ANWAR IQBAL QURESHI

FISCAL SYSTEM OF ISLAM

INSTITUTE OF ISLAMIC CULTURE

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FOREWORD

The attention of the readers is drawn to the Preface written in 1953 when the stencilled draft of this book was sent by Harvard Law School to fifty eminent Orientalists for favour of comments.

There has been a long gap in the publication of this book due to circumstances beyond the control of the writer. However, this long gap has not in any way lessened the value of this book as it deals with basic problems which are not affected by time. If anything, the long gap has increased the value of this book as "Nizam-i Mustafa" is to be introduced in the country and this book will help in understanding many of the Islamic problems relating to taxation.

The writer wishes to place on record his sincere thanks to the Institute of Islamic Culture which has taken considerable pains in editing the manuscript and seeing the book through the press.

Anwar Iqbal Qureshi

Lahore
June 1978

PREFACE

Personally the author believes that the economic problems of the Muslim world cannot be effectively tackled without a thorough knowledge of the Islamic laws, the influence of which upon economic and social policy has sometimes been profound. Not only is there much confusion in the minds of many eminent European scholars on this subject; unfortunately many Muslim scholars also have shown insufficient historic perspective in their interpretation of Islamic law. In this book, the author has attempted to prove, by giving authentic historical data, that there is no so-called *Shari'ah* law (Divine law) in the field of taxation; that the tithe, *kharaj* and poll-tax are secular and not religious taxes; and that the institution of *waqf* has little Qur'anic sanction.

If these conclusions are correct, a vast field is open to us for reform in the Muslim countries, and one is better equipped to fight the elements that often oppose reforms on the ground that such measures are not in harmony with the teachings of Islam.

It may also be helpful to outline briefly the background of the present project. While the author was in Libya in 1953, working for the United Nations as an Adviser to the Government on Land Taxation, he explored a number of points both with officials and non-officials. The question was repeatedly asked why

a change should be thought necessary when many of the taxes which Libya had levied were based on Islamic laws. These facts suggest that it is important to find out precisely what these Islamic laws were in relation to taxation and land rights. Many of the Islamic concepts are not clear and much of the material is not in English. Again, during his Libyan study, he found it necessary to acquaint himself with the system of land tenure and taxation in the neighbouring countries and he was rather surprised to find only a limited material available in English. Under these circumstances, he decided to undertake the present work. On his return to the United States, consultations with the U.S. Departments of State and Agriculture and other agencies in an attempt to find the necessary literature on the systems of land tenure showed that, while considerable material was available on land reform, very little was forthcoming on land tenure and taxation.

The author believes that a thorough understanding of the systems of land tenure is essential if any land reform is to be successfully carried out. At present, to the best of the author's knowledge, no comprehensive or systematic study is available for most of the countries which he wishes to examine. How far he has succeeded in this effort, he cannot say. To be quite frank, he does not feel much satisfied with the work he has done so far, as there are large gaps which still have to be filled. There are also many important points which need clarification, perhaps with persons on the spot more fully acquaint-

ed with these problems. The sections relating to present systems of land taxation are extremely unsatisfactory and considerable field work would probably be needed to complete them. The ideal solution would be to prepare a study as a result of a visit to all these countries. The author has been able to include first-hand information for three countries, namely, Libya, Tunisia and Pakistan.

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Anwar Iqbal Qureshi

CONTENTS

1

ISLAMIC SYSTEM OF TAXATION IN THEORY

A good deal of confusion prevails, even among eminent Muslim writers, regarding the concept of taxation in Islam. This confusion has become bewildering and at times misleading in the hands of many Western writers who, otherwise, have made outstanding contributions to Islamic studies by providing the historical material which makes possible comparative approach in Muslim studies which was lacking in many early Muslim writers. Many of them have, however, failed to differentiate, or at least to emphasise, properly the differences between certain Islamic concepts and the prevailing practices in the Muslim countries which during their long history have undergone vast changes from time to time and from place to place, and are the products of time rather than the injunctions of religion.

There is, in fact, strictly speaking, no such thing as Islamic law in regard to taxation. In Chapter 3 below (The Concept of Land Rights in Islam), it has been pointed out that there is no hard and fast rule which can be considered as a positive commandment one way or the other regarding rights in land. There is no direct injunction in the Qur'an on this subject, though there is a positive commandment about inheritance which points to the institution of

private property. The Muslim rulers are free to make any changes in the system of land rights in the interest of the State, provided the institution of private property is generally recognised and no arbitrary steps are taken to violate the fundamentals of inheritance law, which aims at providing equal opportunities to all heirs and at preventing the concentration of wealth in a few hands. An examination of the history of the system of land tenure in Muslim countries provides ample support to this contention.

The situation in regard to taxation is even more interesting and directly supports our contention. The Qur'an makes a pointed reference to the payment of *zakat* (poor-tax or poor-rate), and has emphasised this payment in various sections which we shall presently discuss. No specific rates for such payments were, however, mentioned in the Qur'an which treats the subject of *zakat* very often under the category of charities in general called *sadaqat*. *Zakat* is also a form of charity with the principal difference that, while the payment of charity is left to the will of the giver, in the case of *zakat* a certain minimum payment is enjoined on all believers and it is one of the five fundamental pillars of faith. Many writers have tried to build a whole theory of taxation in the Islamic State around this concept. The earlier details of the system were worked out during the life of the Prophet when Muslims formed a community rather than a State and no organised sources of revenue were available to that community.

The various payments, or what may be loosely termed as taxes, mentioned in the Qur'an or sanctioned by the Prophet are :

(1) Zakat (*Poor-tax*)
  (*a*) *zakat* on the produce of the soil (*'ushr*)
  (*b*) *zakat* on gold, silver, merchandise, etc.
  (*c*) *zakat* on animals
(2) *Tribute*
  (*a*) collective tribute
  (*b*) tribute from individuals (*jizyah*)
  (*c*) land tribute (*kharaj*)
(3) *Booty or Spoils of War* (Ghanimah)

Taxes mentioned in (1) above are discussed below. Those mentioned in (2) and (3) will be discussed in a subsequent chapter dealing with the Islamic tax system in practice.

Zakat (*Poor-tax*)

Zakat, or properly *zakah*, is a word of Aramaic origin. The three important translators of the Qur'an, whose translations we have used, translate it differently. Muhammad Ali translates *zakat* as *poor-rate*, Pickthall as *poor-due*, and Yusuf Ali as *regular charity* to distinguish it from charity in general. Some commentators translate it as indispensable alms or legal alms. *The Encyclopaedia of Islam* uses *alms-tax* for *zakat*. The present writer prefers to use *poor-tax* as used by Hitti,[1] who also terms it as *legal alms*. *Zakat* is more specific than *sadaqah* which is voluntary and implies almsgiving in general.

1. Philip K. Hitti, *History of the Arabs* (5th Ed.), p. 119.

Tehcnically, *zakat* is a fixed portion of one's wealth which it is obligatory to give annually for the benefit of the poor, and the giving away of wealth to the needy is thus regarded as bringing about its purification and ultimate increase.[2]

During the early days of Islam, while the Prophet resided in Mecca, we do not find any trace of collection of *zakat*, although some of the verses which we shall shortly quote regarding the payment of *zakat* are of Meccan origin. During this period the number of believers was limited. Under these circumstances, regulation of private charity was unnecessary. Things, however, changed with the migration of the Prophet to Medina. The swelling number of immigrants to Medina, increased by converts to Islam, required more and more funds for charitable purposes. The need became all the more urgent as Muslims were only a community and had no State. It is not exactly known when *zakat* began to be "collected" by the Prophet or his agents in Medina. The Muslim authorities place it between the second and ninth year of Hijrah.[3] The transformation of *zakat* into a fiscal institution was limited by the Prophet to the irreducible minimum. The essential elements of the later regulations are mentioned in the Qur'an. The character of *zakat* during the time of the Prophet was still vague and it did not represent, properly speaking, a tax demanded by religion. After the Prophet's death, many bedouin

2. Muhammad Ali, *A Manual of Hadith*, p. 208.
3. *Shorter Encyclopaedia of Islam*, p. 654.

tribes refused to continue to pay *zakat* as they considered their agreements cancelled by the death of the Prophet; and many believers, among them 'Umar I himself, were inclined to agree with this. Only the energy of Abu Bakr made *zakat* in its fiscal form a permanent institution which, through the establishment of a State treasury, contributed greatly to the expansion of Muslim power. Ardent believers continued as before to regard it as their right to utilise their *zakat* themselves as they thought fit; but very soon the development and centralisation of the State made this impossible in practice. When the system of Muslim jurisprudence (*fiqh*) came to be elaborated, *zakat* was definitely maintained as a religious tax and regulated in all its details, and the views put forward on this occasion have also left their effect upon tradition. Among them is prominent a detailed *zakat* ordinance, which is usually ascribed to Abu Bakr, sometimes to the Prophet himself, or to 'Umar or 'Ali.

Articles liable to the payment of *zakat* have been divided into five categories: (1) crops; (2) fruits; (3) animals; (4) gold and silver; (5) merchandise.

The first three categories are called visible *zakat* and the latter two hidden *zakat*. Even when the *zakat* was collected by the State in the earlier Muslim period, it was confined to the three categories of visible wealth, in the case of which the Government agent called '*amil* could fix the amount of *zakat* from his own observation. The so-called hidden properties, i.e. the last two categories, were expressly with-

drawn from Government control and payment of *zakat* on these was expressly left entirely to the conscience of the individual.[4]

Qur'an on Zakat

Order Regarding the Payment of Zakat *to Earlier Prophets*

In chapter xxi.: "The Prophets," verse 73, the Qur'an mentions the Prophet Ibrahim and the order given to his followers regarding the payment of *zakat*:

"And We made them leaders, guiding (men) by Our Command, and We sent them inspiration to do good deeds, to establish regular prayers, and to practise regular charity, and they constantly served Us (and Us only)."

Similar orders were given to Prophet Isma'il. It is mentioned in the Qur'an (xix. 55):

"And he enjoined on his family prayer and almsgiving and was one in whom his Lord was well pleased."

Reference is made to Moses in the Qur'an (vii. 156):

"As for chastisement, I will afflict with it whom I please and My mercy encompasses all things; so I will ordain it (especially) for those who guard against evil and pay the poor-tax, and those who believe in Our communication."

As the followers of Moses were greedy, they were warned by God through their Prophet in the following words in ii. 83:

"And when We made a covenant with the Children of Israel[5]: You shall serve none but Allah. And do good to (your)

4. Ibid., p. 365.

5. "Allah's making a covenant with a people signifies His giving commandments to them. Compare Deut. 4 : 13: 'And he declared unto you his covenant which he commanded you to perform'" (M. Muhammad Ali, Tr. *The Holy Qur'an*, p. 38, footnote 120a).

parents and to the near of kin, and to orphans and the needy, and speak good (words) to (all) men, and keep up prayer and pay the poor-rate.[6] Then you turned back except a few of you; and you are averse."

A clear ultimatum was given to them in the following words in v. 12:

"And Allah said: Surely I am with you. If you keep up prayer and pay the poor-rate and believe in My messengers and assist them, and offer to Allah a goodly gift [loan],[7] I will certainly cover your evil deeds, and cause you to enter gardens wherein rivers flow. But whoever among you disbelieves after that, he indeed strays from the right way."

In the same connection, God mentions in the Qur'an (xix. 31) that similar orders were given to Christ: "And He has made me blessed wherever I may be, and has enjoined on me prayer and poor-rate so long as I live."

Verses of the Qur'an Enjoining the Payment of Zakat *upon the Followers of Islam*

"This Book, there is no doubt in it, is a guide to those who believe in the Unseen and keep up prayer and spend out of what We have given them" (ii. 2-3).[8]

In ii. 43, there is a direct reference to the payment of *zakat*: "And keep up prayer and pay the

6. Compare Deut. 14 : 28-29 : "At the end of three years thou shalt bring forth all the tithe of thine increase the same year, and shalt lay it up within thy gates. And the Levite, (because he hath no part nor inheritance with thee,) and the stranger, and the fatherless, and the widow, which are within thy gates, shall come, and shall eat and be satisfied; that the Lord thy God may bless thee in all the work of thine hand which thou doest."

7. Translation by Muhammad Ali. It means spending in the name of God. God in His infinite grace looks upon this as a loan, for which He gives recompense manifold.

8. Here the reference is to charity in general.

poor-rate and bow down with those who bow down." The injunction becomes clearer and stronger in ii. 177 in which it is mentioned:

"It is not righteousness that you turn your faces towards the East and the West, but righteousness is this: that one should believe in Allah, and the Last Day, and the Angels and the Book and the Prophets, and give away wealth out of love for Him to the near of kin and the orphans and the needy and the wayfarer and to those who ask and to set slaves free and keep up prayer and pay the poor-rate; and the performers of their promise when they make a promise, and the patient in distress and affliction and in time of conflict. These are they who are truthful; and these are they who keep their duty."

The passage quoted above shows what righteousness is and indicates the purposes for which *zakat* should be utilised. It also, incidentally, shows two different types of charities, one, the general charity which one gives without any specific limit to win the favour and pleasure of God and the other the minimum charity—the *zakat*, the payment of which is obligatory. In v. 55 it is mentioned:

"Only Allah is your Friend and His Messenger and those who believe, those who keep up prayer and pay the poor-rate and they bow down."

A few chapters later, while dealing with the subject of war with infidels, it is mentioned in ix. 11 :

"But if they repent and keep up prayer, and pay the poor-rate, they are your brethren in faith."

In verse 18 of the same chapter, it is further mentioned:

"Only he can maintain the mosques of Allah who believes

in Allah and the Last Day and keeps up prayer and pays the poor-rate and fears none but Allah."

Qur'anic Injunctions Regarding Payment of Zakat *on Land and Gold and Silver*

The verses of the Qur'an which we have given in the previous pages relate to the general orders regarding the payment of *zakat*. The specific orders are contained in the following verses.

In ii. 267, it is said :

—"O ye who believe ! give of the good things which ye have (honourably) earned,[9] and of the fruits of the earth which We have produced for you, and do not even aim at getting anything which is bad, in order that out of it ye may give away

9. 'Abdullah Yusuf 'Ali comments (*The Holy Qur-an*, p. 108, footnote 14) : "According to the English proverb, 'Charity covers a multitude of sins'. Such a sentiment is strongly disapproved in Islam. Charity has value only if (1) something good and valuable is given, (2) which has been honourably earned or acquired by the giver, or (3) which is produced in nature and can be referred to as a bounty of God. (1) may include such things as are of use and value to others though they may be of less use to us or superfluous to us on account of our having acquired something more suitable for our station in life: for example discarded clothes, or an old horse or a used motor car; but if the horse is vicious, or the car engine so far gone that it is dangerous to use, then the gift is worse than useless; it is positively harmful and the giver is a wrongdoer. (2) applies to fraudulent company-promoters who earn great credit by giving away in charity some of their ill-gotten gains, or to robbers (even if they call themselves by high-sounding names) who 'rob Peter to pay Paul'. Islam will have nothing to do with tainted property. Its economic code requires that every gain should be honest and honourable. Even charity would not cover or destroy the taint. (3) lays down a test in cases of a doubtful gain. Can we refer to it as a gift of Allah ? Obviously the produce of honest labour in agriculture can be so referred to. In modern commerce and speculation there is much of quite the contrary character, and charity will not cover the taint. Some kinds of art, skill, or talent are God-given ; it is the highest kind of charity to teach them or share their product. Others are the contrary : they are bad or tainted. In the same way, some professions or services may be tainted if these tend to moral harm."

something, when ye yourselves would not receive it except with closed eyes. And know that Allah is Free of all wants, and Worthy of all praise."

There is no specific mention of payment of *zakat* on animals in the Qur'an.

These orders are further supplemented in vi. 142:

"Eat of its fruit when it bears fruit, and pay the due of it[10] on the day of its reaping."

The second order is contained in ix. 34. This relates to those who hoard wealth and do not pay *zakat*:

"And [as for] those who hoard up gold and silver and do not spend it in Allah's way—announce to them a painful chastisement."[11]

"On the day when it shall be heated in the Fire of Hell, then their foreheads and their sides and their backs shall be branded with it. This is what you hoarded up for yourselves, so taste what you used to hoard" (ix. 35).[12]

In ix. 71, it is further remarked:

"And [as far as] the believers, men and women, are friends one of another. They enjoin good and forbid evil and keep up prayer and pay the poor-rate and obey Allah and His Messenger. As for these God will have mercy on them. Surely Allah is Mighty, Wise."

In xxii. 41, it is mentioned:

10. Reference here is to *zakat* of produce.

11. Muhammad Ali comments: "The acquisition of wealth is not disallowed, but the hoarding of it so as not to spend it in the cause of truth and for the welfare of humanity is denounced" (*The Holy Qur'an*, p. 393, footnote 1055).

12. Muhammad Ali comments: "The punishment of an evil is spoken of throughout the Holy Qur'an as similar to the evil. . . . Being branded with the hoarded wealth is thus a fit description of the chastisement of the hoarders" (ibid., pp. 393-94, footnote 1056).

"Those who, if We establish them in the land, will keep up prayer and pay the poor-rate and enjoin good and forbid evil. And Allah's is the end of affairs."

A warning to those who do not pay *zakat* is to be found in xli. 6:

"Say unto them, O Muhammad: I am only a mortal like you. It is inspired in me that your God is One God, therefore take the straight path unto Him and seek forgiveness of Him. And Woe to the idolaters, who give not the poor-due and who are disbelievers in the Hereafter. Lo! as for those who believe and do good works, for them is a reward enduring."[13]

Here those who do not give *zakat* are treated at a par with unbelievers who do not believe in the Day of Judgment.

In the writer's view, for the proper functioning of the Muslim system of religion, it is absolutely essential that one should have profound faith in life after death and the Day of Judgment. If this is recognised, there will be no evasion of the spiritual laws and taking shelter under the letter of the law. One will be bound to do many good deeds such as helping the poor beyond the minimum extent prescribed by the letter of the law. This is desired of all those who seek the favour of God and their reward in after-life.

After this warning to those who hoard and do not spend anything in the way of God, there are definite commandments in ix. 60 concerning the paying of *zakat* and the terms by which it should be spent:

"Alms are only for the poor and the needy, and those

13. M. M. Pickthall, *The Meaning of the Glorious Koran*, p. 346. *Zakat*, as mentioned before, is translated as "poor-due" by Pickthall in his translation of the Qur'an.

employed to administer the (funds);[14] for those whose hearts have been (recently) reconciled to Truth;[15] for those in bondage and debt; in the cause of Allah; and for the wayfarer;[16] (thus is it) ordained by Allah, and Allah is Full of Knowledge and Wisdom."

Finally, in ix. 103 it is mentioned:

"Take alms[17] out of their property, *thou wouldst* cleanse them and purify them thereby."

It may be mentioned that *zakat* was not accepted from the non-believers and the hypocrites; to the latter category belonged some tribes who showed outward sympathy to the Muslims. Hence the refer-

14. The reference is to the collectors of *zakat* who could be paid out of *zakat*.

15. Here the reference is to new converts to Islam.

16. According to A. Yusuf 'Ali, *zakat* can be used for the following purposes: "Alms or charitable gifts are to be given to the poor and needy and those who are employed in their service. That is, charitable funds are not to be diverted to other uses, but the genuine expenses of administering charity are properly chargeable to such funds. Who are the needy? Besides the ordinary indigent, there are certain classes of people whose need is great and should be relieved. Those mentioned here are: (1) men who have been weaned from hostility to Truth, who would probably be persecuted by their former associates and require assistance until they establish new connections in their new environment; (2) those in bondage, literally and figuratively; captives of war must be redeemed; slaves should be helped to freedom; those in the bondage of ignorance or superstition or unfavourable environment should be helped to freedom to develop their own gifts; (3) those who are held in the grip of debt should be helped to economic freedom; (4) those who are struggling and striving in Allah's Cause, by teaching or fighting or in duties assigned to them by the righteous Imam, who are thus unable to earn their ordinary living; and (5) strangers stranded on the way. All these have a claim to charity. They should be relieved by individual or organised effort, but in a responsible way" (*The Holy Qur-an*, p. 458, footnote 1320). Commentators agree that here the reference is to the minimum alms—the *zakat*.

17. Alms here means *zakat*.

ence is to those who had acknowledged their wrong-doing and were seeking the mercy of God.

Traditions Regarding Zakat

There is abundant literature on the Traditions regarding the payment of *zakat*. We will not mention those Traditions which enjoin the payment of *zakat* as these are not necessary for our purpose in the presence of express commands of the Qur'an itself. We shall give here only those Traditions which supplemment the orders of the Qur'an and throw light on the administrative and quantitative aspects of the problem.

Abu Sa'id said: "The Prophet said: There is no *zakat* in what is less than five uqiyahs (of silver), nor is there any *zakat* in the case of less than five camels, nor is there any *zakat* in what is less than five wasqs."[18]

Ali said: "The Messenger of Allah said: I remit (*zakat*) on horses for riding and slaves for service; but pay *zakat* on silver, one dirham out of the every forty dirhams; and there is no *zakat* if there are 190 dirhams, but when it reaches 200, there are (to be paid) out of it five dirhams (of *zakat*)."

