the mofussil⁶⁹ deriving its authority from the Mughal Government's grant of Diwani. The other was the Supreme Court, a royal court, deriving its authority from the British Crown and Parliament. The establishment of the Supreme Court of Judicature was, in true sense, the starting point of positive enforcement of British laws upon the subjects of India, because by now both Sadr Nizamat Adalat and Sadr Dewani Adalat came under the jurisdiction of the Supreme Court which was to administer justice in accordance with the English law.

Translation of the Classics of Islamic Law into English

It has been said earlier that the Englishmen, being ignorant of Islamic laws, appointed muftis in the civil courts for the assistance of the English judges. In order to take full control of the judiciary, the Government of the East India Company patronized a translation project with a view to rendering the classics of Islamic laws into English. Pursuant to that project Charles Hamilton translated the '*Hedaya*'⁷⁰ and NBE Bailie translated the '*Fatawa-e- Alamghiri*'⁷¹. With these translations⁷² in hands, the English judges were no more in the need of *muftis*.

⁶⁷ Muslim judges.

⁶⁸ Hindus having profound knowledge of the Vedas and other scriptures.

⁶⁹ The term Mufussil was applied to denote the areas surrounding three Presidency Towns of Calcutta, Bombay and Madras.

⁷⁰ This is a monumental work on Islami Law by Burhanuddin Margheenani (d. 1197).

⁷¹ *Fatawa-e-Alamghiri* is a compilation of law created at instance of the Mughal Emperor Aurangzeb. This compilation was the work of many scholars. In order to compile it Aurangzeb gathered 500 fuqaha, 300 from the Indian subcontinent, 100 from Iraq and 100 from the Hejaz. This codified work served as the primary source for exercising and implementing the national laws according to Islamic code of law. It consists of exhaustive number of possible situations and their juristic rulings by the great Hanafi jurists of the time. (<http://en.wikipedia.org/wiki/Fatawa-e-Alamghiri>).

⁷² Premier Book House, Lahore (1957) and Smith, Elder and Co., London (1875).

TB Macaulay and the Formal Codification of British Laws

During the reign of Lord Bentinck TB Macaulay, a well-known British lawyer and educationist was invited to India and subsequently he led both the law commission and the education commission. His "Minute on Indian Education (1835)" is regarded as the milestone in the educational history of the sub-continent in which he championed English as the only medium of instruction. He advised the Company Government to introduce British education system thoroughly. "At present" he writes "we must do our best to form a class of persons Indian in blood and colour, but English in tastes, opinions, morals and intellect".⁷³ At the same time, as the head of the first Law Commission, he prepared the draft of the Penal Code⁷⁴ purely on the basis of British criminal jurisprudence. Full-scale replacement of Islamic laws with secular and materialist British laws started its journey from 1836 and it continued up to the withdrawal of the British imperialist forces in 1947. So much 'mercy' was shown upon so-called Muslim laws. After forceful eviction of the civil, criminal, constitutional, social, international and other laws of Islam, the British became 'tolerant' about the personal laws. The Law Commission said, "No portion either of the Mohammedan or of the Hindu law ought to be enacted as such in any form by a British Legislature" and they reasoned,

"The Hindu law and Mohammedan law derive their authority respectively from the Hindu and Mohammedan religions. It follows that, as a British legislature can not make Mohammedan or Hindu religion, so neither can it make Mohammedan or Hindu law".⁷⁵

'Independence' and Its Aftermath

In 1947, the British went away leaving behind two 'independent' states: India and Pakistan. Though the philosophical base of two countries was different (secularism for India and religion for Pakistan), there appeared no practical difference among the state-level activities of these two countries. The striking difference, if at all, between British India and today's subcontinent is that the former was governed by the white Englishmen and the later by brown ones or, properly called, the 'Macaulay Children'.⁷⁶ The laws and the legal system planted by

⁷³ *Selections from Educational Records*, Part I, edited by H. Sharp. Calcutta : Superintendent, Government Printing, 1920. Reprint. Delhi : National Archives of India, 1965, p. 116.

⁷⁴ Jain, MP. *Outlines of Indian Legal and Constitutional History*, Wadhwa, New Delhi, 6th Edition, (2006), p. 430.

⁷⁵ *The Parliamentary Papers*, XXV, p. 259.

⁷⁶ The term *Macaulay's Children* is used to refer to people born of Indian ancestry who adopt Western culture as a lifestyle, or display attitudes influenced by colonisers. It is used as a pejorative term, and the connotation is one of disloyalty to one's country and one's heritage.

the British were hardly altered in these 'independent' states. *Albeit* new laws were enacted, these are but carbon copies of the teachings and philosophies of the former masters.