Ibn 'Umar said: "The Messenger of Allah said: Whoever acquires wealth, there is no *zakat* on it until a year has passed over it."[19]

18. The minimum on which *zakat* is payable is called *nisab*. In the case of cereals and fruits, the *nisab* was five wasqs, which comes between 1640 and 2460 lbs., according to different calculations. In the case of camels, the *nisab* was five ; in that of goats and sheep, 40. In the case of silver it was five uqiyahs or 200 dirhams which comes to a little over 16 pre-1913 shillings. According to one *hadith*. the *nisab* in the case of gold was twenty dinars—about three ounces of gold. No *zakat* is payable on things which are required for daily use. Jewels and precious stones are also excepted.

19. *Zakat* on silver or gold, meaning saved money, is paid annually on the net savings of that year, and all previous outstanding balances.

Samurah reported : "The Messenger of Allah commanded us that we should pay *zakat* out of that which we provided for trade."[20]

'Amr ibn Shu'aib reported on the authority of his grandfather: "The Prophet addressed the people and said : Beware ! Whoever is the guardian of an orphan who has property should trade with it and should not leave it (undeveloped), so that *zakat* should eat it."[21]

Abu Hurairah said : "When the Messenger of Allah died and Abu Bakr became his (successor), many of the Arab tribes rebelled. Abu Bakr said: By Allah, I shall fight those who make a difference between prayer and *zakat*, for *zakat* is a tax on property. By Allah, if they withhold from me even a she-kid which they used to make over to the Messenger of Allah, I shall fight against them for their withholding[22] of it."

Abu Hurairah said : "The Messenger of Allah appointed a man from among the Asad to collect the *zakat* of Banu Sulaim —he was called Ibn al-Lutbiyyah—so when he came to the Prophet, he called him to account for it."[23]

20. *Zakat* was paid on camels and sheep which were kept for trade purposes and therefore there is no reason for excepting trade goods. But while there is a natural increase in the case of animals, out of which *zakat* is paid, the capital involved in goods for trade may sometimes lie dormant. There is no reliable *hadith* to show how *zakat* was calculated on merchandise. A reasonable course would be to take as the basis of calculation the profit which is gained by trading.

21. *Zakat* being a tax on hoardings or possessions must be paid by every owner of property even though he happens to be an orphan. The guardian of the orphan is, therefore, enjoined to carry on trade with the capital so that the capital itself may not be consumed.

22. *Zakat* was the most important source of revenue during the time of the Prophet when therewas no other source of income and Muslims made up a community and not a State, and during the Holy Prophet's lifetime *zakat* was collected by officials for public treasury, called *Bait al-Mal*. When the Prophet died, many of the Arabian tribes who had just entered Islam rebelled against the Caliph and refused to pay *zakat*.

23. This collector withheld a part of what he had brought, saying that part of his collections was presented to him. The Holy Prophet decided that no one who was appointed as a collector could receive personal presents.

Sahl reported : "The Messenger of Allah said : When you have formed an opinion, then take (the *zakat*) and leave one-third, leave one-fourth."[24]

'Abd Allah reported : "The Prophet said : In (the produce of) lands watered by rain and springs or in what is watered by water running on the surface of the ground is one-tenth, and (in) what is watered by wells one-twentieth."

Abu Hurairah reported : "The Prophet said : In treasure-trove (or minerals) one-fifth (shall be taken by the State)."[25]

And Hasan said : "In amber and pearls one-fifth (shall be taken by the State)."

Views of the Jurists on Zakat

Eminent Muslim jurists have worked out quite an elaborate system regarding payment of *zakat*, its modes of payment, what it covers and what is exempt, the rates and its disbursement.

In the *Hidayah*, *zakat* is defined as an ordinance of God, incumbent upon every person who is free, sane, adult and a Muslim, provided he has been in possession of the property or effects subject to payment of *zakat* for a complete year. The reason that faith in Islam is made a condition is that the rendering of *zakat* is an act of piety. Certain minimum exemptions are allowed which will be mentioned under each category. *Zakat* is not incumbent upon a person against whom there are debts, equal to or exceeding his whole property. Nor is it due on necessities of life such as a dwelling house, household

24. One-third or one-fourth of the *zakat* may be left with the owner for distribution according to his choice.

25. The one-fifth taken from treasure-trove is not *zakat* in the proper sense, as it is taken only once.

furniture, clothing, cattle kept for immediate use, etc.

Zakat *on Animals*

Although there is no direct mention of *zakat* on animals in the Qur'an, in the early Muslim period, especially during the days of the Prophet, this was the most important source of *zakat*. This is easily understood since animals formed the most important source of wealth in Arabia. This was the first form of *zakat* which began to be collected publicly and was treated as a compulsory alms collected by the officials, and it formed the main source of income of the Muslim community.

Animals Subject to Tax and the Rate of Taxation

Camels. No *zakat* is due on fewer than five camels. The schedule below gives the rate of *zakat* up to 200 camels.

Upon five camels the *zakat* is one goat, provided they subsist upon pasture throughout the year, because *zakat* is due only upon such camels as live on pasture, and not upon those which are fed in the house on forage.

One goat is due upon any number of camels from five to nine; and two goats is the *zakat* on any number from ten to fourteen; and three on any number from fourteen to nineteen and four upon any number from twenty to twenty-four; and upon any number of camels from twenty-five to thirty-five the *zakat* is a yearling camel's colt; and upon any number from thirty-six to forty-five, a camel's colt of two years; and upon any number from forty-six to sixty,

a four-year old female camel; and upon any number from sixty-one to seventy-five, a five-year old female camel; and for any number from seventy-six to ninety, the *zakat* is two camel colts of two years; and on any number from ninety-one to one hundred and twenty, four four-year old female camels. These proportions of *zakat* upon camels are those written by the Prophet in his letters and instructions to his public officers and tax-collectors.

⇒ According to the *Hidayah*, *zakat* is levied only on those camels which are fed for the larger part of the year on pastures. No *zakat* is levied on stall-fed animals.

⇒ *Horned Cattle: Cows, Buffaloes, etc.* No *zakat* is due on less than thirty cattle nor on cattle which are stall-fed. One calf, a year-old, is due as *zakat* on every thirty kine; on forty kine, the calf should be two-year old.

⇒ Zakat *on Sheep and Goats.* No *zakat* is due on fewer than forty goats and sheep, nor on those which are not fed on pastures for the greater part of the year. *Zakat* is one goat or sheep from forty to one hundred and twenty sheep or goats. The rate is shown below:

1 to 39	Free
40 to 120	1
121 to 200	2
201 to 399	3
400	4
For every 100 over 400	1

The *Hidayah* mentions that these rates were ordained by the Prophet. Kids or lambs are not accepted as payment unless they are one-year old.

Horses. Jurists differ as regards the payment of *zakat* on horses. When horses and mares are kept indiscriminately together, feeding for the greater part of the year on pasture, it is at the option of the proprietor either to give a *zakat* of one dinar per head, or five per cent. upon the total value. The last mode was adopted by the jurist Zafar. The two disciples of Abu Hanifah—Yusuf and Muhammad—maintain that no *zakat* whatever is due upon horses, the Prophet having ordained that Muslims should not be subject to *zakat* for their horses or slaves. Abu Hanifah, on the other hand, quotes an ordinance issued by the Prophet in which he directed that the *zakat* upon ordinary horses should be one dinar, or ten dirhams, per head. The two disciples, however, maintain that this applies solely to horses of superior quality bred for war purposes, and not for ordinary purposes.

Zakat is not due on camels, colts, calves, hinds, lambs, etc., less than one year of age.

Labouring Cattle Exempt from Zakat. Camels and oxen kept for the purpose of labour, such as carrying burdens, drawing the plough, and so forth, are not subject to *zakat*; neither is any *zakat* due upon them when fed for one-half of the year or more upon forage.

'Ushr (*Tithe*)—Zakat *on the Produce of Land*. The

term *'ushr* is not found in the Qur'an, but has been frequently used by Muslim jurists. They do not draw any strict line between *zakat* and *'ushr* dues. We find that in the well-known work of Abu Yusuf, *Kitab al-Kharaj*, which we have often quoted, *'ushr* is frequently used in the sense of *zakat* and the same example is followed by other eminent writers on the subject. Muhammad 'Ali points out that *'ushr* is not technically *zakat*; it is really a secular land-tax.[26] This was certainly the case in the later Muslim period when the problem became complicated with the conquest of other countries by the Arabs and the introduction of *kharaj* in these lands in place of *'ushr*.

We shall give the views of the jurists regarding *'ushr*.

Views of Muslim Jurists Regarding 'Ushr

The Hanafite school treats tithe under *zakat*[27] because they consider tithe as the *zakat* of the produce of the earth. Some of them have nevertheless raised the question as to whether tithe is really

26. Muhammed 'Ali, op. cit., p. 471.

27. Some Hanafite texts treat tithe under the caption of *zakat* of the produce of the earth, while others treat it under that of *zakat* of the crops and fruits (*zakat al-zurur' wa'l-thimar*). Aside from cases like the foregoing, the Hanafites, even those who consider tithe as identical with *zakat*, use the word *'ushr* (tithe) in order to refer to the tithe; and, on the other hand, when they use the word *zakat*, they mean by it the *zakat of animals, gold and silver and articles of trade only*. The Shafi'ites and Malikites, on the contrary, denote by *zakat* the tithe as well as other kinds of *zakat*; and so, when they want to distinguish the tithe from others, they use some such expression as *zakat* of crops and fruits, or *zakat* of produce (earth).

a kind of *zakat*. A few maintain that tithe was called *zakat* because, in the opinion of Abu Yusuf and Muhammad ibn al-Hasan, the conditions of *nisab* and the lapse of a year are required.[28] The author of the *Majma'* objects to this construction and claims that the tithe was called *zakat* because it was disbursed like *zakat*. The author of the *'Inayah* says that the extension of the name *zakat* to tithe is by way of metaphor.[29] The author of the *Fath*,[30] on the other hand, puts in a strong plea for the identity of *zakat* and tithe. He remarks that tithe is *zakat*—so much so that it is disbursed in the same way as *zakat*—and that the most that can be said concerning the controversy over the nature of *zakat* is that it turns on the question of whether or not certain of the conditions of *zakat* are applicable. But he adds that whatever the answer to that question may be, it evidently does not prevent tithe from being a kind of *zakat*. The Hanafite doctors are, nevertheless, unanimous that there is a difference between the two, namely, that while *zakat* is an act of worship pure and simple, tithe is primarily a financial charge, although it participates in a way in the nature of worship; and that this is the reason why tithe was treated last of all. From this rather important difference follow certain minor ones, such as that, unlike *zakat*, tithe is levied on property owned by minors, insane persons, *waqfs*, etc. In many respects, however, tithe, according to the jurists, is like *zakat*.

28. *Majma'*, p. 175.
29. *'Inayah*, p. 186; *Fath al-Mu'in*, p. 401.
30. P. 186

It might be advanced as a general proposition that, unless the doctors indicate to the contrary, the presumption is that tithe is like *zakat*, especially as regards its religious aspects and that the differences between the two are practically limited to the political and financial field, such as the State's right of collection.[31] The Shafi'ites and Malikites, on the contrary, both treat and consider tithe as an integral part of, and identical with, *zakat*. Consequently, what they say on *zakat* applies equally to tithe and to other kinds of *zakat*.[32] The historical evidence, however, does not confirm this view. It clearly indicates that tithe was a fiscal institution.

From this it appears that the difference of opinion between Abu Hanifah and the two disciples exists with respect to two points in particular : first, the specification of the quantity as a condition, and, second, that of the permanency of the object of *zakat*. The argument of the two disciples, with respect to the former of these, is twofold : first, the Prophet has ordained that there should be no *zakat* on less than five wasqs ; secondly, tithe being regarded as alms, to render it obligatory it is requisite that some *nisab* be ascertained and established so as to confine the levy to the rich. The argument of Abu Hanifah is that the Prophet ordained that *'ushr* should be held due upon everything produced from the ground—which ordinance is general in its appli-

31. *Fath al-Mu'in*, p. 401 ; *Bahr*, p. 255; *Kifayah*, p. 172; Kasani, p. 37; cf. also *Defteri Muqtasid* (p. 54) on nature of "tithe" paid by *dhimmis*.

32. Mawardi, *al-Ahkam al-Sultani yyah* ; *Minhaj*, p. 238 ; *Wajiz*, p. 90 ; Kharashi, p. 71.

cation and without any specification of quantity and with respect to the ordinance quoted by the two disciples, it is to be taken as applying solely to articles of commerce, that is to say, that "there is a *zakat* upon articles, as merchandise, where the quantity amounts to five wasqs. In the time of the Prophet, fruits were sold by the wasq and, as the price was 40 dirhams per wasq, the amount of *nisab* was fixed at 200 dirhams.

Lands watered by means of buckets, or machinery, or watering-camels are subject to half tithe.[33] The reason why such lands are made subject to half tithe only is that the expense of tillage greatly exceeds that of lands watered by rains, or by the periodical overflow of great rivers.

According to Abu Hanifah, *'ushr* is due upon everything produced from the ground, whether the ground be watered by the annual overflow of rivers or by periodical rains, except wood, bamboos and grass. He further maintains that *'ushr* is subject neither to the minimum exemption like cattle or gold and silver, nor does the condition of the lapse of one year apply to it. On the other hand, his two disciples, Abu Yusuf and Muhammad ibn al-Hasan, maintain that *'ushr* is due only on those things which are "permanently productive"—meaning those which are not perishable, as are vegetables and fruits, and are capable of storage, like grains, etc. They further hold that a minimum quantity of agricultural

33. Five per cent.

produce of five wasqs[34] is exempt from '*ushr*.

With respect to lands watered a part of the year by rivers and a part by labour, in regulating their proportion of impost, regard is to be had to the greater portion of the year ; that is to say, if the land be such as is watered by rivers for the greater part of the year, the impost is a tithe ; but if it be watered for the greater part of the year by labour, it is only half tithe, or a twentieth.

Differences of Views Regarding Tithe on Honey, etc.

Tithe is due upon honey where it is collected in tithe-lands. Shafi'i maintains that nothing is due upon honey because it is an animal production, the same as silk ; and since silk is tithe-free, honey is so likewise. The arguments of Abu Hanifah are two-fold : first, the Prophet ordained that honey should be subject to tithe ; secondly, bees collect their honey from blossoms and fruits ; and since these articles are subject to tithe, it follows that honey, which is extracted from those, must be so also. This is different from the case of silk-worms because these feed upon leaves of trees, which are not subject to tithe. He therefore holds that tithe is due on

34. The wasq (also wisq) is a measure of capacity, about a camel's load, holding 60 sa's, of the kind used by the Prophet, each sa' being four mudds, the mudd being, according to the people of Iraq and Abu Hanifah, two, and, according to the people of Hijaz and Shafi'i, one and one-third ratls (or ritls) or about one pound; the wasq is 480 and 320 ratls, respectively. Himl, a measure of weight, is 300 manns (plural: amnan). The mann (also mana, plural: amna') is two ratls (ratl also being a measure of weight), the ratl is 12 uqiyahs (plural: awaqu), or 20 istars, or 128 dirhams (septimal weight). The uqiyah used in *hadiths* is 40 dirhams. (Cf. Mawardi, op. cit., *Minhaj*, Kharashi.)

honey.

Tithe is due upon the grass produce of tithe lands and no deduction is to be allowed on account of the expense of cultivation because lands watered by labour are subject to half-tithe.

According to the *Hidayah*, on grains, oil seeds, beans and peas the tax is one-tenth of the crop, even when grown on *kharaj*- or rent-paying lands. The minimum assessable quantity is five wasqs.

But if these crops are grown under irrigation, the tax is only one-twentieth. The full tithe, and not half tithe, is, however, to be imposed when the land is irrigated by water brought to the land at the expense of any person other than the cultivator himself. The difference in favour of irrigation, when the works themselves have been established by the cultivator, is held to be a remission in consideration of the expense involved, for the Prophet has said: "All that is watered by the heavens or by springs owes a tax of one-tenth."

Zakat *of Wealth*

The classes of goods subject to the *zakat* of wealth are :

(1) Gold whether bullion or wrought
(2) Silver whether bullion or wrought
(3) Articles of trade

Gold and Silver. The *nisab* of gold is 20 mithqals[35] and the *nisab* of silver is 200 dirhams. The rate of *zakat* both on gold and silver is 2½% of the value of

35. About 3 ounces.

the metal.

There is no *zakat* for less than 20 mithqals of gold and 200 dirhams of silver because of the *hadiths*: "There is no *zakat* on gold until its value amounts to 20 dirhams," and "There is no *zakat* on silver until it reaches 200 dirhams, and when it reaches 200 dirhams the *zakat* on it is 5 dirhams."

After the first 20 mithqals and 200 dirhams, the *zakat* for every additional 4 mithqals and 40 dirhams is 2 more qirats of gold and one more dirham of silver respectively. If the additional amount after the 20 mithqals or 200 dirhams is below the above-mentioned quantities, according to Abu Hanifah, there is no *zakat* on it. According to Abu Yusuf and Muhammad ibn al-Hasan, as well as al-Shafi'i and the Malikites, such additional quantity, even if less than 4 mithqals and 40 dirhams, respectively, is subject to a proportional amount of *zakat*.

The term "Articles of Trade" is used for wealth in general except gold and silver. The rate of 2½% is applicable to all trade merchandise on an average yearly stock.

2

TAXATION SYSTEM IN PRACTICE DURING EARLY ISLAMIC PERIOD

The main taxes that were levied during the earlier Islamic period were as follows :

(1) *Zakat*—poor-tax.

(2) *'Ushr*—tithe.

(3) *Kharaj*—land-tax, levied in conquered countries in lieu of tithe usually levied on non-Muslims especially in the earlier centuries of Muslim rule, but not invariably so.

(4) *Jizyah*—poll-tax or capitation-tax.

(5) Taxes in kind taken from the subject population as a partial payment of taxes to supply provisions, etc., for military.

(6) *Tribute*—payments of fixed sums of money for towns and lands retained under treaty of capitulation, and similar payments obtained under compulsion from foreign countries.

(7) *Ghanimah*—one-fifth of the booty falling to the State Treasury.

(8) Tax on commerce, commercial wares, etc.

(Zakat *or Poor-Tax*. The Prophet "has described *zakat* as wealth 'which is taken from the rich and returned to the poor'.[1])

1. Muhammad 'Ali, *The Religion of Islam*, p. 463.

According to the principle laid down by the Prophet, the revenue derived from the poor-tax in the form of herds and gold was applied in the following manner: (1) equipment of the soldiers for war against non-Muslims; (2) payment of officers entrusted with the levying and collection of this tax; (3) support and maintenance of needy and indigent Muslims.[2] The nearest relatives of the Prophet, the members of the two noble Quraishite families of Muttalib and Hashim, were, however, excluded from sharing in it as they were already granted fixed annuities from the general State revenue. But soon, indeed, the head of the State obtained full control and secured full power of disposal, at will, not only over the revenue derived from the poor-tax but all other State revenues as well. This view was advocated in the juristic theories of the school of Imam Malik. In the beginning of Islam, on the contrary, individual provinces enjoyed the privilege of distributing, among its poor, proceeds realised from poor-tax. Such was particularly the case in Yemen. Still more considerable amounts, which really constituted the general State revenue, flowed in from other sources. Under the first, and especially the second, Caliph, the Arabs made extensive conquests: rich countries like Syria, Babylon and Egypt passed into Muslim possession and thence streamed in immense revenues in the State treasury. It thus became

2. It should be noted that no mention is made of the revenue collected from the tithe which in practice was not regarded as a compulsory poor-tax but as ordinary revenue of the State.

unnecessary on the part of the State to collect *zakat*, and it was left to the people to pay it to deserving persons.

Thus *zakat* began to be regarded as a religious obligation incumbent on the individual like prayer or fasting and ceased to be a State tax. This view is supported by two eminent French scholars whose views are given below.

According to D'Ohsson,[3] *zakat* is not a compulsory tax to be collected by the State. It is for the individual to pay this to the poor as a part of his religious beliefs.

According to Worms,[4] *zakat* is the first tax in Islam. It was introduced by the Prophet for the upkeep of the early partisans of Islam. During the very early years it constituted the basis of the public treasury called *Bait al-Mal*. Later, when they had other sources of revenue and the Empire grew, *zakat* was no longer applied to the upkeep of the army and became a real charity fund of Islam.

The obligation of *zakat* has two objects : (*a*) alms, (*b*) tax. It is alms because it leaves to the discretion of the Muslim to pay that part of *zakat* which is non-obvious, viz. gold and silver. This is left to his conscience. The other aspect is a tax, as its collection is left to the special collectors called '*amils*, appoint-

3. M. D'Ohsson, *Muradgea Tableau General de Empire Ottoman* (Paris, 1824), 8 vols. It contains French translation of Ibrahim Halabi's famous book, *Multaqa al-Ahbur*.

4. M. Worms, *Recherches sur la Constitution de la Propriete Territorialle Dans les pays Musulmans*.

ed by the authority.

Summing up the discussion on *zakat* in his admirable work, Worms concludes that the tax is essentially of a religious nature and its purpose is to purify a person in the eyes of God. The agents or other officials who had to collect *zakat* refer to the collection from the bedouin tribes who had adopted Islam. For these tribes *zakat*, from the very beginning, was hardly anything but an obligatory impost, the amount of which was usually fixed exactly in terms of agreements made with the Prophet.

'Ushr—*Tithe*. '*Ushr* is the same as the Assyrian *Ish-ru-u*, which means tribute paid in kind, and the Hebrew *ma-asher* is the tenth which the sanctuaries received and was also levied by kings and which the Mosaic law wished to introduce as compulsory.[5]

The term '*ushr* is not found in the Qur'an but has been frequently used by Muslim jurists. They do not draw any strict line between *zakat* and '*ushr* dues. We find that in the well-known work of Abu Yusuf, *Kitab al-Kharaj* (which we have often quoted), '*ushr* is frequently used in the sense of *zakat* and so do other eminent writers on the subject. Yahya b. Adam[6] was also aware that it was used in the fiscal sense of land-tax too. Muhammad 'Ali points out that '*ushr* is not technically *zakat* ; it is really a secular land-tax.[7] This was certainly the case in the later

5. *Shorter Encyclopaedia of Islam*, p. 610.

6. Yahya b. Adam, *Kitab al-Kharaj*, translated in French, W. Juynboll under the title *Le Livre de L'impot foncier*, Leiden, 1896.

7. Muhammad 'Ali, *Manual of Hadith*.

Muslim period. The problem became complicated with the conquest of other countries by the Arabs and the introduction of *kharaj* in these lands in place of *'ushr*.

When, in the course of the first century, the people of the conquered lands adopted Islam, they began, in spite of all measures taken by Muslim authorities, to avoid the payment of *kharaj* and were prepared to pay only the tithe like the Arab Muslims, its burden being much less than the *kharaj*. Land in the conquered provinces thus gradually ceased to be regarded as State land and *'ushr* was in practice treated as a secular tax, which the writer maintains was in theory as well.

That *'ushr* was regarded as a secular tax and not a compulsory poor-tax is illustrated by the fact that in the earlier days of Muslim rule, when soldiers were strong, their lands were absolutely exempted from tax and they paid no *'ushr*. It was only by steps and against heavy protests that they were forced to pay the *'ushr*.[8] Amongst the jurists, Abu Hanifah regarded *'ushr* as a secular tax. Opinions of the other three Imams differ. They regard *'ushr* as a religious tax which has to be paid, while *kharaj* is a land-rent and can, therefore, be imposed on *'ushr*-lands.[9]

The nature of *'ushr* as a secular tax becomes quite obvious when the views of authorities are

8. Al-Ya'qubi (Ibn Wadih), *Historiae*, edited by Houtsma in two vols., Leyden, 1883. See also Amedraz and Margoliouth, *The Eclipse of Abbasid Caliphate*, IV, 410.

9. Worms, op. cit.

considered in relation to *kharaj*, which was obviously a secular tax. Some of these views are given below.[10]

'Umar I had prohibited the collection of tithe from a Muslim or an ally when he paid *kharaj*.

Abu Hanifah maintains that a land cannot be subject to both tithe and *kharaj*, but, according to Malik, as explained by Saidi Khalil, this can be done in certain cases.

DeSacy[11] argues that in principle *'ushr* and *kharaj* taxes are of an incompatible nature and cannot exist simultaneously on the same land.

The history of land tenure in the earlier Islamic period shows that the conversion of the landowner to Islam did not exempt him from the tribute (*kharaj*) which was attached to his land. Similarly, the plot of land subject to *kharaj*-tax which passed from a *dhimmi* to a Muslim did not change in nature. No tithe was collected on the produce of tributary lands, as they were subject to *kharaj*, irrespective of the religion of the occupier of the land.

Abu Hanifah had decided that the *kharaj*-land must be exempt from the payment of *'ushr* because the land had already been charged with a higher tax which ranged between one-fifth and one-half, as compared to one-tenth of *'ushr*.

Kharaj—*Land. Tax*. The word *kharaj* is derived through the Persian from the Aramaic *halak*. It

10. **Worms,** *Asiatic Journal*, XIV (1894), 353.
11. **DeSacy,** *Chrestomathie Arabe*.

originally meant tribute in a general sense (just as did *jizyah*[12]) to which non-Muslims in Muslim lands were liable. By the end of the first century it began to be used exclusively as a tax paid on landed property, as opposed to *jizyah*, which began to be used exclusively for poll-tax.[13]

When, at the time of the great conquests, the inhabitants of the newly acquired territory were left in undisturbed possession of their fields, it was ordained that the soil should be liable to taxation. Henceforth the inhabitants were to pay a definite part of the harvest as a tribute to the Muslim treasury and remained bound to pay this *kharaj* for all time even if they became converts to Islam.[14]

Under Byzantine and Persian rule, the occupiers of these lands had been subject to a tax of this kind in these regions and the Arabs retained the old methods of administering it in many details. The tribute was paid mainly in kind. Definite quantities of corn or other foodstuffs were imposed on villages or, in some cases, on districts. The Muslim officials

12. Daniel C. Dennett, Jr., *Conversion and Poll Tax in Early Islam*, p. 12

13. *Shorter Encyclopaedia of Islam*, p. 245. "In all legal codes the term *kharaj* is used to designate the tax on land while the tax on the individua is called jizyah, or capitation tax" (Worms, in *Revue de Legislation at d Jurisprudence*, XV [1842].

"This was originally applied to a land tribute from non-Muslim tribe (*Hidayah*, vol. ii. p. 204), but is now used for a tax, or land-rent due to th State" (Thomas Patrick Hughes, *A Dictionary of Islam* (London, 1885), p. 269

14. Once a land is declared as *kharaj*-land by the first Muslim con queror, it is not likely to change or cease to be a *kharaj*-land even if th owner is converted to Islam. On the other hand, immediately upon conve sion, he is freed from *jizyah* (Worms, *Recherches*, etc., p. 299).

turned these into money, thus bringing to the Muslim treasury very considerable revenues especially in the first century of Muslim rule.

At the beginning of the Abbasid period[15] we find different scholars (e.g. Abu Yusuf, al-Khassaf and Yahya b. Adam) still endeavouring to collect the traditional and legal enactments on *kharaj* and arranging them in special chapters in their books.

The regulations regarding the collection of *kharaj*[16] in those days were still a very important subject. But after the peoples of the conquered territories had generally adopted Islam, they began gradually to cease payment of *kharaj*. It was thought that with the payment of the tithe of the yield of one's fields, enough had been taken and *kharaj*, ultimately, fell everywhere into desuetude. However, it appeared later in the shape of a tax on land, irrespective of the religion of the landowner. In the later books on *fiqh* we therefore find given in detail only regulations regarding poll-tax, while those for *kharaj* are dealt with cursorily or even not at all. It is only in al-Mawardi's special work on the Muslim system of administration that we find the regulations for *kharaj* still dealt with in considerable detail.

Al-Mawardi discusses as follows the factors which

15. Also called al-Daulat-ul-'Abbasiyah, 132-640/749-1240. 37 Caliphs.

16. The *kharaj* on land can vary from one-fifth of the gross produce to ıe-half. In the latter case, it is subject to the actual crop raised, while in e former case of one-fifth, it is fixed regardless of the crop produced. This as applied by 'Umar to Iraq and has been generally prevalent. It is paid cash and is payable whether the land is cultivated or not. The tithe, as e name indicates, was one-tenth (Worms, *Recherches*).

determine the tax-bearing capacity of land.

The person who assesses *kharaj* on a piece of land should consider the capacity of the land, which varies according to three factors, each factor affecting the amount of *kharaj* more or less. One of these factors pertaining to the land itself is the quality of the land by virtue of which the crop grown on it is rich, or the defect which causes the produce to be small. The second factor relates to the kind of crop : grains and fruits vary in price, some fetching a higher price than others. The *kharaj* must, therefore, be assessed in accordance with the yield or the value of the crop grown. The third factor pertains to the method of irrigation. The crop that has been irrigated with water carried on the back of beasts or raised by a waterwheel cannot stand the same rate of *kharaj* as could be charged on land watered by running water or rain.[17]

If the *kharaj* on land was fixed, the owner was free to cultivate or neglect it provided he promptly paid what was due;[18] but when the *kharaj* was a proportion of the produce, the land was given to another person if the owner neglected its cultivation

17. The amount of it seems to have varied according to the kind of cr grown, the fertility of the soil and the method of irrigation and the proxim to markets (Baladhuri, *Futuh al-Buldan*, p. 271). This certainly applied to case of proportional *kharaj* which must not exceed half of the produ (Mawardi, *Ahkam al-Sultaniyyah*, p. 168).

18. *Kharaj* is due on land irrespective of whether or not the owner cu vates the land, provided he has been able to do so, because the reason *kharaj* is the productivity of land and the owner, by not cultivating his l although it was productive, has deprived the beneficiaries of *kharaj* of th revenue (Sarakhsi, *Mabsut*, X. 2).

In this way *kharaj* was assured. However, in case of crop failure through no fault of the cultivator, liberal concessions were given. The right of occupancy was hereditary and could be passed to the heirs of the *dihqan*. On the failure of heirs, this right escheated to the State. Further, the *dihqan* was free to cultivate the crop as he chose and he enjoyed a fixity of tenure.[19]

In the earlier period of the Muslim rule, the general policy was to allow conquered land to remain with its former owners on fixed conditions of tribute and taxation,[20] such land being considered State land, and, according to later theory, it was leased to non-Muslims since Muslims were supposed to form a military, and not a land-owning, class.[21] However, such regulations as may have existed to this effect were largely ignored[22] in spite of the few

19. *Kharaj* lapses if the entire crop has been destroyed as a result of unavoidable natural forces (*afat*), such as the subsiding of land, or fire, extreme cold, etc. If, however, the crop was destroyed in consequence of avoidable agencies, such as wild birds, or if the crop was destroyed after harvest, the tax is not remitted (ibid., X, 82).

It is a settled principle of Muslim administration, founded on the *Shari'ah*, that not only is the land-tax not due from land which is not under cultivation but, if the crop is inadequate or destroyed by flood, fire or draught, the cultivator is entitled to a proportionate reduction of, if not entire exemption from, the tax. Exemptions from land-tax are to this day granted for these causes ("Land Cultivation in Egypt," *Egyptian Civil Code* [Cairo, 1911], II, 350).

20. *Encyclopaedia of Islam*, II, 140.

21. Ibn 'Abd al-Hakam, *Futuh Misr*, p. 81; Baladhuri, op. cit., pp. 214 and 447; Mawardi, op. cit., pp. 121 f.

22. Von Kremer, *Culturgeschichte* (S. Khuda Bukhsh, Tr.: *The Orient under the Caliphs*, Calcutta, 1920), p. 125; Maqrizi, *Khitat* (Bulaq, 1270), I, 96.

recorded cases of early enforcement.[23] Since at first no Muslim was expected or required to pay more than the poor-tax, or *zakat*,[24] all land acquired by the Muslims spelled a considerable loss of revenue to the State, that is, to the collective Muslim community. As long as there were more countries to conquer and more tribute to demand, the evils of the early financial system did not make themselves felt, but as settlement and administration followed upon conquests and as conquests gradually decreased, the system of 'Umar I failed to meet the situation since in all provinces of the Empire more and more land passed into the hands of Muslims and was thus withdrawn from taxation except for payment of the tithe. It was then that Hajjaj (died 714/1314), realising the inevitable results of tax-exempt land-lordism among the Muslims, extended the land-tax to their holdings.[25] This raised a storm of opposition against him but, supported by Caliph 'Abd al-Malik (66-85/685-704), he held his ground on the question in his own province of Iraq and thus opened the way for its adoption later in other parts of the Empire. In Egypt, the introduction of this system was considered during the rule (98-102/717-720) of 'Abd al-'Aziz, more popularly known as 'Umar II, but was abandoned.[26] At the same time, 'Umar II

23. Ibn 'Abd al-Hakam, op. cit., p. 162; Von Kremer (Tr. Bukhsh), op. cit., pp. 85-88.

24. Mawardi, op. cit., p. 108; Von Kremer (Tr. Bukhsh), op. cit., pp. 56-5

25. Baladhuri, op. cit , p. 368; Maqrizi, op. cit., I, 77 f.

26. Ibn 'Abd al-Hakam, op. cit., p. 156. It is interesting to note he that in the correspondence between 'Abd al-Malik and 'Abd al-'Aziz th word used is *jizyah* and not *kharaj*.

worked for a solution of the Muslim land-tax problem. Since the Muslims based their opposition to the new measure on religio-political grounds, claiming that taxing them for land as the unbelievers were taxed degraded them to the level of non-Muslim subjects, 'Umar II soothed their politico-religious pride by agreeing that a Muslim should pay neither the poll-tax nor the land-tax. But, in order to prevent a decrease in revenue, he argued that all of the *kharaj*-land, that is, conquered land left in the hands of its owners on condition of tribute, belonged to the believers as a community and that *kharaj* or revenue derived from this land, though going to the State treasury, was eventually divided among the members of the community through the system of State pensions. Therefore, if individual Muslims acquire sections of this land without at the same time assuming the responsibility of its normal yield, those particular individuals in reality rob the Muslim community of that revenue, for they gain a personal privilege at the expense of their fellow-Muslims. Moreover, the non-Muslim holders of the land need the land in order to meet their tribute payments; to take it away from them without assuming the revenue responsibility is, therefore, an injustice to them also. He, therefore, decreed the following: (1) the sale of *kharaj*-lands to Muslims (Arab or *mawali*) is to be prohibited from 100/718 onwards, but this prohibition is not to be retrospective; (2) on conversion to Islam a *mawla* must surrender his land to the tributary community; but if he wishes,

he might lease it back for an amount presumably equivalent to the *kharaj*; (3) new converts may settle in the towns.[27] Thus did pious 'Umar II, with aims identical with those of Hajjaj, sought to guard the State revenue from land against ruinous diminution.

'Umar's plan failed. As Wellhausen has put it:

"The principle of the inalienability of the tribute land could not be carried through, and the change of property was no more put a stop to than the change of faith. So, under his later successors, the method of Hajjaj, namely, that of imposing a land tax on all landowners alike—Muslim as well as non-Muslim—was reverted to though with the difference that a distinction was now drawn between *jizyah* and *kharaj*. *Jizyah*, it was said, rests on the persons and is a sign of their subjection; *kharaj*, it was said, rests on the land and does not degrade the person. Since the land-tax was by far the more important, its payment by all Muslim landowners more than offset the loss of the poll-tax from converts to Islam. Thus a clever bit of legal finesse saved the exchequer from inevitable ruin."[27]

But even these measures failed ultimately to solve the problems of Muslim State finances, and under the Abbasids it became necessary to abolish even the State pensions, the pride and joy of early Islam, the details of which are given in the later part of this chapter.

Evidence of Papyri *Regarding* Kharaj. A great deal of misunderstanding prevails as to the origin of *kharaj* and *jizyah*. This is evident in the writings of

27. J. Wellhausen, *Das arabische Reich und sein Sturz* (Berlin, 1902), Eng. trans. by M. G. Weir, *The Arab Kingdom And Its Fall*, Calcutta, 192[illegible]

some of the most capable early Muslim writers on this subject. A good deal of light has been thrown on this controversial discussion by the discovery of *Greek Papyri* found in 1901 and published in 1910.[28] The collection relates to the years 79-104/698-722, and the main findings of these *Papyri* are summarised below.

The most important subdivisions of *kharaj* are the land-tax and poll-tax; and as the subject of these taxes, so far as the earlier Arab period is concerned, is one of much obscurity, and as, moreover, the present *Papyri* throw a good deal of new light on the matter, it seems best to gather up the chief conclusions from the previous evidence as well as from that furnished by the *Papyri*.

In later times we find in Egypt, as in the provinces of the Muslim Empire, generally two main taxes—*kharaj* or land-tax (which, according to Muslim legal theory, was levied not on the individual but on land) and the *jizyah* or poll-tax (levied not on land but on the individua land paid only by non-Muslims). This, however, was not the original practice. Under the early Caliphs the two terms were synonymous and Muslims paid neither land-tax nor poll-tax. It is not certain as to how and when this change took place, when *kharaj* and *jizyah* became distinguished in such a way that the one was levied on land only, including that of Muslims, and the other only on the person of a non-

28. H.I. Bell, Editor, *Greek Papyri*, British Museum catalogue with texts, Vol. IV : "The Aphrodite," London, 1910.

Muslim. Enlightening discussions on this question are those of Becker and Wellhausen.[29] Wellhausen showed that the terms *kharaj* and poll-tax were not originally distinct but were applied indifferently to the tribute levied by the Muslims on conquered countries. His theory, which is probable enough in itself, seems to rest at several points upon conjecture rather than evidence, and is as follows. At first no Muslim paid either land-tax op poll-tax, whereas non-Muslims paid both. Consequently, when in the course of time land came to be acquired by Muslims or the existing owners accepted Islam, it ceased to pay land-tax, with the result that either the total tax payments decreased in amount or the burden on taxable land grew greater. In consequence of this, Hajjaj, Governor of Iraq, refused to exempt converts to Islam from payment of land-tax, a step which aroused great indignation. The Caliph 'Umar II, therefore, laid it down that no Muslim should pay either of the taxes. But to prevent the loss to the treasury, he declared that *kharaj*-land was the property, firstly, of Islam in general, secondly, of the single communities to which the Muslims had leased it in consideration of payment of the tribute. It was, therefore, unlawful to take away part of this land and exempt it from *kharaj*; and consequently he enacted that no Muslim should acquire *kharaj*-land and that on any land-holder's conversion to

29. Wellhausen, op. cit., and Becker, *Papyri Schott-Reinhardt* Heidelberg, 1905.

Islam his land should revert to the community though he might remain on it by paying rent. This rule was not, however, made effective retrospectively. After 'Umar's death, as it proved impossible to prevent the alienation of land, a return was made, in practice, to the precedent of Hajjaj, but to avoid its odium, the jurists evolved a theory that *khiaraj* was distinct from poll-tax and was levied not on the person but on the land. Finally, the last Umayyad Governor of Khurasan instituted the practice of levying the tribute in a lump sum on the communities as *kkaraj*, while poll-tax was an extra impost and was collected only from non-Muslims.

The *Schott-Reinhardt Papyri*, edited by Becker, confirms the theory that the term "poll-tax" was first used in a general sense; the word was employed as an equivalent in the sense of gold taxes, in other words, it meant not poll-tax but tribute. Becker shows that the term "*kharaj*" was not used in Egypt at all in the earliest times. It is, moreover, abundantly clear that poll-tax in the above sense was levied in a lump sum on a community, whereas in its later sense as a poll-tax it was levied on individuals. The government requisitions name only poll-tax and it will be seen that the actual distribution of the tax quotas among the individual tax-payers was made by local officials. Thus the explanations given by Becker in his *Beitrage* become almost certain that the Arabs, on taking over the province of Egypt, took over at the same time the existing tax system, that they demanded a lump sum of money from the

province as tribute and left the officials to raise money in proportions they thought it fit out of the existing taxes. Part of the money came from the Roman land-tax, part from the Roman poll-tax. It is thus not correct to say that these taxes were recognised Arab imperial taxes and identical with the later *kharaj* and poll-tax.

Greek Papyrus No. 1420[30] described the money taxes. It is quite clear from the evidence that one of the taxes is poll-tax, as it shows the number of men on whom the tax was levied. In the case of other money taxes, the tax is listed in the name of the holding on which it is imposed. This conclusion is corroborated by the evidence of the Byzantine receipts. As the Arabs adopted the Byzantine system, there is no reason to doubt the distinction between the two forms of taxes. The *Papyri* give different rates of poll-tax. The rate of poll-tax in Roman Egypt was different in different districts and for different classes of population.

The other points in connection with poll-tax remain to be mentioned. In the first place, while, on the one hand, many persons who paid land-tax did not pay poll-tax, there were others who paid the latter tax but not the former. It is natural to suppose that those who paid no land-tax held no land; or it may be that they were persons holding quite unproductive land and were, therefore, exempt from one of the taxes which they were normally liable to pay. Pos-

30. *Greek Papyri* in the British Museum Catalogue with texts, op. cit.

sibly land-tax was regarded as the main impost.