Stagnancy in Legal Thinking : Comparison with the Period of Abu Hanifa

Despite the distance of more than twelve hundred years there exists a close similarity between the period of Abu Hanifa and that of our time. After the representative form of Government had been changed into monarchical dictatorship, the consultative assembly (the symbol of dynamism in Islamic laws) disappeared leading to a serious stagnancy for a long period. In the absence of a unique and comprehensive codification of laws, the judiciary of an empire larger than the Roman Empire at its height could not maintain consistency in its judgments. The general masses were the worst victims of this legal vacuum. Whenever the learned men were asked about a practical legal problem, they started reciting different verses of the Qur'an and narrating numerous sayings of the Prophet (SAAS) and His companions, and in most of the cases, without drawing any conclusion. Similarly, after the death of Moghul emperor Aurangzeb, the patron of *Fatawa Alamghiri*, and the rise of the British East India Company as an empire builder in the subcontinent, a period of stagnancy in all the intellectual fields of Islam, and in the field of dynamic jurisprudence in particular, began. The shocking difference between the period of Abu Hanifa and that of ours is that, at that time, only the official consultative assembly disappeared, but the judiciary had been left with full freedom to decide cases in accordance with the Qur'an and the Sunnah. They could not imagine of official eviction of the primary sources of Islamic laws and replacing them with the Roman or any other prevalent legal system. Contrary to that, in British India there not only did revolutionary changes of the rulers occur, rather, by this time, the vast area of Islamic laws was narrowed down to the status of personal laws of the subjects and forcefully replaced by secular British laws. At departure, they left behind a huge corpus of derailed legislation and despite 'independence' that corpus is increasing day by day.⁷⁷

Jurists Needed for Islamization of Laws

Supreme brilliants of the Muslim *ummah* should be recruited in the field of jurisprudence. A committee should be formed with the dedicated jurists. The committee must maintain safe distance from the corrupted ruling authority. At the very outset of the prospective re-Islamization project, they should have to acquire accurate knowledge of the political ups and

This frame of mind or attitude is also referred to as Macaulayism. (http://en.wikipedia.org/wiki/Thomas_Babington_Macaulay)

⁷⁷ There are more than one thousand Acts and Ordinances in force in Bangladesh supplemented by thousands of volumes of secondary legislation along with the binding precedents of our higher judiciary. A close look to the legislation of the British period and the 'independent' period hardly finds any distinction except the change of some proper names.

downs in the Muslim territories in the last four centuries. Without this knowledge, they can not properly estimate the extent and gravity of loss caused to Islamic systems throughout these centuries. Then the foreign elements influencing the thinking style of the intellectuals and the masses should be identified. Vices of those elements should be clearly presented. They must maintain co-ordination with all the revivalist movements.

Functions of the Jurists

Their ultimate goal should be to make an exhaustive code dealing with all the branches of laws necessary for the administration of a modern state. In the making of such a compendium, their primary concentration must be on the Qur'anic verses that specifically deal with legal issues. Books written on the legal verses of the Qur'an (like that of Jassas, Qurtubi and Ibn Arabi) will be of great help in this regard. The Prophet (SAAS) was the official interpreter of the Qur'an nominated by Allah Himself⁷⁸ and therefore all the relevant authentic Prophetic traditions relating to the interpretation of the legal verses must thoroughly be studied. In the explanation of the legal traditions, special help must be taken from the books of Majduddin Ibn Taimiya, Abdul Gani Maqdisi, Ibn Daqiqil Id, Ibn Hajar Asqalani and Muhammad Ibn Ali Shawkani. What should not be forgotten is that in this giant initiative it would be foolish to try to build everything anew, because from the second century onwards we have the written records of the huge corpus of wonderful legal literature left behind by our pious predecessors. These materials must be used with the help of our God-given intellect. No particular *majhab* (school of legal thought) should be given unreasoning preference. It is to be remembered that our unconditional allegiance is due to Allah and His Messenger only. At the same time, we must make respectful use of the writings of our predecessors.

Conclusion

If a private legislature can successfully accomplish the codification of the necessary laws in a lucid manner, it will be able to open new horizons before our intellectuals who have not had the access to Islamic laws due to the existing academic, social and structural limitations. It can, hopefully, revolutionize the thinking pattern of our learned elders, convince the younger, remove suspicions from those who have a skeptic mentality about the viability and superiority of Islamic laws over other laws whatsoever and achieve popular support – the corner stone of any sustainable revolutionary change. Abu Hanifa and his private legislature should be taken as the pioneer and the lighthouse, as he is the most successful figure in the history of such kind of legal renaissance.

⁷⁸ See the Qur'an, Surah An Nahl : 44, 64.

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