The reason for non-payment of poll-tax by many persons is also doubtful. A possible explanation is that persons paying land-tax but not poll-tax were Muslims, and persons paying the latter but not the former were privileged Muslims who were exempt from land-tax. But one would expect the exemption to be rather from the poll-tax. Moreover, the fact that the terms are all of Greek or Coptic origin makes it very unlikely that any of the tax-payers in these accounts were Muslims. Certainly all the persons named in this collection who are described as converts to Islam have Arabic names, and probably did not then pay any taxes. If this explanation is ruled out, the fact that many persons did not pay poll-tax shows that the tax was very different from the later poll-tax which was levied on all non-Muslims. Thus some persons were found to have paid all taxes and others only two or even one of them. This is rendered more likely by the fact that on different occasions the same person is found differently assessed.[31]

The other point is the position of women with regard to poll-tax. In the above-mentioned collection there is not a single instance of a woman paying this tax though women appear fairly often among tax-payers.[32]

Jizyah—*Poll-Tax*.[33] The history of the word *jizyah* is difficult but interesting. The traditional Muslim view traces the distinction between *jizyah*

31. Ibid., p. 168. 32. Ibid.

33. For details, see Nabia Abbott, Ed., *Studies in Ancient Oriental Civilization*, Chicago Univ. Oriental Institute, 1938.

and *kharaj* back to the time of 'Umar I. Wellhausen and Becker have, however, as mentioned in the previous section, shown conclusively that at that early time the terms "*jizyah*" and "*kharaj*" were used synonymously in the sense of "tribute paid to the Muslims". The term "*jizyah*" is used in the Qur'an, ix. 21, meaning the tribute of the subject people paid as a sign of their subjugation. In the *Kurrah Papyri* it is used for the entire gold-tax, which included both land-tax and capitation-tax. The term "*kharaj*" was obviously borrowed by the Arabs from their predecessors. It appears, therefore, that the distinction between these two terms was in the early Arab period a geographic one. Both terms are used for the entire tribute of the subject people, *jizyah* gaining currency in the western world and *kharaj* in the eastern provinces. This would account for the absence of the word *kharaj* in the *Kurrah Papyri* and other early Arabic *papyri* from Egypt.

The *jizyah* may be imposed either as a poll-tax or as a tribute upon the conquered country. *Jizyah* is not an Islamic institution as is commonly supposed. It has already been mentioned that the Arab conquerors left unchanged the fiscal system that they found prevailing in the lands they conquered from the Byzantines and that the explanation of *jizyah* as a capitation-tax is an invention of later jurists who were ignorant of the true condition of affairs in the early days of Islam.[34]

34. Caetani, *Annali del l'Islam* (Milan, 1927, in 5 vols.), IV, 610, and V, 424. Also Sir Thomas W. Arnold, *The Preaching of Islam* (Third Ed., London, 1935), p. 59.

Jizyah originally denoted tribute of any kind paid by the non-Muslim subjects of the Arab Empire but came later to be used for capitation-tax as the fiscal system of the new rulers became fixed.

Was Jizyah *A Very Burdensome Tax? Jizyah* was too moderate to constitute a burden since it released the payers of the tax from compulsory military service that was incumbent on their Muslim fellow-subjects. Worms defines *jizyah* as a compensation exacted by law from every non-Muslim subject in return for the security of his life and liberty. But he fails to mention that it was also in lieu of his exemption from military service and other taxes, such as *zakat*, which were imposed only on Muslims. *Jizyah* as a poll-tax was not an Islamic innovation but was taken over, together with other items of taxation, from Byzantium.[35]

No legislation existed regarding capitation during the time of the Prophet or the first Caliph, Abu Bakr. 'Umar, the second Caliph, was the first to legislate regarding a capitation-tax.[36] He ordained that in countries where gold currency obtained, such as Egypt and Syria (the current coin there being the Roman solidus), all grown-up men should pay up to four dinars a year as capitation-tax. Whereas in

35. Frede Lokkegaard, *Islamic Taxation* (Copenhagen, 1950), p. 142.

36. It was the year 8 or 9 of Hijrah that capitation-tax was first levied (Dr. Perron, *Precis de Jurisprudence Mussilman*, III, 655). *Jizyah* is of two kinds. When imposed on a people under capitulation and with mutual consent, its amount is whatever may be agreed upon and it cannot be afterwards increased. When imposed on a conquered people it is fixed by law at 48 dirhams per annum for the rich, 24 dirhams for persons of middling condition and 12 dirhams for the poor (*Fatawa 'Alamgiri*, II, 347).

countries where silver currency prevailed, such as Mesopotamia, East Arabia (Bahrain), Persia (the current coin being the Sassanid dirham), the capitation-tax was assessed at 40 dirhams, the dinar being then valued at 10 dirhams There were three classes of capitation-tax : the rich paid four dinars, the middle class two, the poor only one dinar.

In Syria, capitation-tax was fixed on a similar principle, but we lack precise information. We only know that for each individual community this tax was fixed at an aggregate amount which continued unaltered, whether the number constituting the community increased or decreased.[37]

According to an Arab historian, Maqrizi,[38] in Egypt the capitation-tax for every adult male cap-

37. Baladhuri, op. cit., p. 269. Malik usually reckons a dinar as equivalent to 10 dirhams but in two places (III, 192, IV, 17) as equivalent to 12 dirhams. Later jurists like Abu Hanifah and Ahmad ibn Hanbal reckoned it as equivalent to 12 dirhams. It seems that either the value of gold was raised or the purity and weight of the dirham was lessened. This is proved by later dirhams which weighed, on an average, 2.97 as against 3.9 of the earlier Sassanid dirham. Tradition of Ibn 'Asakir mentions that Walid reports as follows : Ibn Jabir and others related to me that they (the Muslims) concluded peace with them (i.e. the inhabitants of Syria) on condition that they should pay a certain sum as capitation-tax which would neither be raised if their number increased or cut down if their number decreased (cf. Muller, *Islam im-Morgen und Aben-land*, I. 277, 281-282), some facts about the capitation-tax of Egypt under the Caliph 'Umar. The inhabitants of Egypt had to pay 2 dirhams per head and supply a fixed quantity of wheat, oil, honey and vinegar. But under him an arrangement was made by which a sum of 4 dinars was paid inclusive of everything. Baladhuri op. cit., pp. 216, 218. The revenue derived from this tax then amounted to 1 million dinars. Suyuti, *Husn al-Muhadarah*, I, 69, 70. See Yaqut, *Buldan*, Meynard's Tr., pp. 199, 412.

38. Maqrizi, op. cit., I, 76.

able of earning a livelihood was two dinars. This tax, it is said, was imposed by 'Amr b. al-'As, the conquering Muslim general, and the first Governor of Egypt, on the Copts at the conquest of Egypt. The number of Copts at this time was estimated at 8 million, and the total sum realised was 14 million dinars. It is, however, well known that the rates of *jizyah* levied by the early conquerors were not uniform[39] and the great Muslim jurists, Abu Hanifah and Malik, are not in agreement on some of the less important details.[40] The following facts taken from

39. Baladhuri, op. cit., pp. 124-25. "The capitation-tax, which is levied by Muhammadan rulers upon subjets of a different faith, but claim protection. . . . The usual rate is one dinar for any male person, females and children being exempt according to Abu Hanifah but included by Al-Shafi'i. [According to all jurists], it should not be levied upon monks, or hermits, or paupers, or slaves" (Hughes, op. cit., p. 248). By payment of *jizyah*, capitation or poll-tax the *dhimmis* "secure protection for their property, personal freedom and religious toleration from the Muslim Government" (ibid., p. 711). Discussing this subject further, Hughes observes: "if a country inhabited by infidels is conquered by a Muslim army; theoretically, the inhabitants, together with their wives and children, are considered as plunder and property of the State, and it would be lawful to reduce them to slavery. In practice, however, the milder course prevails and by paying the stipulated capitation-tax, the subdued people become . . . free subjects of the conquering power, whose condition is but little inferior to that of their Muslim fellow-subjects." He further observes, quoting *Hidayah* (II, 219), that "Zimmis do not subject themselves to the law of Islam, either with regard to things which are merely of a religious nature, such as fasting and prayer, or with regard to those temporal acts which, though contrary to religion, may be legal by their own, such as the sale of wine or swine's flesh." See also A. von Kramer, op. cit., I, 60, 436.

40. Bell, op. cit., XXV, 173. Roman Egypt had an elaborate system of poll-tax which was different in different districts and on different classes of population. *Catalogue of Greek Papyri*, op. cit., p. 172.

In the majority of cases the rate of poll-tax in Egypt was 2 shillings per head (ibid., p. 172).

Abu Yusuf's *Kitab al-Kharaj* may be taken as generally representative of Muslim procedure under the Abbasid Caliphate. The rich were to pay 48 dirhams a year, the middle classes 24, while the poor, i.e. the field labourers and artisans, paid only 12 dirhams. This tax could be paid in kind if desired; cattle, merchandise, etc., were accepted in lieu of specie. The tax was to be levied only on able-bodied males and not on women and children.[41] The poor who were dependent for their livelihood on alms and the aged poor who were incapable of working were also specially excepted, as were also the blind, the lame, the incurable and the insane, unless they happened to be men of wealth. This same condition applied to priests and monks, who were exempt if dependent on the alms of the rich but had to pay if they were well-to-do and lived in comfort. The collectors of *jizyah* were particularly instructed to show leniency and refrain from all harsh treatment or the infliction of corporal punishment in case of non-payment.

This tax was not imposed on Christians, as some would have us think, as a penalty for their refusal to accept the Muslim faith but was paid by them in common with other *dhimmis*, or non-Muslim subjects of the State, whose religion precluded them from serving in the army, in return for the protection secured to them by the arms of the Muslims. When the people of Hirah contributed

41. Abu Yusuf, op. cit., pp. 69-71.

the sum agreed upon, they expressly mentioned that they paid this *jizyah* on condition that "the Muslims and their leader protect us from those who would oppress us, whether they be Muslims or others".[42] Again, in the treaty made by the Muslim general Khalid with some towns in the neighbourhood of Hirah, he writes: "If we protect you, then a *jizyah* is due to us; but if we do not, then it is not due."[43] How clearly this condition was recognised by the Muslims may be judged from the following incident in the reign of the Caliph 'Umar. The Emperor Heraclius had raised an enormous army with which to drive back the invading forces of the Muslims, who had, in consequence, to concentrate all their energies on the impending encounter. The Arab General, Abu 'Ubaidah, accordingly wrote to the Governors of the conquered cities of Syria, ordering them to pay back all the *jizyah* that had been collected from the cities, and wrote to the people saying: "We give you back the money that we took from you as we have received news that a strong force is advancing against us. The agreement between us was that we should protect you and as this is not now in our power, we return you all that we took. But if we are victorious, we shall consider ourselves bound to you by the old terms of our agreement."[44] In accordance with this order, enormous sums were paid back out of the State treasury

42. Tabari, *Tarikh*, Prima Series, p. 2055.
43. Ibid, p. 2050.
44. Ibid,

and the Christians called down blessings on the heads of the Muslims, saying: "May God give you rule over us again and make you victorious over the Romans; had it been they, they would not have given us back anything but would have taken all that remained with us."[45]

As stated above, *jizyah* was levied on the able-bodied men, in lieu of military service they would have been called upon to perform had they been Muslims; and it is very noticeable that when any Christian people served in the Muslim army, they were exempted from the payment of this tax. Such was the case with the tribe of al-Jurajimah, a Christian tribe in the neighbourhood of Antioch, who made peace with the Muslims, promising to be their allies and to fight on their side in battle on condition that they should not be called upon to pay *jizyah* and should receive their proper share of the booty.[46] When the Arab conquests were pushed to the north of Persia in 21/642, a similar agreement was made with a frontier tribe which was exempted from the payment of *jizyah* in consideration of military service.[47]

We find similar instances of the remission of *jizyah* in the case of Christians who served in the army or navy under the Turkish rule. For example, the inhabitants of Megaris, a community of Albanian Christians, were exempted from the payment

45. Abu Yusuf, op. cit., p. 81.
46. Baladhuri, op. cit., p. 159.
47. Tabari, op. cit., p. 2665.

of this tax on condition that they furnished a body of armed men to guard the passes over Mounts Cithaeron and Geranea, which lead to the Isthmus of Corinth. The Christians who served as pioneers of the advance-guard of the Turkish army, repairing roads and bridges, were likewise exempt from tribute and received grants of land quit of all taxation,[48] and the Christian inhabitants of Hydra paid no direct taxes to the Sultan but furnished instead a contingent of 250 able-bodied seamen to the Turkish fleet, who were supported out of the local treasury.[49].

The southern Rumanians, the so-called Armātoli,[50] who constituted so important an element of strength in the Turkish army during the sixteenth and seventeenth centuries, and the Mirdites, a tribe of Albanian Catholics who occupied the mountains to the north of Scutari, were exempt from taxation on condition of supplying an armed contingent in time of war.[51] In the same spirit, in consideration of the services they rendered to the State, the capitation tax was not imposed upon the Greek Christians who looked after the aqueducts that supplied Constantinople with drinking water,[52] nor on those who had charge of the powder magazine in that

48. L.F. Marsigli, *Stato Millitare' dell Imperio Ottomanno* (Amsterdam. 1732), I, 86.

49. G. Finley, *A History of Greece* (Oxford, 1877), VI, 30, 33.

50. Victor Lazar, *Die Sudrumanen der Turkei und Angrenzenden Lander* (Bukarest, 1910), p. 56.

51. A. de La Jonquiere, *History de Empire Ottoman* (Paris, 1881), p. 14.

52. Thomas Smith, *Remarks on the Manners, Religion and Government of the Turks* (London, 1678), p. 324.

city.[53] On the other hand, when the Egyptian peasants, although Muslim in faith, were made exempt from military service, a tax was imposed upon them, as on the Christians, in lieu thereof.[54]

Taxes in Kind. Besides the capitation-tax, the subject population had to supply provisions for the troops and, according to 'Umar's rule, indeed, were under an obligation to furnish monthly the following quantities for every Arab warrior : in Syria and Mesopotamia, two mudds of wheat, three kists of oil (kist is the Greek *hohlmas*), a certain quantity of honey and fat. The inhabitants of Iraq had to supply 15 sa's of wheat and a certain quantity of fat not precisely known. The Egyptians had to supply monthly an ardeb of wheat and linen necessary for the clothing of the troops and the Caliph.[55]

Fixed Tribute. This did not differ materially from the poll-tax except that it was fixed once for all in a lumpsum to be paid by foreign rulers or other communities who recognised the paramount power of the Muslims but were otherwise internally independent. The amount of this tribute was not large, although exact figures are not known.

Ghanimah—*One-fifth of the Booty.* Income from this source had the sanction of the Qur'an. The importance of this source of income began to dec-

53. A. Dorostamus, *Neueste Beschreibung derer Griechischen Christen in der Turckey* (Berlin, 1737), p. 326.

54. A. de La Jonquiere, op. cit., p. 265.

55. Cf. *Sharh al-Muwatta'*, I, 74, for details of the various weights and measures.

line very rapidly as all the neighbouring countries were conquered by the Muslims. With permanent conquest, this source of income disappeared.[56]

Taxes on Commerce and Commercial Wares. Taxes on trade were first introduced by 'Umar I. Evidence regarding the rates of such taxes is conflicting. The generally accepted view is that the Muslims paid 2½%, the *dhimmis* 5% and the foreigners 10%. The tax was paid once a year only. No proper evidence is available regarding the method of the assessment of this tax. The view of Malik is that it was paid on each journey. This sounds more reasonable as it indicates the nature of customs duties which could easily be assessed at the value of goods carried by each caravan. However, it is not clear if the various categories of traders—Muslims, *dhimmis* and foreigners—were subject to a uniform tax or a varying tax.

Collection of Taxes—Zakat. The historical evidence shows that *zakat* as a compulsory measure in the form of poor-tax began to be collected in Medina during the time of the Prophet, on animals.

Cattle and flocks of sheep which came in by way

56. To the State belonged from the legal fifth : (1) fifth of the booty ; (2) fifth of the mines ; (3) fifth of the flotsam and jetsam ; (4) fifth of what was raised by the tax officers from the moveables and wares of Muslims, of the subject population and the foreigners who came to Muslim countries for the purpose of commerce. Finally is to be mentioned ransom money which those possessing a fixed abode had to pay. These ransom moneys fell to the State treasury without any deduction and were not regarded as booty (Yaqut, *Mu'jam al-Buldan*, I, 51, 52).

of taxes were kept and looked after.[57] The office of the overseer of the State pasture (*hima*) was, indeed, a post of trust and confidence which 'Umar gave to his freedman. At the time of 'Umar there was in the State pasture no less than 400,000 camels and horses.[58] In order to distinguish these from others they were branded with a special mark (*wasm*). However, in the latter part of 'Umar's rule when revenues began to flow in from conquered parts of the Empire, the collection of *zakat* by the State on animals was abandoned.

System of Collection of Taxes other than Zakat. In the earliest times taxes were realised by the commander of the troops who, in conquered lands, exercised the highest functions of the Government. Mu'awiyah, as a far-sighted administrator, sought to separate finance from political administration. He appointed a Governor at Kufah for political administration, which meant military affairs and leadership of public prayers, but placed the collection of taxes, particularly the land-tax, in charge of a special officer who acted quite independently of the Governor. This officer bore the title of *Sahib al-Kharaj*. Attention should be called to the fact that from the very beginning of the Caliphate the policy of complete decentralisation prevailed as regards finances. There was no central treasury. The entire taxes of the province flowed into the treasury of the Governor or of any

57. At the time of the Prophet the State pasture was in Jaqu ; at the time of 'Umar I, in Babada and Saraf (Mawardi, op. cit., p. 322).

58. *Sharh al-Muwatta'*, IV, 246, 247.

other officer, as the case might be, specially entrusted with the collection of taxes. Out of the taxes were met the charges of administration, State annuities, pay of the soldiers; and only the balance, if any, was remitted to the common State treasury (*Bait al-Mal)* or, in later times, to the private purse of the Caliph when the State treasury became the property of the Caliph.[59] In the matter of revenue, Mu'awiyah, being head of the State, had an absolute unfettered discretion. He disposed of the revenue of his vast Empire at will.

System of Tax Collection as Revealed by Papyri.[60]

The regular money taxes consisted of land-tax, poll-tax and trade-tax, all payable in gold, the first being the most important. These taxes were very dependable; they were followed in importance by the regular corn-tax, which varied with the crops. In addition to the regular gold- and grain-taxes, there were several extraordinary taxes raised regularly as needed, both in money and kind. These were usually requisitions for provisions, for allowances to officials and Arab settlers, for provisions for workmen, sailors, for naval constructions, for public buildings, for trans-

59. In the more important provinces there must have been a very considerable amount of money in the Provincial treasuries. When Mukhtar conquered Kufah he found in the Government treasury 9 million dirhams (Ibn Athir, *Kamil*, ed. C. J. Tornberg in 12 vols. [Leyden, 1876]. IV, 187). In the treasury of Busra there were, when 'Ubaidullah ibn Ziyad left the town as a fugitive, 9 million dirhams (Ibn Athir, op. cit., IV, 110). When Yazid ibn Muhallab took possession of Busra he found the Government treasury to contain 10 million dirhams (De Goeje, *Frag. Hist. Arab.* I, 59).

60. For details, see Bell, op. cit.

portation—in fact, for anything that was needed. There was, furthermore, the tax to be paid in personal service, which service varied from minor temporary demands to important and responsible liturgies. It is very evident that these four main divisions of taxes—the regular gold-taxes, the corn-tax, the extraordinary requisitions, and the personal service tax—were indeed a hangover from the Byzantine system, though they do not exhaust the taxes of either period.

When we come to consider the assessment and collection of taxes, the process seems identical with that of the late Byzantine times. The amount of the tax was fixed at headquarters and the notification of the assessment was addressed to the people of the villages in the districts, a total sum in gold and in kind being mentioned. The collection was left to local officers with respect to grain-tax. Thus the principles of collective assessment and local collection were in force. With regard to the poll-tax—a *jizyah* in its later and narrower sense—there seems to be some doubt as to what extent the individual poll-tax-payer was personally responsible for payment to the district treasury where the tax registers showed amounts against the name of each tax-payer. These same registers raise the question of rate and uniformity of poll-tax. They bear out neither the general rate of two dinars per head, nor the rate of four, two, and one dinar supposed to have been taken from the rich, the middle class and the poor, respectively. Again, the registers list fractions of a

man and the rates vary from two to eight solidi.[61] The totals also give an average of varying rates. From such data it is concluded that poll-tax was not an individual tax but a collective tax levied in a lump sum on the community, being poll-tax only in the sense that it was based on the number of taxable men in each community.

The yearly tax assessments were not made until the high level of the Nile had been ascertained. Tax notifications stating the full amount for the year followed soon after but actual payments had to await the results of the harvest and were generally made in two instalments. The tax registers show frequent payments of various sizes credited to the same account, though they were made by different individuals whose relationship to the actual land-owner is not always clear. Unfortunately, though the date of payment is stated, the part payment on which they were to be applied is not indicated. Hence it is difficult to tell definitely to what extent local tax-payers' accounts were allowed to fall into arrears. However, we have indirect factors which should throw some light on the question. On the one hand, the entire machinery of the government was directed towards an efficient system of taxation—a system in which punctuality of payment was of prime importance. Instances are on record which show that in one case of partial failure of crops or other natural calamities, grain-taxes were in part comput-

61. Greek word for *dinar*.

ed in money at a reduced rate rather than allowed to accumulate in large arrears. It was only when even this computation worked an evident hardship, the taxes were temporarily remitted. In a centralised system the district officer would be held responsible for all delays, which again would make him frown on arrears under all circumstances, even though he himself, to a certain extent, indulged in the forbidden practice. Under weak and corrupt Governors this indulgence would assume larger proportions, allowing tax arrears to accumulate in large sums.

Taking all these facts into consideration, we may safely conclude that taxes in kind were paid promptly whereas money taxes came more slowly but were hardly allowed to get more than a year overdue.

The total revenue, after deducting local expenditures, found its way either into the treasury in Alexandria or to that in Fustat. The Alexandrian portion seems to have been used chiefly for naval enterprises, which were conducted annually, at least during Kurrah's time. The portion sent to Fustat found its way eventually to Damascus, to Mecca and to Medina. What proportion of the total was spent on local, provincial, and imperial purposes there is no way of finding. It must have varied according to the honesty of the local officers, the avarice of the Governor, and the insistent demands of the Caliphs.

Conflicting Details Regarding Taxation. We have seen in the previous pages conflicting rates regarding various taxes, especially the poll-taxes. We should not be surprised to find conflicting accounts as

details which, in a subject of this nature and the distance of the period, are unavoidable. In spite of the conflicting accounts, the principle underlying the system of taxation comes clearly to light. It was a just principle of assessing the taxes according to the nature of the soil and the mode of cultivation. We cannot, indeed, pass over unnoticed a very exceptional measure of 'Umar I which he sanctioned in favour of the Arab tribe of Banu Taghlib who carried on agriculture in Mesopotamia. He would not treat this tribe, pure Arab as it was, on the same footing as subject races, though they obstinately refused to accept Islam and persisted in the faith of their forefathers, i.e. Christianity. 'Umar, discharging them from the obligation of paying capitation- and land-taxes, directed that the Taghlabides should pay double the amount of the poor-tax.[62] In Syria and Egypt, there were some variations in the land-tax; the assessment and payment of the tax were determined according to the changing conditions of agriculture. In Spain, after the conquest, the Arab General divided among his troops all lands coming into Muslim possession by conquest and not by capitulation. But the fifth fell to the State and, being declared crown land, was allowed to remain in the hands of the Christians, the original owners, for cultivation as before, in return for delivery to the treasury of one-third of the produce. Lands obtained by capitulation lying in the northern pro-

62. Ibn Athir, op. cit., II, 410; Mawardi, op. cit., p. 242.

vinces remained in possession of their former owners as against payment of the capitation-tax.[63] Next to these sources of income, one most considerable was the war booty, of which the fifth fell to the treasury, a source which in the almost unbroken conquests of the first century must have yielded immense amounts of money. The increase in revenue soon brought home the necessity of keeping regular accounts of income and expenditure and, for this reason, indeed did 'Umar adopt the institution of the revenue board existing in the Persian Empire under the title of *Diwan*: a name later on extended to all other government offices. When once the Governor of Bahrain came to Medina, he announced to the Caliph 'Umar that, of the revenue of the province, he had brought with him only one-half and that half amounted to a million dirhams. The Caliph treated it as a joke, for the figure far exceeded anything that he had hitherto heard. When, however, convinced of the correctness of his statement, he thus addressed the people assembled in the mosque for prayer: "I have received great wealth from Bahrain; shall I weigh it out or count it over to you?" It is clear from this that, quite in conformity with the spirit of the patriarchal times, he intended to distribute among the comunity the money flowing into the State treasury. A man from among the people is said to have reported that he had seen the Persians

63. R. Dozy, *Recherches sur l'Histoire et La Literature de L'Espagne* (2nd ed.), I, 79.

keeping their treasury in order by means of a *diwan*, and he suggested that the same system should be adopted. 'Umar fell in with the proposal and directed a register of accounts to be kept showing both income and expenditure. This was an innovation in Medina. In the conquered provinces of the Byzantine and Persian Empires, in Egypt and Syria, books were kept by native Christians in the Greek language; in Babylon and Mesopotamia, by Persians in the Persian language. Under the Umayyad Caliphs, Greek and Persian were replaced by Arabic for the first time as official languages in account books, tax-rolls and chancery.[64] In Medina itself 'Umar had such a register of income and expenditure prepared with which he combined a system of annuity for all Muslims, fixed on certain, clearly defined principles.

Muslim Innovation of Dividing Tax Receipts amongst the Community. While earlier, Abu Bakr and even 'Umar himself, as we have seen, divided at once the State revenue among the community,[65] the immense and rapid growth of the religious community of Islam, the conversion, *en masse*, of almost all the inhabitants of the Arabian Peninsula, necessitated the introduction of order and method in the distribution of money—amongst the members of the community. Here the decisively democratic and

64. Baladhuri, op. cit., pp. 193, 453. See for further information Wellhausen, op. cit,

65. Abu Yusuf, op. cit. Abu Bakr ordered in Medina 9⅛ dirhams for all without distinction: men, women and children, freed men, clients. In the following year when still more wealth came in, each received 20 dirhams.

socialistic conception of original Islam lay at the basis. By its novelty and important consequences, this political institution stands out as one of the most conspicuous landmarks, not merely in Islamic history but in history as a whole. 'Umar took counsel with the most distinguished Companions of the Prophet as to how the division was to be effected. All were agreed in holding that the entire State revenue was the common property of the Muslims and as such was to be distributed among them. They referred to the Byzantine institutions which the Arabs had come to know in their wars and they suggested that, like the Greeks who kept a register of paid soldiers, a general census of the Muslims should be undertaken and each member of the community should be assigned a fixed share.

In drawing up this census, they carefully adhered to the principle of the division of the entire people into tribes and families. Beginning, as might be expected, with the family of the Prophet, they made the other Arab tribes follow in succession according to their relationships or intimacy with the Prophet.[66]

'Umar began his census with the widows of the Prophet. He placed 'A'ishah at the head of the list and assigned to her an annuity of 12,000 dirhams. She was followed by the rest of the wives of the Prophet

66. We can form a good idea of the tribal register by referring to th tribal register made by Wustenfeld and specially that of the Ishmailite trib which is as follows: (1) widows of the Prophet, (2) Hashimites: (*a*) 'Ali an his family; (*b*) the Abbasids; (*c*) Abu Bakr and the tribe of Taim; (3) 'Um and the tribe of 'Adi, Jomah and Saham; (4) 'Uthman ibn 'Affan and Umayyads.

who received 10,000 each. (According to Mawardi only 6000 each; but, according to Abu Yusuf all the widows of the Prophet received 12,000 with the exception of Safiyyah and Jawaraiyah, but they protested against it and received the same amount as the rest.)[67] After[68] these followed those members of the Hashimite family (but with less amount) who had embraced Islam at a later stage. After the relatives of the Prophet came the *Ansar* and they began with Sa'd ibn Mu'ad of the Aus tribe. Then came his kinsmen, among them those always had precedence who had early accepted Islam and had distinguished themselves in the wars and campaigns of the Prophet. In this, however, 'Umar departed from the practice followed by Abu Bakr which assigned the very same amount to all Muslims irrespective of rank and position. Proceeding on this basis, he placed at the head those *Ansar* and *Muhajirin* who had fought in the Battle of Badr ; to every one of these he allowed an annuity of 5000 dirhams and the same to their allies (*hali*) and clients (*mawali*).

He assigned 4000 dirhams to those who had either accepted Islam early or who, prior to the persecution of the Meccans, had fled to Abyssinia for the sake of their faith. To the sons of the warriors who had taken part in the Battle of Badr he assigned 2000

67. Abu Yusuf, op. cit.

68. Mawardi, op. cit., Chapter XVIII. The same amount he assigned to the members of Hashimite family, Muttallibides and Hashimites who had taken part in the Battle of Badr.

each, making an exception only in the case of Hasan and Husain whom he allowed 5000 each; and the same figure he fixed for 'Abbas ibn 'Abd al-Muttallib. He assigned 3000 dirhams each to those who joined the Prophet prior to the taking of Mecca. To those who accepted Islam on the conquest of Mecca he allowed 200 dirhams each and the same amount to the sons of *Ansar* and *Muhajirin*. For his own son he set spart 3000 dirhams.[69] Some, who had enjoyed the special favours of the Prophet, received an exceptionally high annuity, i.e. 4000 dirhams.[70] After these, he arranged the greater mass of the Arab tribes according to their position in the tribal register, their knowledge of the Qur'an and their military services. To the Yamanides and the Kaisides, who had settled in Syria and Iraq he assigned a pay ranging from 300 to 1000 and even to 2000 dirhams.[71] All others were placed in a subordinate class. To the women, who likewise left Mecca after the Prophet's flight to Medina, he assigned a fixed amount: to some 1000 dirhams; to others, various sums ranging between 1000 and 3000 dirhams. One hundred dirhams each he fixed for weaned children, raising the figure to 200 or even more when they grew up. It must be especially noted that 'Umar, in assigning annuities, made no distinction between the full-blooded Arab (*sarih*) and the half-Arab (*halif*) and the client

69. Abu Yusuf, op. cit.

70. Mawardi, op. cit., Chapt. XII. His account agrees with that of Abu Yusuf whom he has undoubtedly used.

71. Ibid.

(*mawla*). He would have all Muslims treated alike without distinction. This is the laconic order he issued to an Arab governor who, while refusing the annuity to the clients, granted it to the Arabs: "It is wicked in a man to despise his brother Muslim." Even to non-Arab converts did 'Umar assign annuities: to various Persian landlords in Mesopotamia and to a quondam Christian of Hirah.

As regards foreign converts and their clients, he gave the merciful counsel to his commanders to treat them on precisely the same footing as Muslims of Arab origin. There was to be no difference between them in point of rights or duties either. He even permitted that they should constitute a special tribe of their own, governed according to the very same principles which had applied to the Arab tribes in matters of annuities. Ten dinars each he assigned to the wives and children of soldiers who had either fallen in battle or were actually engaged in active service. This measure was confirmed by 'Uthman and later Caliphs.[72]

He did not leave even the Muslim slaves unprovided for. He assigned an annuity of 3000 dirhams to each of the three slaves who had fought in the Battle of Badr. Apart from the annuities, he appears to have distributed fixed rations every month among the troops and the inhabitants of Medina: for every man, including the slaves, nine mudds of wheat and

72. Shibli, *Al-Faruq*, English translation: *'Umar the Great* (2 vols.) by far Ali Khan and M. Salim Ashraf (Lahore: Sh. Muhammad Ashraf, rious reprints.

two kists of vinegar.

This census of the Muslim population was apparently done with great care. Every Arab tribe, with its members, was entered on a special list and changes, due either to death or birth, were very scrupulously noted. It is reported that on one occasion the Caliph 'Umar I went personally over with the register to the Khuza'ah tribe and invited its members to come and individually receive their share from him.[73] Later, under Mu'awiyah an overseer was appointed who recorded births and deaths.[74]

In considering these facts, one must confess that here we stand face to face with one of the most singular events in history. A general census of the inhabitants was undertaken even in the old Asiatic Empire—as also it was undertaken in the Roman Empire—but the end in view was to make the burden of taxation heavier and to shut out every possible chance of evading the tax-gatherers. 'Umar I, however, effected the census in a wholly different spirit. It was to assign to all who professed Islam their legitimate share in the State revenue, to which according to the accepted notions of the time, they had an undoubted claim. We need hardly discuss the impression which this measure must necessarily have created upon the populace. However, this happy state of affairs did not last very long.

73. Baladhuri, op. cit., p. 448.

74. Suyuti, op. cit., I, 70. This system of register was fully completed by 'Umar in 20640.

3

THE CONCEPT OF LAND RIGHTS IN ISLAM

The problem of land reform has attracted increasing attention during the last few years. Cultivable land, in practically all old countries, is limited in supply and its distribution is rather unequal. New areas could be brought under cultivation only if facilities for irrigation in the semi-desert areas and for reclamation in marshy areas were forthcoming. As these projects require large investments, and capital is rather scarce in underdeveloped areas, the possibilities of bringing any new lands under cultivation are quite limited. The rapid increase in population in some of the Middle Eastern countries, particularly in Egypt and Pakistan, has increased the demand for land, which has been further aggravated by lack of employment facilities in other vocations. The introduction of political reforms and the extension of voting rights are making the rural population more vocal, and the politicians cannot remain indifferent to their demands, the most important of which is for a more equitable distribution of land.

It is not intended in this chapter to discuss the merits or demerits of such a demand. Here we intend to examine the Islamic concept of land rights,[1] and

1. We are concerned here with the principles rather than the practices during long Muslim rule in various countries at different periods of history.

shall illustrate these principles from the Qur'an and from the practices followed by the Prophet Muhammad and his first four successors, whose actions are considered to be the basis of Muslim case law. A close and careful examination of this problem has become all the more necessary because a good deal of heat has been generated by conflicting views in regard to rights to individual ownership of land, and the holders of these divergent views claim the authority of religion in support of their views. One group claims that Islam is against holding of land as private property, and that its teachings favour the nationalisation of land. The other group strongly resents such an interpretation of the Islamic laws regarding land rights, and claims that Islam places no ban or restrictions on holding of private property in which land is included.

Rights in Land According to the Qur'an

The primary authority on Islamic law is the Qur'an. To start with, we should, therefore, try to find out the teachings of the Qur'an on this subject. A careful study of the Qur'an, however, reveals that there is no revelation in the Qur'an bearing directly on the subject. It will be convenient if we first examine the claim of those who say that Islam is in favour of nationalisation of land.

The Qur'anic verse which is presented as the principal authority in favour of land nationalisation is found in lv. 10-12 :

"And the earth, He has set it for living creatures ; therein

is fruit and palms having sheathed clusters, and the grain with (its) husk and fragrance."[2]

From this verse it has been inferred that private ownership of land is inadmissible and that the Qur'an prohibits any system of land-ownership in which the landlord exploits landless tenants inasmuch as the land has been created for the living creatures of God. The passage as it stands certainly does not convey any such meaning; the matter should be examined on the basis of its historical background, especially of the verses itself, and in the light of interpretations made by authoritative commentators.

This passage is one of the early Meccan revelations and in it the attention of the people is drawn to he glory and powers of the God of Islam. It should e remembered that Mecca at that time was the entre of the Arab pagan world and the Ka'bah was he depository of about five hundred different idols.

The passage, of which a few lines have been uoted above, runs in full as follows :

"The Beneficent (God) taught the Qur'an. He created *man*, ught him (the *mode of*) *expression*. The sun and the moon llow a reckoning, and the herbs and the trees adore (Him). id the heaven, He raised it high, and He set up the measure, at you may not exceed the measure, and keep up the balance th equity, nor fall short in the measure. And the earth, He s set it for (His) creatures ; therein is fruit and palms having eathed clusters, and the grain with (its) husk and fragrance. hich then of the bounties of your Lord will you deny?"[3]

2. M.M. Pickthall, Tr., *The Meaning of the Glorious Koran*, p. 382.
3. Maulana Muhammad 'Ali, Tr., *The Holy Qur'an* (Lahore : Ahmediy-Anjuman Isha'at Islam, 1951), lv. 1-13.

The whole chapter continues in a similar strain, pointing out that the beneficent God has provided so many good things for His creatures. Clearly, from this general account, one cannot infer any such positive interpretation that would bar private ownership of land and require land to be treated as communal property.

Those who are conversant with the teachings of the Qur'an are aware that, when a certain thing has to be barred or prohibited, the commandments are clear and positive and reasons are also given for such a course of action. There is nothing of this sort in the passage, that has been quoted. The chapter takes its title from the name of the Divine Being, the Beneficent: with which it begins, and the entire chapter speaks of the beneficence of God, repeating the words, "Which then of the bounties of your Lord will you deny?". Other verses which might be quoted in support of the suggested interpretation are a little more appropriate, for example, in ii. 29, one finds the statement: "He it is Who created for you all that is in the earth," or elsewhere in the Qur'an there is the passage: "And He has made subservient to you whatsoever is in the heavens and whatsoever is in the earth, all from Himself."[4]

Some have asserted that a positive authority in favour of land nationalisation is found in the following words of the Qur'an: "Land belongs to God. He causes such of His servants to inherit it as He

4. xlv. 13.

pleases, and the end is (best) for the righteous."

It is argued that the caliph as the vicegerent of God owns all land of the nation as a whole, and that individuals have no right to appropriate any part of that land to themselves. But even the first four words taken by themselves do not convey this meaning which is contrary to the whole philosophy of the Qur'an and of Islam.

According to Islam, everything belongs to God as He is the Creator of everything. It is mentioned in the Qur'an: "To Him belongs whatever is in the heaven and whatever is in the earth and whatever is between them, and whatever is beneath the soil."[5] According to Muslim concept, the very life of a Muslim belongs to God. So it is quite clear that the words "land belongs to God" do not mean that land is national property.

To sum up, the few verses of the Qur'an that have been quoted as authority for the nationalisation of land on the ground that it belongs to God and that the Muslim State, which acts in the place of God on earth, should, therefore, make land the property of the nation, do not in fact support this contention, because everything ultimately belongs to God. This contention is further supported in another verse, in xvi. 52. It is mentioned that "whatever is in the heavens and the earth is His." The same fact is emphasised in ii. 284.

Land as Private Property. We have seen above that

5. xx. 6.

there is not a single verse in the Qur'an which supports the contention that land is national property. It has, on the other hand, been contended that neither is there any verse which supports the right of private ownership of land. It is, indeed, quite true that there is no verse in the Qur'an bearing directly on the subject, and the authority of the Qur'an as such cannot be invoked for either of the conflicting views. For this we have to rely upon indirect evidence.

It is stated in the Qur'an :

"God has made some of you excel others in the means of subsistence, so those who are made to excel do not give away their sustenance to those whom their right hands possess, so that they should be equal therein."

Though this verse does not positively establish the right of private ownership of land, it clearly shows that Islam does not envisage the system of equality of wealth as advocated by communists. The words attributed directly to God indicate that He gives more to some and less to others. If rights of private ownership of wealth are not admitted, then one may ask how the inequality arises. Other verses of the Qur'an also point indirectly to the ownership of land in private hands, for example, it is mentioned in the Holy Qur'an: "Eat of its fruit when it bears fruit and pay the due of it on the day of its reaping..." In this verse, payment of the due refers to *zakat* on land, which is paid only on private property. The question of payment of *zakat* could not arise if land were national property. The payment of *zakat* which

is repeatedly ordained in the Qur'an is based on the concept that there are many less fortunate people who do not have worldly possessions and that the fortunate ones should not forget them but should share with them some of their wealth. Further evidence is found in ii. 267 :

"O you who believe, spend (benevolently) of the good things that you earn and of that which We bring forth for you out of the earth, and aim not at the bad to spend thereof."

Authorities agree that here, too, the reference is to the payment of *zakat*. This commandment can apply only to those who are capable of paying *zakat* and these are generally comparatively well-to-do people.

It must be admitted that while there is no verse in the Qur'an directly establishing private ownership of land, a number of verses, however, accept inequality of wealth and the payment of *zakat*, which is levied on private property. It is well to remember here that the Qur'an recognises the teachings of earlier scriptures such as the Old and New Testaments, and it is only when it wants to change an existing law that a direct and pointed reference is made to it, or when people have faltered in the interpretation of previous laws that the law comes under discussion.

Private ownership of land was the custom during and before the time of the Prophet. Lammens[6] mentions that private individual landed property was common in Ta'if even before the Prophet's time. He

6. Henri Lammens, *Islam*, tr. Sir E. Denison Ross, and *Etude sur le regeme du Calif Omaiyade* (Beirut. 1906), p. 137.

further brings the corroborative evidence of the Qur'an, where cultivable land is mentioned as one of the objects for the acquisitive desire of man. Another foreign expert[7] on Muslim land systems mentions that the Prophet adopted the practice of giving pieces of land to private individuals and gives the name of the first Caliph who received a parcel of land from the Prophet.

The fact that there are no express laws in the Qur'an or any clear commandments in any authentic traditions regarding the rights in land and tenancy is explained by the fact that this was the prevalent system in Arabia and other countries and it was not intended in any way to change this system. The customs and usages that prevailed among the Arabs at the time of the promulgation of Islam were considered right to form an integral part of the Islamic law.[8]

The author of the *Hidayah*, for instance, in establishing the legality of partnership, says : Partnership is lawful because the Prophet found people purchasing it and confirmed them therein. In commenting on this passage Ibn Hammam remarks[9]: There is clearer authority in favour of legality of partnership than certain traditions, namely, continuous practice from the time of the Prophet, and thus there is no

7. A.N. Poliak, "Classification of Land and Its Technical Terms," *American Journal of Semetic Languages and Literature*, January 1945.

8. Sir Abdur Rahim, *Muhammadan Jurisprudence* (London/Madras, 1911), p. 1.

9. Ibn Hammam, *Fiqh al-Qadir*, V, 377.

need for relying on any particular dicta.

Discussing the general principle of applicability of the then existing laws and practices for Islamic people, another eminent authority[10] on the Qur'an remarks : We hold permissibility to be the original principle and prohibition to be equivalent to abrogation, with reference to the interval of time between Jesus Christ and the Prophet, when lawfulness was the original attribute of human action, thus the Prophet came and declared some acts to be unlaw ful, so that the rest remained lawful and permis sible.

How Rights in Land Can be Acquired? Now that we have shown that there is no ban in Islamic law to own land as private property, we shall proceed to examine as to how rights to land can be acquired under Islamic law. In discussing this, we shall proceed to throw some light on the subject from the earliest period of Islam, which evidence incidentally further strengthens the case of those who claim that Islam allows private property in land.

According to Islamic law, property rights can be acquired by the following methods: (1) by inheritance, (2) by purchase, (3) by grants from the State (*fay'* lands), (4) by reviving *dead* lands.

(1) *Inheritance.* The law of inheritance is too well known and clearly supported in many verses in the Qur'an,[15] so that it does not require further detailed

10. Sir Sayyid Ahmad Khan, *Tafsir-i Ahmadi* (Bombay ed.), p. 18.

examination here.[11] Children (both male and female) are entitled to inherit and become the owners of the property left by their parents.

(2) *Purchase*. The acquiring of rights in land by purchase is also well established in Islam. The Prophet himself purchased land for building his house in Medina and this example was adopted by other Companions who followed the Prophet from Mecca to Medina. The tradition goes on to say that the land which the Prophet purchased belonged to two orphans and that their guardians wanted to give it free to the Prophet, but he refused and paid a reasonable price.

(3) *Grants from the State*. The institution of *fay'* in its final form was introduced by 'Umar b. 'Abd al-'Aziz, known as 'Umar II (99-102/717-720). It is generally accepted by the Shafi'ites,[12] that *fay'* resulted from a *sulh* (treaty), a view which is also supported by Abu Hanifah.[13] But the opposite theory, namely, that *fay'* depends on surrender, is maintained by other Muslim scholars. This view obviously has gained the upper hand since in Abbasid[14] times the tax levied on conquered lands was called *fay*

11. For details see Mirza Muhammad Bashir Ahmad, *Islam and Ownership of Land* (Urdu), (1950), p. 52. See also *Sahih Bukhari*, chapter relating to the Residence of the Prophet.

12. Followers of Abu 'Abdullah Muhammad b. Idris al-Shafi'i, who was born in 150/767 at Ghazzah (Arabia) and died in 209/820. He founded the Shafi'i school of Muslim law.

13. His full name is al-Nu'man b. Thabit Abu Hanifah. He was born about 81/700 and died probably in 150/767. He is the founder of the Hanafi school of Muslim law.

14. Abbasid dynasty had 37 Caliphs and ruled from 132/640 to 749/12

while that levied on treaty lands was called *kharaj*. The only obligation on *fay'* lands was to pay tithe, which is corroborated by Abu Yusuf[15] and Becker.[16] The grant of *fay'* lands is called *iqta'*. *Iqta'* is one of the main problems presented by the economic structure of Islam. It is difficult to render an exact English translation of this word. It originally meant the act of bestowing or allotting a cut-off piece of land. The nearest English translation can be rendered "fief," though it must be understood that it is not exactly the same thing as the fiefs of medieval Europe.

Originally these lands were bestowed on deserving persons as a token of appreciation of services to the cause of Islam. Abu Yusuf mentions that occasionally during the earlier period of Islam they were also given to political opponents to pacify them and to attach them. Persons to whom they were granted had the full right to dispose them of by sale. For example, the *iqta'* granted by the Prophet to Bilal b. al-Harith (the slave who became famous through services rendered to Islam) was sold by his descendants to 'Umar II. 'Umar later discovered minerals

15. Abu Yusuf Ya'qub (d. 182/798) and Muhammad b. al-Hasan al-Shaibani (d. 189/805) are two most important disciples of Abu Hanifah. The former is the author of the well-known book *Kitab al-Kharaj*, a standard work of reference on land tenure and taxation, to which we shall frequently refer in this chapter. These two pupils are more authoritative for the development of the teachings of the Hanafi school than Abu Hanifah himself.

16. C. H. Becker, *Islamstudien I*, Leipzig, 1924; *Papyri Schott-Reinhardt* (*Veroffentlichungen aus der Heidelberger Papyrus Sammlung III*, 1), Heidelberg, 1906.

on this land, and paid royalties for the mineral rights to the family of Bilal on the plea that he had purchased the land as arable land and that the mineral rights did not accrue to him. This illustrates the concept of private property rights that prevailed at the time of the Prophet and the first four Caliphs. Abu Yusuf[17] mentions that the system of *iqta'* introduced by the Prophet continued until the early Abbasid period. During this period it was clearly understood that *iqta'* that had been given by the State could not be taken back and given to someone else. Such an act would be simply usurpation. Abu Yusuf further mentions that the same absolute rights enjoyed by an inheritor belong to a buyer who purchases the *iqta'* from the original grantee or his heirs.

However, Abu Yusuf's writings also suggest that the Abbasid rulers[18] had already begun to regard *iqta'* grants as a looser form of possession in which the State retained a real right of ownership and he felt obliged to administer a warning to the rulers to this effect.

Later with the progress of Muslim conquests the policy began to change. It is unfortunate that the change was not frankly recognised and openly advocated, but traditions in support of it began to develop.

Finally, we meet with traditions showing a directly negative attitude towards the *iqta'*. Certain orthodox jurists are inclined to assume that this is an innova-

17. Frede Lokkegaard, *Islamic Taxation in the Classic Period.*
18. Abu Yusuf, *Kitab al-Kharaj*, Cairo. Quoted by Lokkegaard.

tion. Traditions of this kind seem to belong to ascetically-minded, perhaps Alidic, circles, apparently turning their venom against the Umayyads.[19] It is said that of the first four Caliphs, Abu Bakr,[20] 'Umar I,[21] Uthman[22] and 'Ali,[23] only 'Uthman granted fiefs. This is implied in the view of history according to which 'Uthman constitutes a necessary factor for explaining the corruption of the Golden Age.

Thus 'Umar I is said not to have given *iqta'* from the domains (*sawafi*) in *Sawad* (the alluvial land between the Euphrates and the Tigris), but to have reserved these lands as the property of the nation. When, on the other hand, it is said that 'Uthman granted *iqta'*, no doubt against the levying of *fay'*, this assertion may have a certain historical justification, as it was not until his reign that there was any orderly regulation worth mentioning after the turbulent conditions of the conquests. Mawardi[24] states that the *iqta'* in question took a new form, the *iqta' ijarah*, or the *iqta'* of lease, against the earlier *iqta'* of *tamlik* (property).

19. 46-132/661-750.

20. The first Caliph of Islam whose full name is 'Abdullah b. 'Atik Abu Bakr. He was proclaimed caliph in 11/632, and died after two years in 13/634.

21. The second Caliph of Islam. His full name is 'Umar b. al-Khattab, who succeeded Abu Bakr in 13/634, and after ten years' rule was assassinated by a Persian slave in 24/644.

22. The third Caliph. His full name is 'Uthman b. 'Affan, succeeded 'Umar in 24/644, and was slain in 36/656.

23. The fourth Caliph. His full name is 'Ali b. Abu Talib. He succeeded 'Uthman in 36/656, and was assassinated in 41/661.

24. His full name is Abu al-Hasan 'Ali ibn Muhammad ibn Habib al-Mawardi, and is the author of the famous book *al-Akham al-Sultaniyyah* ("State Regulations") which work has been frequently quoted by us.

The claim cited above, however, cannot be maintained in the face of the still existing historical records. Maqrizi[25] mentions some examples of *iqta'* given by 'Umar I after the conquest of Iraq. He gave some *iqta's* even before the conquest (perhaps in connection with a development similar to that of the fiefs of the Prophet mentioned above), which were given from that part of the booty which was left to the free disposal of the leader, when distributing the portions that were due to the soldiers. Likewise there is a reference to an *iqta'* issued by 'Ali, the fourth Caliph and son-in-law of the Prophet.

It was very difficult subsequently to disentangle the controversy that arose concerning these grants, a controversy further complicated by conflicting authorities. It has been contended that 'Umar I changed his views. Qalqashandi,[26] in an effort to harmonise the conflicting views, arrived at the conclusion that the Prophet gave fiefs before the conquest, while 'Uthman was the first who did so afterwards. Imam Shafi'i in *Kitab al-Umm*, on the other hand, suggests that the transactions relating to the Prophet had no real importance because they affected only a very small territory.[27] We find a clearer grasp of this problem in *Kitab al-Kharaj* by Abu Yusuf, the standard work on the subject.

In Abu Yusuf's work there are observations and

25. Al-Maqrizi in his famous work *al-Khittat*, 4 vols., Cairo, 1356/1917.
26. Al Qalqashandi in his famous work *Subh al-A'sha*, 14 vols., Cairo, 1338/1919.
27. Lokkegaard, op. cit., pp. 18-19.

traditions which show the general trend of development for the *iqta'* institution. Originally the grant of *iqta'* conferred unrestricted rights, which, however, later began to be restricted. This view is supported by several European scholars.

Lammens[28] mentions that in the town communities of Hijaz there was a well-developed sense of individual ownership, and landed property was common for the wealthy part of the population. There is much contradictory evidence on this subject, and especially the later traditions are far from satisfactory. Many eminent Muslim writers seem to have been misled by the mass of contradictory traditions. Abu Yusuf, however, maintained a well-balanced view. He quietly looks beyond the web of contradictions, stating that the Prophet gave fiefs and thereby reconciled people with Islam, and that the Caliphs gave fiefs after him, as many thought their *iqta's* were legitimate.[29]

We may conclude that the principle of private ownership of land is amply supported by the grants made from State lands by the Prophet himself and by the first four Caliphs. The following authentic traditions[30] further support the above view.

28. H. Lammens, *La cite arabe de Taif a la veille de l'hegire* (Melanges le l'Universite Saint-Joseph, Beyrouth), tome 8, fasc. 4, 19.

29. Lokkegaard, op. cit., p. 19.

30. The entire body of traditions is called *Sunnah*, while every individual radition is called *hadith*. There are six standard works on traditions, each nown after its author : (1) al-Bukhari (d. 256/870), (2) Muslim (d. 261/875), 3) Abu Dawud (d. 275/888), (4) al-Tirmidhi (d. 279/892), (5) al-Nasa'i (d. 303/ 15) and (6) Ibn Majah (d. 273/886). The collections by al-Bukhari and Muslim are held in great esteem. We shall quote each tradition according to he author of the work in which it exists.

'Urwah b. Zubair mentions that 'Abdur Rahman b. 'Auf narrates that the Prophet gave as a grant some lands to him and to 'Umar I. During the reign of Caliph 'Uthman, Zubair purchased some lands from the relatives of 'Umar which they had inherited. Zubair went to 'Uthman for the finalisation of this transaction and said that there was evidence from 'Abdur Rahman b. 'Auf that the Prophet had bestowed these lands on 'Umar I and that he wanted to purchase his share. The transaction was confirmed by 'Uthman as he regarded 'Abdur Rahman b. 'Auf as a very reliable witness.

Al-Quma b. Wa'il[31] relates that his father, Wa'il b. Khanjar, said a piece of land was granted to him by the Prophet in Hadramaut.

Abu Bakr's daughter Asma'[32] relates that the Prophet gave to her husband. Zubair, a piece of land in Khaibar which had date-palms and other trees.

'Urwah b. Zubair relates that the Prophet gave him a piece of land from the groves of Bani Nadir which had been made State land.

'Abdullah b. 'Umar relates that, in addition, a big area of land was given by the Prophet to Zubair.

'Umar b. Dinar[33] relates that when the Prophet came to Medina he granted some land both to Abu Bakr and to 'Umar I.

Abu Rafi'[34] relates that the Prophet had granted a tract of land to some of his relatives but they could not develop or cultivate it. During the reign of 'Umar, they sold it for 8000 dinars.[35]

There are a number of other traditions of land grants by the Prophet which became the private property of the persons to whom the land was granted. These lands were inheritable, which was a commo

31. Quoted by Abu Dawud and Tirmidhi.
32. Quoted by Bukhari and Abu Dawud.
33-35. Quoted by Abu Yusuf, *Kitab al-Kharaj*.

practice. The grant of these lands was called *iqta'*.

The system expanded rapidly and covered vast areas of the best lands. They could be bought and sold. The *iqta'*-holders did not, as a rule, reside on their estates; they lived in towns and cultivated the estate through tenants.[36]

(4) *Ownership through Revival of Dead Lands.* There is ample evidence from reliable tradition to support the view that if a person revived dead land it became his private property.

According to Abu Yusuf, land is regarded as "dead" if there is no trace on it of any cultivation or construction, if it is not meant for the use of a neighbouring locality, if it is not common pasture, or a burial ground, if it is not used to get wood, or to get any food for cattle, or if it is not owned or possessed by anyone.

'A'ishah, one of the wives of the Prophet, who kept herself well acquainted with the affairs of State, mentions that the Prophet said that anyone who revived land which did not belong to anybody became its owner. Another tradition from 'Umar also supports this contention and affirms that if anyone revives dead land, it becomes his property.

Ownership of Vacant Lands Vacant lands may be divided into two categories : (*a*) *Mawat*, (*b*) *Khalsah.*

(*a*) *Mawat* lands were those lying vacant either because their owners had died without any heirs and the lands had been neglected, or because there had

36. G. Heyworth-Dunne, *Land Tenures in Islam*, Cairo, 1952.

never been any owner of these lands, which were left uncultivated because of lack of irrigation or water facilities. These lands are also called dead lands.

(*b*) The *khalsah* or crown-lands were those which had been proclaimed as the property of the State—public domain. These included several types:

(*i*) *Land surrendered to the State by its owners, who had authorised the State to make whatever use of these lands it deemed fit.* Ibn 'Abbas relates a tradition that when the Prophet migrated from Mecca to Medina, the inhabitants of Medina surrendered to the Prophet those of their lands which they could not irrigate themselves and authorised the Prophet to do whatever he liked with them.

(*ii*) *Land of which the owners had been dispossessed by the Muslim State as a punishment and which had been annexed as crown land.* During the time of the Prophet, the lands in the outskirts of Medina which belonged to Bani Nadir[37] belonged to this category.

(*iii*) A third type, which considerably increased the area of public lands, developed after the death of the Prophet when the Muslim conquest of adjacent countries started. For instance, after the conquest of Iraq all the lands belonging to the Persian King or in the possession of his family were declared State lands. Similarly, lands belonging to those who had died during the war or had absconded were declared State lands.

37. Quoted by Abu Dawud.

Samurah b. Jundub[38] reports that the Prophet said that if any person fenced or enclosed vacant land, that area belonged to him. This reminds one of the earlier colonial days of the United States of America and of some other colonies where land was abundant and any new settler was free to occupy vacant land, but it was a condition of ownership that only that area would be treated as his property which was fenced or enclosed.

'Urwah b. Zubair Tabi says : "I stand witness to the decision of the Prophet who proclaimed that land belongs to God and to all persons. But any person who revives dead land, he becomes its owner."

Some more relevant traditions are given below.

Sa'id b. Zaid[39] says that if anybody revives dead land, it belongs to him. But nobody has any right to encroach upon the property of others. The idea underlying this tradition is that when a person wants to revive dead land he must ascertain that it does not belong to anyone else.

Time Limit for Revival. It is not enough merely to enclose vacant land and then to maintain ownership of it indefinitely. The land must in due course be brought under cultivation. Authorities agree on three years as the common period during which the

38. The simple right of first occupancy is not sufficient to obtain a title to ownership. It must be supported by labour, i.e. the occupant should have taken pains to bring the land under cultivation by clearing, etc. He retains his title as long as the land is cultivated (Dr Worms, "Recherches sur la constitution de la propriete territorial dans les pays musulmans," *Journal Asiatique*, 1842-43.

39. Quoted by Abu Dawud and Tirmidhi.

land must be cultivated; otherwise, the right of ownership lapses. The same criterion was adopted under the Ottoman Land Code during the Turkish regime. The following tradition which is considered authentic and has not been disputed by anyone has a direct bearing on the subject.

Tawus Tabi[40] relates that the Prophet said: "Any vacant land which is not in the possession of anybody belongs to God and His Prophet and is available to anyone who revives it. Anyone who keeps it vacant for three years loses all rights to it."

This is further supported by the proclamation of 'Umar I[41] who said that "the dead land belongs to its reviver provided it is not unnecessarily kept unproductive; in such a case a person loses all rights after three years." The necessity for this proclamation arose as many people had started occupying dead lands without cultivating them. All the Muslim jurists are unanimous in the view that any person who revives dead land becomes the owner. However, Abu Hanifah asserts that the permission of the State is necessary to revive dead land in order to claim a right of ownership.[42] This view is not shared by other equally respected and eminent jurists, such as Abu Yusuf, Muhammad, Shafi'i and Ahmad b. Hanbal, who maintain that the traditions on the

40. Quoted by Abu Yusuf, op. cit.

41. Shaikh 'Ali Muttaqi has gathered all traditions in his book, *Kanz al-'Ummal*. Sse vol. II, chapter relating to the revival of dead lands.

42. This view is supported by Worms who asserts that in order to revive dead land it is necessary to obtain permission of the sovereign.

subject are quite clear and that no permission from the government to revive dead land is necessary. They maintain that, in view of the clear commandments about the revival of dead land by the Prophet, a person has the right to do so and the government should recognise this right and in case of dispute should undertake to decide the matter.

Malik makes a distinction between dead lands which are close to inhabited places and those which are far from it. He concedes that the right to revive dead land without State permission does not apply to the former, but that for the latter no such permission is necessary.

It may be stated here that in our view dead lands have at all times and in all countries been a part of the public domain; hence the acquisition of it must be by the sanction of the State.

It is our view that the stand taken by Abu Hanifah is more rational and practical. He goes to the spirit of the traditions, while the other jurists adhere more to the letter of the law. It seems to us that it was not necessary for the Prophet to go into all details of this problem as the jurists have done. As a practical man of affairs he gave a general injunction about the revival of dead land. At that time, there was no particular shortage of land and the number of Muslims who wanted to revive such land was rather limited. The inhabitants of Medina indeed had surrendered to the Prophet part of their land which they could not utilise themselves. In the absence of any direct tradition pro-

claiming that the permission of the government was not necessary, one is inclined to support the view taken by Abu Hanifah. If a right was given to everybody to occupy vacant land, one would have no means of knowing whether it was State land preserved for any particular purpose or private land lying temporarily vacant. This would lead to endless disputes even when intentions were honest. Abu Hanifah's contention is further supported by the practical action taken by the successors of the Prophet who were faced with practical problems of administration. Both 'Umar I and 'Umar II adopted a practical approach to the problem. If a case was brought to them in which a person had revived land thinking that it was vacant land, and later a claim was brought forward by someone else that the land belonged to him, he was given the right either to compensate the new occupant for his efforts and take back his land or to accept a price for the land from the new occupant and transfer his rights to him.

To sum up : (1) The system of private ownership of land was in existence at the time of the Prophet.

(2) It had also been in existence long before his time.

(3) The Prophet not only did not object to this system, but encouraged it by grants of State land and by granting property rights to those who revived dead land.

This subject has been considerably enlarged upon by eminent Muslim jurists, who strongly support

private property rights in land.

Views of Muslim Jurists Regarding Private Rights in Land. The juristic view regarding dead land has been thoroughly discussed by the author of the *Hidayah*.[43] In spite of a certain amount of repetition involved, a brief summary of his discussion on this subject is given below:

Mawat,[44] which we have translated as vacant or dead land, is defined in the *Hidayah* as:

"a piece of ground which, for a long time, has lain waste without belonging to any person, or which had been formerly the property of a non-Muslim, whose whereabouts are no longer known and is likewise so far removed from a village that, if a person calls out from thence, his voice cannot there be heard."

It is reported from Muhammad b. Hasan that it is a requisite that the ground be neither the property of a Muslim nor that of a *dhimmi*, and, likewise, that it should not be in use. If the owner is unknown, the ground in the meantime belongs to the Muslim community; but if he afterwards appears, it must be restored to him, and the cultivator is responsible for any damage he may have caused. Khudri maintains that *mawat* land must be at some distance from a village. Abu Yusuf agrees with Khudri that this condition is necessary for the reason that where the ground is close to a village it cannot be said to be entirely useless to its inhabitants. On the other hand, Muhammad b. Hasan holds it sufficient that the

43. *The Hidayah, or Guide.* A commentary on the Muslim laws, compiled by Ali ibn Bakr, Burhan al-Din, Tr. Hamilton, 2nd Ed. with Preface by S. G. Grady, London, 1870. 1st Ed. in 4 vols.

44. Arabic *ihya' al-mawat*, meaning, literally, the revival of the dead.

villagers do not in reality make use of the ground, whether it is near or not.

According to Muslim jurists, the cultivation of waste-land vests ownership of the land in the cultivator. According to Abu Hanifah, if a person cultivates waste-land without permission of the State, he does not, in that case, become owner of the land. The two disciples maintain that, in this case also, the cultivator becomes owner, because of a saying of the Prophet: "Whosoever cultivates waste-lands does thereby acquire the property of them," and also because they are a sort of common goods, and become the property of the cultivator by virtue of his being the first possessor in the same manner as in the case of seizing game, or gathering firewood. One argument of Abu Hanifah on this point is a saying of the Prophet: "Nothing is lawful to any person but what is permitted by the *Imam*."[45]

If a person cultivates waste-land, and afterwards relinquishes it, and another then cultivates it, some have said that the second cultivator is best entitled to the property, for the first was the owner of the profits only, and not of the land itself; therefore, upon relinquishing it, the second obtains a superior claim. It is certain, however, that the first cultivator may repossess the land from the second, because he is the owner of it by virtue of his having brought it

45. The word *Imam* is rather difficult to translate into English. In ordi nary usage it refers to one who leads the prayers. Originally it was used in the sense of head of the community or State and later became a designatio of eminent Muslim jurists.

to a state of cultivation (as appears from the saying of the Prophet quoted above), and does not forfeit his property by the relinquishment.

A *dhimmi* acquires ownership of the land he cultivates as well as a Muslim. If a *dhimmi* cultivates waste-land, he becomes proprietor of it in the same manner as a Muslim, because cultivation establishes a right of ownership.

A *dhimmi* and a Muslim, therefore, are alike in this respect, in the same manner as in all other aspects of property rights.

If the land is not cultivated for three years after it is marked off, it may be reassumed by the State. If a person demarcates a piece of land and marks it off by stones or such, and keeps it in that state for a period of three years without cultivating it, the State may in that case lawfully repossess it and assign it to another, because the ground was given to the first with a view to his cultivating it so that a benefit might ensue to the Muslims from the collection of tithe and tribute. As he neglected this, it is, therefore, incumbent on the State to deliver it to another so that the end for which it was given to the first may be accomplished. Moreover, the demarcation of the ground with stones does not, like cultivation, establish a right of ownership since by cultivating the land is understood rendering it productive, whereas the demarcation of it with stones serves merely to designate the boundaries. Land, therefore, still remains unappropriated as before.

With respect to the specification of three years,

necessary to confirm ownership, it is founded on a saying of 'Umar I: "The marker has no right after three years have elapsed." It is based on the principle that three periods of time are requisite for a person who marks a piece of land: one, that he may go to his place of abode after having set the marks; second, that he may there settle his affairs; and, third, that he may return to his land. Each of these several periods is determined at a year. If, therefore, after the lapse of three years the marker does not return to his land, it is presumed that he has relinquished it.

The view of the jurists seems to be that the revival of dead land must not be practised on the borders of land already cultivated. It is not permitted to cultivate a piece of waste-land immediately bordering upon land that is in a flourishing state as a space has to be left for the use of the cattle of the owner of the good land and also for piling up his stacks. Such land does not come under the description of waste-land any more than a river or a highway. The jurists maintained that it was not lawful for the head of the State to bestow on a person any article of indispensable use to the Muslims as a community, such as a salt pit, or a well from which people draw water to drink.

The traditions or the views of the jurists as discussed in the *Hidayah* really do not help us in gaining a clear view of land rights according to Islam. Even a well-recognised work like *Sahih* of Bukhari is of little help as it is full of contradictory tradition

without any historical perspective and the exact dates to which a tradition relates. One, however, gains a clearer understanding of this concept from the two eminent Muslim writers of the early Islamic period, Abu Yusuf[46] and al-Mawardi,[47] who are considered great authorities on the subject not only by Muslims, but by all eminent European scholars. We shall, therefore, resort to these two scholars to throw some light on this problem.

Abu Yusuf mentions two kinds of legal rights to land : the right of "lordship" and the right of possession. As regards the former, he divides land into three classes : (1) Lands which are under the "lordship" of the State, represented by the Caliph. The Caliph was authorised to impose land-tax (*kharaj*). This class of land was denoted as *kharaj*-land and consisted of lands conquered by the Muslims in war. (2) Lands on which the State had only limited "lordship" and could levy on the holders only such tax as was agreed upon with them at the time of the conquest. The holders of these lands, otherwise, had all property rights in their lands. (3) Lands upon which the State had no "lordship" other than political. Lands of this category were called '*ushri*- or tithe-lands, which had rights of absolute property. This class contained those lands the proprietors of which became Muslims at the time of the conquest and, as a result, had full right to their properties. Mawardi also deals with

46. Abu Yusuf, op. cit.
47. Al-Mawardi, *al-Ahkam al-Sultaniyyah*.

the subject at great length, but we shall examine his views in another chapter dealing with land tenures in Islam. Considerable light has also been thrown by a number of eminent German and French scholars on the concept of land rights in Islam, of whom we shall briefly mention a few.

Views of European Oriental Scholars. Hammer-Purgstall,[48] according to whom there were three main classes of lands: (*a*) '*ushri*-lands, which were distributed at the time of Muslim conquest among the conquerors as their property (*milk*); (*b*) *kharaji*-lands, left to their non-Muslim owners as their property, with no other distinction from the former than heavier taxation; and (*c*) the State domains, which were employed as military fiefs. This classification, based by Hammer-Purgstall on the authority of Ottoman writers, Mufti Abu Su'ud (the counsellor of Sulaiman the Magnificent) and Muhammad Ghalabi, was accepted by W. Padel,[49] but a more popular view was that of Dr Worms,[50] who was the first to utilise to a great extent *al-Ahkam al-Sultaniyyah* of Mawardi. Worms' conclusions on the identity of *kharaji*-lands and the State lands, and on the fiefs

48. *Geschichte des osmanischen Reiches* (2d Ed., 1834), II, 341. More fully in his *Des osmanischen Reiche Staatsverfassung und Staatsverwaltung.*

49. "Das Grundeigentum in der Turkei nach der neuern Gesetzgebung," *Jahrbuch der intern.*, Vereinig. fur vergl. Rechtsw. and *Volkswirtschaftslehre*, Vols. VI-VII, Abt. I (1903). Cf. W. Padel and L. Steeg, *De la legislation fonciere ottomance* (Paris, 1904). The opinion that *kharaji*-lands are the property of their holders was expressed also by Belin in *Journal Asiatique* (1861), pp. 414 ff.

50. "Recherches sur la constitution de la propriete territorial dans les pays musulmans," *Journal Asiastique*, 1842-43.

being the later use of those lands which became at the time of the Muslim conquest the State domains, were accepted by the majority of authors who treated these problems, though not all of them approved of these views in such warm terms as P.A. von Tischendorf[51] and Aron Gurland.[52] Nevertheless, his tendency to regard the State's ownership of the land as the fundamental principle of the Islamic land laws, though having influenced some administrators,[53] was firmly opposed by Baron von Tornauv,[54] who proved the existence of private ownership of land in Islamic law, and by Max von Berchen.[55] Von Berchen analysed again the work of Mawardi and came to the conclusion that there were three principal classes of land,[56] (*a*) '*ushri*-lands, which were the private property of Muslim owners; (*b*) *kharaji*-lands, which were the State domains,[57] partly captured and partly annexed by peace treaties (their tenants paid to the treasury rents denoted as *kharaj*) and (*c*) lands of the allied peoples, which were an intermediate zone between

51. *Das Lehnswesen in den moslemischen Staaten insbesondere im osmanischen Reiche*, Leipzig, 1872.

52. *Grundzuge der muhammedanischen Agrarverfassung und Agrarpolitik mit besonderer Berucksichtung der turkischen Verhaltnisse* (Dorpat, 1907). A pamphlet against the views of Padel.

53. E.g. the first Russian governor-general of Turkestan, Kaufmann, who proposed in 1873 to regard lands as a property of the State, arguing that, according to the Islamic law, land belongs to God and to all the human beings and a private person has right only to the fruit of labour invested in land.

54. "Das Eigenthumsrecht nach moslemischen Rechte," *Zeitschrift der Deutschen Morgenlandischen Gesellschaft*, XXXVI, 285.

55. *La Propriete territoriale et l'impot foncier sous les premiers califs* (Geneva, 1886), pp. 7-8. Published also in Snouck Hurgronje's *Opuscula*, 1, 3.

56. Ibid., pp. 32-33.

57. Cf. ibid., p. 12.

the Muslim State and the enemy territory. Their holders were owners, not tenants, but so long as they remained non-Muslims they paid for their lands a tribute called *kharaj/jizyah*. Von Berchem's supposition is that Mawardi only codified the real state of things, which existed since the first Caliphs. Becker accepted the main outlines of Von Berchem's classification but suggested that even in countries ruled by Muslims, like Egypt, there were, at the time of the first Caliphs, lands left to the natives, on condition of paying tribute, by the side of the State domains, leased to the farmers who paid rents. This view was practically a return to Hammer-Purgstall's scheme, brought into co-ordination with Becker's[58] suggestions.

Rights in Regard to Cultivation, Tenancy, and Rents. While evidence of the recognition of private ownership of land is quite conclusive and there is hardly any material difference of opinion among the jurists and traditions on this subject, it is, unfortunately, not so in regard to rights of cultivation, tenancy and rents. Here there are a number of conflicting traditions which are quoted by advocates of opposite schools of thought, and there are also considerable differences among the earlier Muslim jurists.

In order to ascertain the law of the *Shari'ah* in regard to these matters, let us examine these traditions. We shall first examine those which assert tha

58. C.H. Becker, *Islamstudien*, Leipzig, 1924.

rights in land are admissible only to the extent that a person can cultivate that land himself and which appear to prohibit the leasing of land either on cash or crop-sharing basis.

The traditions which seem to support this contention are from six sources. The set of traditions which has attracted most attention in this connection is that of Rafi' b. Khadij.

Evidence of the Traditions. Rafi' b. Khadij narrates that during the time of the Prophet, he used to lease land for cultivation and to fix one-third to one-fourth of the corn (used in the sense of cereals) crop as the rent of the land. One day, one of his uncles came and said: "The Prophet has prohibited us from this business which was profitable for us, but obedience to the Prophet is incumbent on us. He has prohibited us from renting the land on one-third or one-quarter of the corn crop and has ordered that the owner should either cultivate the land himself or should give it to others to cultivate. The Prophet had disliked giving lands to others on rental."

In another tradition, Rafi' mentioned the name of his uncle Zahir b. Rafi'. He narrates that "the Prophet once inquired from him as to the terms on which he dealt with lands. He gave the Prophet the detailed terms of tenancy contracts. On this the Prophet said: 'Don't do like that. Either cultivate the land yourself or give it to someone else for cultivation or leave your lands vacant.' "[63]

63. Quoted by Muslim, Bukhari, Ibn Majah.

In another tradition, Rafi' relates his own story. One day he was irrigating the land. The Prophet passed by and asked him whose land it was and who was cultivating it. He replied that he was cultivating it. The seed and the labour were his and he would get half the crop, the other half going to the owner. On this the Prophet said: "You have done a usurious transaction. Return the land to the owner and claim the expenses which you have incurred."[64]

In this connection there is a tradition from Sa'id b. Musayyab who says that Rafi' had said that the Prophet had debarred them from such a business which was profitable for them. By business he meant that if anyone owned land he leased either for cash or kind. The Prophet said: "If any one of you has land, he should give it free to his brethren or cultivate it himself."[65]

Sa'id b. Musayyab narrates another tradition from Rafi' who heard it from his uncle. "The Prophet has prohibited share-tenancy and the sale of dates while still on the palms, and has said that only three persons can do the cultivating; first, those who own land and cultivate it themselves; second, those to whom someone gives land free for cultivation; and third, those who rent land for money."[66]

Sulaiman b. Yasar narrates another tradition

64. Quoted by Abu Dawud.

65. Quoted by Tirmidhi.

66. Quoted by Abu Dawud, Ibn Majah, Nisa'i. But Nisa'i says that the first part is that of the Prophet and the remaining part is Sa'id's explanation which has been mixed up with the tradition.

from Rafi' in which the following statement of his uncle is given: "The Prophet has said that if any person has land he should not lease it for a predetermined quantity of corn as rent." According to another version, his uncle mentioned that he who has land should either cultivate it himself or give it to his brethren for cultivation, but he should not lease it for one-third or one-fourth or a fixed quantity."[67]

Rafi"s son relates on the authority of his father: "The Prophet has prevented us from such business which is a source of profit for us. He has prohibited anyone from cultivating land which is neither his own nor has been given to him (for cultivation) free of any rent."

Ibn 'Umar relates: "We used to lease our lands. But when we heard the narration of Rafi' b. Khadij we gave it up." Another tradition relates that Ibn 'Umar said: "We used to lease our land on crop-sharing basis and thought there was no wrong in it. Then Rafi' mentioned that the Prophet has prohibited this. Therefore, as a result of his assertion, we have given this up."[68]

After Rafi', the next biggest source of traditions on the subject is Jabir b. 'Abdullah from whom the following is narrated:

(1) The Prophet has prohibited the leasing of land.[69]
(2) The Prophet has prohibited share-crop tenancy.[70]
(3) The Prophet has prohibited that land should be taken

67. Quoted by Ibn Majah, Abu Dawud, Nisa'i.
68. Quoted by Muslim, Abu Dawud, Ibn Majah.
69-70. Quoted by Muslim.

either on rent or on share-crop tenancy.[71]

(4) If anyone has land, he should cultivate it himself. And if he could not do that he should give the land to his brethren.

This tradition comes to us in different versions. According to one version, it is said that if anyone has surplus land, he should either cultivate it himself or give it to his brethren and if he does not desire to do so, he should leave it vacant. According to another version, he should give it as a gift or give it as a loan. Still another version says that he should not lease it.[72]

(5) The Prophet has prohibited the sale of vacant land (for two or three years).[73] It may be mentioned that some persons in order to avoid actions of usury, used to make a limited sale contract or forward contracts regarding fruit trees which were prohibited by Islam.

(6) I have heard the Prophet say : "He who would not give up renting of land or share-crop tenancy, give an ultimatum of war to him from the Prophet and his God."[74]

The four other traditions which support this view are from Abu Hurairah.

(1) The Prophet said that any person who has land should either cultivate it himself, or should give it (for cultivation) to his brethren without any charge. If he does not wish to do so, he should leave it fallow.[75]

(2) The Prophet has prohibited charging rent for one's land, crop-sharing, or making others buy the dates while they are still on the palms.[76]

The two other traditions are also of the same

71. Quoted by Muslim.
72. Quoted by Muslim, Bukhari, Ibn Majah.
73. Quoted by Muslim.
74. Quoted by Abu Dawud.
75. Quoted by Bukhari, Muslim, Abu Dawud.
76. Quoted by Muslim, Tirmidhi.

nature and need not be repeated here.

We have quoted every source of tradition that is available in support of the view that the Prophet prohibited the leasing of land either for cash or kind and had advised that it should be given free of rent.

Now let us examine the authenticity of these traditions. The first thing which strikes even a casual observer is that the Prophet should suggest such a far-reaching change in the existing structure of society (about which there is ample evidence that, not only his first four Caliphs leased their lands, but he, himself, had leased his own lands) and that no one else should mention this outstanding change beyond the six persons quoted above. It is a well-known historical fact[77] that, when Khaibar was attacked by the Prophet, a part of it was conquered by sword and a part had surrendered under a peace treaty. The Prophet reserved half the area for the nation, and the remaining half was divided into eighteen parts among those who assisted in this expedition. It was provided in the peace treaty that the Jews would have to vacate this area but they would be provided with suitable lands away from Khaibar. When the Prophet expressed his desire to enforce this part of the treaty, the Jews came and begged that they should be allowed to stay on. They said: "We will cultivate the lands on your behalf. You take half and let us keep the remaining half." As there was shortage of suitable cultivators, the Prophet

77. Fully recorded in all the six books of traditions.

agreed to this on the express understanding that they would vacate these areas when required to do so. It is on record that this arrangement continued until the death of the Prophet, and that he used to receive his own share of the crop from the land leased out to the Jews. When Abu Bakr succeeded the Prophet, he also allowed this arrangement to continue, but during the period of 'Umar I, when it was discovered that the Jews were not refraining from mischief in spite of repeated warnings, in accordance with the treaty, he removed them from Khaibar and announced that the owners on whose behalf the Jews were cultivating these lands should take possession of their properties. The proposal was also placed before the wives of the Prophet and they were asked either to take possession of their shares (which were meant for their support) or to entrust them to the care of the State and, instead, receive their share in produce, such as they had received in the past from the Jews. They preferred to receive the produce, except 'A'ishah and Hafsah who took possession of their land and managed it themselves.

Other traditions which support the view that the renting of land was permissible are as follows.

The emigrants who came from Mecca to Medina with the Prophet used to work in the gardens of the landowners of Medina as tenants. Another tradition mentions that there was hardly a household of emigrants in Medina of which the members were not working as tenants. 'Umar, 'Ali, and the heirs of Abu Bakr, 'Umar and 'Ali all leased their lands and

it was customary to receive half of the produce as their share, though this varied in some cases.

The narrators of these traditions are highly reliable persons, and it is difficult to dub all their traditions as unreliable or faked. It is, therefore, necessary that the matter should be examined closely and critically. Traditions, however accurate in themselves, are not exact certified written records of hearings and are likely to create misunderstanding if they are taken out from their proper settings, or even more, if the circumstances of each case are not explained or examined carefully and critically. Such an examination reveals the following additional facts which throw considerable light on this controversy. We learn that when some of these traditions were quoted, they created quite a stir, as cultivation of land by tenants was a common practice in those days. People began to probe into these traditions and to examine the persons responsible for them, and to find out the exact circumstances which gave rise to the traditions.

Hanzalah b. Qais says that he inquired from Rafi' b. Khadij about the leasing of land for silver and gold (cash rent). He said: "There is no objection to this." He explained it as follows: "The fact is that, during the period of the Prophet, people used to lease their lands on condition that the produce near water channels and certain other more advantageous parts of the fields would accrue to the landlord. As this practice was quite common, the Prophet strictly prohibited the leasing of land on such conditions. There was, however, no objection from the Prophet

to lease lands for a clearly defined and fixed share."[78]

Further probing also reveals that powerful landlords used to take undue advantage of the weak bargaining position of the tenants, who had hardly any other source of livelihood, to make them agree that the crops from more suitable parts of the field would accrue to them, while the tenant had to be content with the share from those parts of the field which were less favourably located. It was known that often crops were poorer, or even failed in these less favourably located parts of the field, and the unfortunate tenant, after all his hard work, got very little for his share. It was to this disadvantageous position of the tenants that Rafi' referred when he said that the Prophet had prohibited them from doing business which was clearly profitable for them (the landowners). It was to prevent this unfortunate situation that the Prophet said : "Either you should cultivate your lands yourselves or leave them fallow," so that the poor tenant should not be so exploited, or that the rents should be fixed in cash so that the tenant was able to keep all the produce which he raised and pay his rent in cash.

As regards the giving of land free of rent to tenants, the background of these traditions reveals that these were just pieces of advice which the Prophet in his characteristic manner always gave to various parties to show benevolence and charity. He never declared that it was either obligatory to give lands

78. Quoted by Muslim, Abu Dawud, Nisa'i.

free of rent or that giving land on tent was barred. In the ordinary course of things, no objection was raised against tenancy and the owner was free to lease or do otherwise with his property as he saw fit. This is indicated by the tenancy practices which were current in the time of the Prophet and the Caliphs after him. It is hardly likely that it was merely through neglect that these practices were not forbidden. The silence is due to the fact that they were recognised local customs and it was not found necessary to change them. Therefore no comments were made, as Sir Abdur Rahim has well remarked: "It would not be correct to suppose that Islam professed to repeal the entire customary law of Arabia and to replace it with a code of altogether new laws."[79] Discussing the pre-Islamic customs under the title of leases, he mentions:

"A lease of land used to be granted generally for the term of a year, but sometimes, though rarely, for two or three years. There is no record of a lease for a longer term. The rent was paid either in money or part of the produce or wheat. Sometimes it used to be a condition of the lease that the lessor should supply the seed for cultivation, and sometimes that it should be supplied by the lessee. Of the former the tenure was called *mukhabara*' and of the latter '*muzara'a*'. Sometimes the stipulation used to be that the lessee should cultivate the land with seed found by himself, and the lessor would have for his share the crops that would grow on the portion adjoining the stream or on some other specified plot. The Arabs also used to farm out the fruit trees."[80]

Views of the Schools of Jurists Regarding Tenancy,

79. Sir Abdur Rahim, op. cit., p. 1.

80. Ibid.

etc. The four prominent schools of Muslim jurists have thrown an interesting light on this subject. In view of the importance of this subject in the present-day Muslim countries, their views are summarised below, as they throw important additional light on the subject.[81]

The Hanafi School. According to the founder of this school, Abu Hanifah, share cropping is not permissible. It can be permitted only if the landlord does not quit after providing the land but is prepared also to share with the tenant the seed and the plough animals. According to his two disciples, Abu Yusuf and Muhammad, the following types of share-cropping are permissible:

(1) Land should belong to one party and seed, implements, draught animals, and labour should be provided by the other party on the understanding that the total produce would be shared in a certain ratio—half, one-third, or one-fourth.

(2) land, implements, plough animals, and seed should belong to the owner of the land and labour only should be provided by the tenant, the share of each being expressly defined.

(3) Land and seed should be provided by the landlord, and labour and draught animals and implements should be provided by the tenant and their shares defined.

(4) All factors of production should be common and the share in total produce be defined.

81. *Al-Fiqh al-Madhahib al-Arba'ah* (Cairo: Ministry of Awkaf, 19
Vol. III.

Any contract which provides for fixing the quantity of produce beforehand as the share of one party or for produce from a certain portion of the field to be earmarked for the landlord, or for the provision of any other items or services beyond the produce of the field is void.

Views of Hanbal. The views of Hanbal are the same except that, according to him, it is essential that the landlord should provide the seed.

Views of Malik. Malik's views on the subject are rather elaborate. The subject has been treated by him under partnership. In brief, according to Malik, the value of each factor of production should be assessed beforehand according to some common denominator. The rent of land, the value of labour, the cost of capital equipment and the share of each partner should be determined according to his contribution. However, he insists that the cost of seed must be shared equally by both parties.

Shafi'i's Views. Shafi'i is opposed to all the views expressed above. He maintains that either the landlord should hire the tenant on cash wages and undertake all the expenses of cultivation himself, taking the whole produce himself, or that land should be taken by the tenant on a cash rent, the tenant undertaking to provide all other expenses of cultivation and owning the entire produce.

Hidayah *on Tenancy (Muzara'ah).*[82] *Definition of*

82. Tenancy is the nearest translation for *muzara'ah.* In the English translation of *Hidayah,* the term "compact of cultivation" is used for *muzara'ah,* but we have changed it to-contract of cultivation".

the Term. *Muzara'ah*, in the language of the law, signifies a contract between two persons, one being a proprietor of land, and the other the cultivator, by which it is agreed that whatever is produced from land shall belong to both in such proportions as may be determined in the contract.

Difference of Opinions Concerning Contracts of Cultivation A contract of cultivation is analogous to a contract of partnership in regard to stock and labour; as one of the parties to the contract is the proprietor of the ground and the other its tiller, the product is divided between them.

By analogy, the validity which attaches to a contract of *mudarabah* (lease) on the basis of convenience should also be extended to contracts of cultivation. As it often happens that there are men possessed of property who have no capacity for trade or business and others endowed with such a capacity, who have no property, it is convenient for them to make a contract of *mudarabah*, so that the desires of both can be accomplished. As the same reasons operate in the case of contracts of cultivation, these too should be regarded as valid.

The adjudication of the courts in Muslim countries has been given according to the doctrine of the two disciples who, in opposition to their teacher, Abu Hanifah, maintain that tenancy is valid both because contracts of cultivation are convenient to mankind, and also because they have become everywhere customary. However, the following conditions are essential to the validity of a contract of cultiva-

tion, according to his two disciples:

(1) That land be capable of cultivation, for, otherwise, the object of the contract cannot be accomplished.

(2) That the parties be duly qualified.

(3) That the period or term of the contract be expressed ; a contract is an agreement, either for the use of the land (as when the cultivator supplies the seed), or, for the use of labour (as when the seed is supplied by the proprietor of the land), and the determinate use of either can be ascertained only with reference to a specific period.

(4) That it be expressly stipulated by whom the seed is to be supplied in order that the basis of the contract may be known ; in other words, in order that it may be known whether it is founded on the use of labour or on the use of land, and that no source of dispute may remain.

(5) That the share which is to fall to him who does not supply the seed be specified, for in consequence of the agreement, he is entitled to a share ; and it is requisite that the proportion be determined, because a thing which is unknown cannot be established by the contract even if a share is stipulated in general terms.

(6) That the proprietor of the land should deliver the land to the cultivator in order to cultivate it, and that he himself should abstain from any management, for if it is stipulated in the contract of cultivation that the landlord also shall manage the land, the contract is null, because of the invalidity of such a stipulation.

(7) That both parties should share the produce of the land after it is reaped, for a contract of cultivation is ultimately a contract of partnership, wherefore every stipulation repugnant to partnership invalidates the contract. (For example, if a precise quantity of the produce be stipulated for one of the parties, it is invalid ; since, as it is uncertain whether so much will be the produce, the partnership is therefore invalidated.)

(8) That the particular species of seed to be used, such as

wheat, barley, etc., should be expressed in the contract in order that the species in which the wages of the labourer are to be paid may be known.

The following four types of contract of cultivation are valid according to the two disciples: (1) where land and seed are supplied by one of the parties, and cattle and labour by the other; (2) where land alone is supplied by one of the parties, and labour, seed, and cattle by the other; (3) where land, seed, and cattle are supplied by one of the parties, and labour alone by the other; (4) where land and cattle are supplied by one of the parties, and seed and labour by the other.

Invalid Contracts. According to the two above-mentioned disciples, the following two types of contract of cultivation are invalid: (*a*) where it is stipulated that seed shall be supplied by one of the parties, and land, labour, and cattle by the other, because the sixth condition mentioned above is then missing; (*b*) where it is stipulated that seed and cattle shall be furnished by one of the parties, and the land and labour by the other, which is likewise invalid for the same reason. In both these cases the produce of land (according to one opinion[83]) belongs to him who supplies the seed, upon the same principle that it belongs to him in the case of any other invalid contract of cultivation. But according to another opinion,[84] the produce belongs

83. The opinion of Abu Ḥanifah, as before stated.
84. The opinion of the two disciples.

to the owner of the land, and he, therefore, stands, as it were, as merely a borrower of the seed of which he has obtained possession by its being sown in his ground.

Contracts of cultivation are not valid unless the period of their duration be specified, nor unless the produce of the land be shared between the parties without allocating a specified quantity to either of them, in order that partnership may be established between them. If, therefore, it be stipulated that either of them is to receive a specified number of measures of grain from the produce of the land, the contract is invalid. In this case, the purpose of partnership would be defeated since it is possible that no more may be produced from the land than what is thus stipulated for one of the parties.

In the same manner also, contracts of cultivation are invalid where it is stipulated that he who supplies seed shall receive an equal quantity of grain from the produce of land, and that the rest shall be divided between the parties, for, in case the produce exceeds the quantity of seed, a stipulation of this nature defeats the partnership with respect to that particular quantity; or, with respect to the whole, in case the produce should not exceed the quantity of the seed. A stipulation of this nature, moreover, is similar to one whereby the parties agree, regarding tribute land, that the rest of the produce shall be divided after deducting tribute. The situation is different where two men agree that, say, one-tenth of the produce shall go to one of the parties, and

that the remainder shall be divided between them, for a stipulation of this nature does not defeat partnership because the remaining nine-tenths continue to be shared between the parties. This is similar to a stipulation, regarding tithe lands, that "after deducting the tithe, the remainder shall be divided between the parties".

In the same manner also, a contract of cultivation is invalid if it stipulates that whatever is produced on a particular spot (such as on the banks of a rivulet) shall belong to one of the parties, and that the remainder of the produce of the whole ground shall be divided between them, for such a stipulation defeats partnership, since it is possible that nothing may be produced except upon that particular spot. Similarly, it is invalid where it is stipulated that the produce of one piece of ground shall go to one of the parties, and the produce of another piece to the other.

In the same manner, a contract of cultivation is invalid where it is stipulated that one of the parties shall get the straw, and the other the grain, for it is possible that nothing may be produced but straw. It is equally invalid if it is stipulated that the straw shall become their joint property and that the grain shall belong to one of them only, for here a partnership is not established with respect to the grain, which is the particular object of cultivation.

The expense of cutting the crop, of carrying it to the stack, of threshing it, and of cleaning the grain from the straw, falls upon both of the parties in pro-

portion to their respective shares. If, therefore, they were to stipulate in the contract that the expenses shall fall on only one of them, the contract would be invalid. In short, all the above-mentioned expenses must be borne by both of the parties in proportion to their respective shares, and not by any one of them in particular because, when the crop is harvested, the object of the contract being accomplished, the contract itself is at an end. As the crop remains the joint property of the parties and no contract or stipulation is left in force between them, it follows that any expenses which may afterwards be required on account of their joint property ought to fall upon them both. Besides, if they stipulate that those expenses shall fall on one of them only, such a stipulation is inconsistent with the true spirit of the contract as it tends to the advantage of one party over the other; and all stipulations having such a tendency invalidate the contract itself in the same manner as a stipulation by which the cultivator is bound to carry the grain or to grind it into flour. Abu Yusuf is, however, of opinion that where the parties agree that the above-mentioned operations shall fall upon the cultivator, this agreement is lawful because of custom.

Views of A Modern Muslim Jurist Regarding Property Rights

We would like to conclude this chapter by giving a summary of the views of a prominent modern Muslim jurist of Egypt.[85]

85. *Fatwa* (ruling) of Shaikh Muhammad Hasanain Makhluf on private operty, dated 18 April 1948. For details, see Heyworth-Dunne, op. cit.

According to Shaikh Makhluf, Islam respects the right of private ownership and permits each individual the legitimate ownership of whatever movable or real property he wishes. He is allowed also to exploit profit from it within the bounds which Islam has drawn, and he is entitled to the right to protect it, as he would be entitled to defend his life and possessions.

There is a tradition which says: "The blood, money, and property of every Muslim are taboo to all other Muslims." Another tradition states: "He who is slain for the sake of his wealth is a martyr."

Islam has provided legislation covering the ownership of money and profits and dealing with the methods by which they are to be transferred from one owner to another. With regard to transaction among men, it has set up an order and limits which guarantee the protection of ownership. The owner is thus enabled to receive his due in full and to profit by the increase of what he owns, while the lessee is permitted to benefit from the property of others. Those methods of dealing, such as various forms of usury and agreements based on ignorance, fraud and chance, are forbidden as leading to disorder and strife, as are coercion, theft and dissipation of public wealth. Restrictions and punishments are provided for those who violate the sanctity of property and transgress against the legal ordinance pertaining thereto. "For they who transgress against the ordinances of God are wrongdoers."

Indeed, God has forbidden the least interferenc

with property or, in other words, the desire to take it away from others, for He has said:

"And do not be jealous because God has preferred to give some of you more than He has given to others. Men have their share of what they have earned and women have theirs, so ask God to give you of His grace; verily, God knows all."[86]

This teaches us that some are favoured over others in matters of property and this should not, therefore, be the source of hostility or envy, for it represents a distribution which has been decreed by a wise and knowing Deity.

No Limit to Private Property. It has been said that Islam should restrict the ownership of land according to the capacity of the individual to cultivate it; that any surplus should be given free of charge to those who have no land; and that no owner should exploit his land by leasing it in any manner.

It is astonishing that men should make laws which God has not seen fit to make and that they should impose upon themselves things which God has thought best not to impose. Islamic law has not subjected private property to any limit which may not be exceeded by the owner, nor has it made it obligatory for an owner to give up that which he is unable to cultivate himself for free distribution to the indigent or for sale to others.

There were among the Companions of the Prophet certain individuals who possessed considerable wealth, such as 'Abd al-Rahman b. 'Awf, a member

86. Qur'an, iv. 32.

of the council under the Caliphate, one of the ten who were promised Paradise.

Alongside these were many, such as the *Ahl al-Suffah*, who possessed very little. Many of the Prophet's helpers owned extensive agricultural lands, but he did not compel those who had accumulated wealth through their own efforts to distribute among the indigent any property, whether real or movable, which they could not exploit themselves.

Indeed, when the Prophet arrived at Medina with those who emigrated with him and his helpers at the beginning of Islam, he established brotherhood between these two groups in the house of Malik b. Anas on the basis of equality and piety. They were told that they could inherit property from each other without regard to blood-relationship, until God made the following revelation: "Some relatives are more worthy than others in the Book of God." Thereupon inheritance on the basis of brotherhood in Islam was abolished and inheritance by blood-relationship was restored.

Equality and comradeship between believers in general is something which is both mandatory and highly desirable. Those verses of the Qur'an which enjoin these things along with aiding the poor and the needy are a general declaration to mankind. But this is quite different from an obligation to renounce the ownership of property. The faith imposes no obligations other than those laid down by the all-wise Lawgiver.

The Muslim religious law permits the owner of

land to do with it as he wishes. He may sow all or part of it himself, he may lease it to another in return for a portion of the produce or for cash, or he may grant all or part of it to anyone else, rich or poor.

Exploitation of Land by Tenants. The origin of the exploitation of land by share-cropping, which is a legal type of lease, is as follows. The people of Medina possessed more fields and farms than others. During the time of the Prophet they used to exploit them by the method of share-cropping or *muzara'ah*, which was also called *mukhabarah*, from *khabir*, or "cultivator". This consisted of a contract between the owner and the tiller of the soil, who was paid part of the produce. Sometimes the share of the owner was specified as a half, a third, or a quarter; at others it was limited to what grew on the banks of rivers, streams, or irrigation canals. Again, he might receive the fruits of a specified plot of land, another plot being set aside for the cultivator. There were also other arrangements which could lead to quarrels and disputes and the dissipation of property because of the elements of ignorance and risk contained therein. Occasionally, the two shares were pooled in a single whole. The Prophet forbade the last two methods because of the danger of conflict which they involved.

Shaikh Makhluf concludes this section in the above-mentioned *fatwa* (or ruling) by the following pronouncement:

"The exploitation of land by leasing it for part of its produce is permitted as long as the manner in which it is done does not lead to disputation or ill-will. Islamic legal authorities

hold that the landowner is free to sow, share-crop, or lease hi land as he wishes without any prohibition or obligation bein imposed on him in this regard. Islam respects the rights o private ownership and punishes transgression against it. N owner is obliged to give up his property to anyone else or b satisfied with only sufficient thereof to ensure him his dail bread."

To sum up. We find that, in spite of their difference about details, the jurists confirm the right of private ownership of land and the right of the landlord to have it cultivated by tenants. Those who seek to reform the present system and secure better rights for tenants will find valuable suggestions in some of these views, especially in the insistence of Shafi'i and Hanbal that, in addition to land, the landlord must at least provide seed. The underlying spirit of these views seems to be that the landlord should either play an active role himself or allow the tenant to do so. The view expressed by Shafi'i would justify many concessions to tenants enjoyed by this class under the English tenancy system where the tenant is an entrepreneur in the fullest sense of the term and the landlord provides land and other permanent improvements.

Leaving aside the data from traditions which are bound to be controversial or even contradictory, and judging the matter purely from a rational point of view, in the light of fundamental principles of Islam, we find that the prohibition of tenancy is clearly untenable. One of the fundamental tenets of Islamic law is the right of inheritance. It is obvious that if

person is unable to cultivate his inherited land (because of his occupation in other vocations or other disabilities), such an inheritance will be useless to him if he cannot receive any benefit from it by renting it to others. In the Muslim laws of inheritance there is no distinction between land and other types of property, so that if a person can rent his inherited buildings, etc., it is obvious that nothing should prevent him from renting his land. If he can be a sleeping partner in business and has all the blessings of Muslim law, what is there to prevent him from doing so in regard to his land? However, it stands to reason that any system of partnership which places the tenant in an unjust position, or where the landlord is not prepared to share the loss as well as the gain, would be invalid as it is invalid in business. The whole Islamic philosophy is that the rough must be shared with the smooth.

This, however, does not mean that the door to land reform or acquisition of land in the national interest is closed. The problem of land reform is far more social and political than economic, and Islam lays special emphasis on safeguarding the interests of the tenants.

If, however, in the larger national interest, it is decided to nationalise land or place any limitation on ownership, the matter should be decided on its own merits. The policy of dragging in religion and to find excuses for this course of action should be avoided.

The teachings of religion are quite clear on the

subject, and land is treated like any other private property. If any lands have to be acquired in the national interest, Islam does not prevent it. It, however, insists that fair compensation should be paid to the owners of the land.

4

THE SYSTEM OF LAND TENURE IN ISLAM

The system of land tenure in Arabia proper in the early Islamic period was simple. All lands were treated as private property of their owners and were subject to tithe. They were called *ushri* lands and later, in the Ottoman Empire, became known as *mulk*[1] lands.

The system of land tenure in the non-Arabian countries was somewhat complex and often caused confusion to those who were not conversant with Muslim history.

In order to understand fully the system of land tenure in the conquered countries, it will be helpful to describe the varying conditions under which Arab sovereignty was established in Iraq, Syria, Palestine and Egypt.

The early Arab converts to Islam were enthusiastic about their new religion and were keen to spread their faith far and wide. This enthusiasm gained further support from the teachings of the Qur'an which emphasises that it is the moral duty of each Muslim to propagate his faith, though it is clearly emphasised in the Qur'an (ii. 256): "That there be no compulsion in religion."

1. The Arabic word is *milk*, meaning property.

The early leaders of Islam were not mere theorists or idealists. They were men of affairs. They had known, at great cost to themselves, the severe persecution which the Prophet and his early followers had to suffer at the hands of unbelievers in Mecca when the Muslims possessed no power. They were, therefore, convinced by personal experience, and it became a general belief that their religion and their lives were not out of danger unless they acquired the necessary power to protect themselves by acquiring the necessary military and political power.

As soon as they gathered enough strength and consolidated their position in Arabia, they became anxious to acquire a dominant position in neighbouring countries. In order to achieve this end, three alternatives were open to them. Firstly, the adjoining countries might of their own accord embrace Islam and thus eliminate the main cause of friction. This would have been the ideal solution, but it did not work out as the rulers of these countries were not willing to accept the new religion in place of that of their forefathers.

In the absence of any response from the rulers of these countries regarding conversion to Islam, the second course was to establish Arab power in those countries. In order to achieve this end, efforts were made to persuade the rulers of these countries to recognise the paramount power of the Caliphs by entering into peaceful treaty relations. If this course was acceptable to the rulers, a promise was given to provide protection against both internal and external

aggression, in return for a tribute, the amount of which was determined by treaties entered into with such countries. This offer did not meet with much success as the rulers of other countries were very proud of their own might and grossly underrated the strength of the Arabs. The only other course left to the Caliphs was to order their Generals to march into these countries and conquer them by sword.[2]

The Caliphs issued instructions to their Generals that the first two alternatives mentioned above should be offered once again before commencing actual warfare.[3] It did not take long for the Arabs to conquer these countries. Some areas were taken after severe fighting and even reverses, while others, after seeing the might of the conquering armies, were prepared to negotiate for peace by recognising Muslim sovereignty. These varying conditions of surrender resulted in different types of land tenure and taxation. The *modus operendi* of the system is as follows.

When the *Imam* determines to enter into an enemy's country, it is incumbent on him to number his armies, horse and foot, and write down their names. And when the Muslims have entered the enemy's country and have surrounded a city or fortress, they are to call the inhabitants to accept Islam. If they comply with the call, the Muslims are to

2. It will be seen that the alternative was not Islam or the sword as has been repeatedly asserted by most non-Muslim writers, but the choice lay between Islam, tribute or sword.

3. It is not lawful to fight those who have not received the invitation to ccept Islam without first calling upon them to do so. Quoted in *Hidayah*.

desist from fighting with them; if they refuse, they are to be called upon to pay the capitation-tax.[4] And if they accept this course, they are then entitled to the same rights and are subject to the same duties as are the Muslims.

By willingly accepting Islam, all people got their right of property in their lands confirmed *ipso facto* by religion, provided they paid the tithe [5] If they did did not accept Islam but were willing to accept the status of *dhimmis*, or tributary people, and paid an annual capitation-tax, their lands were conditioned by the terms of the treaty of peace, between them and the Muslims. That treaty fixed the amount of the annual tribute they had to pay in the form of capitation and the freedom of their rights as to the exercise of their religion and freedom from molestation, etc. Under that treaty the nature of their right to their lands was also determined. In some cases they retained their lands in full ownership, as, for instance, in Arabia proper in the treaty of peace between the Prophet and the people of Wadi Qura, of Fadak, of Salubah and of Ullays.[6] In other peace treaties like those relating to al-Jarbah, Muqanna

4. Quoted by N.B.E. Baillie, *A Digest of Moohummuden Law, According To Hanafi Code* (London, 1885), p. 33.

5. As this course was seldom accepted in the first instance or even after capitulation, properties of this category remained limited.

6. These lands were later bought by 'Umar I, the seeond Caliph, and their full price was paid to their original owners. Mawardi, *al-Ahkam al-Sultaniyyah*, p. 296. M.V. Berchem, *La Propriete Territorale et l'Impot Foncier* (Liepsig, 1886), p. 18.

and Tabuk, the land was annexed by the Muslims as *fay'*[7] and made into public property. It was made inalienable (*waqf*), administreted by the *Imam* or Muslim ruler on behalf of the community, the *Imam* having no personal right over it.

If they choose the third alternative, namely, battle, and were defeated, then legally all their property and even their persons were considered as booty (*ghanimah*) and were at the disposal of the *Imam* to do with as he saw fit. The spoils of war, i.e. the property that was carried by the enemy in battle, was always equally divided among the conquering army.[8] With regard to prisoners of war and indeed all the inhabitants of the conquered territory, the Caliph could either put them to death or make them slaves and divide them among the conquerors or set them at liberty in the status of *dhimmis* subject to capitation.[9] The land was also considered as booty

7. What is acquired by the Muslims without battle. It becomes the property of the Prophet—"territory acquired by a treaty of peace is to God and to his Prophets" (Bukhari). The Prophet spent the revenue of such lands in favour of the community after using a small portion of it for his domestic purposes. After his death, in spite of the claims to it by his heirs, the *fay'* was seized and immobilised for the benefit of the community. Hence the successors of the Prophet were administrators of the property on behalf of the community and had no personal right to it. See Berchem, op. cit., p. 11.

8. For details regarding the division of booty among the conquerors, see M. Belin, "Etude sur la Propriete Fonciere en Pays Musulmans," *Journal Asiatique*, 1861.

9. The first course was adopted in Arabia proper. The second was generally applied to the prisoners captured by the raids of the Muslims into the territory of the enemy; while the third principle was almost universally applied to the conquests of the then mainly non-Arab countries of Syria, Iraq, Egypt, Persia, etc.

and divided in the same way as movable objects. The Prophet thus divided the land of Khaibar and Bani Quraizah among the conquerors.[10] This system was changed by 'Umar I, who, in the countries conquered during his reign, made these into State lands.

A fifth of the land and other booty was retained by the State for public treasury. This portion of land was made *waqf* similar to the *fay'*.

'Umar I confirmed the indigenous population in their lands with heritable occupancy rights on condition that they paid an annual tribute called *kharaj*[11] in exchange for the right of occupancy. Hence this category of land came to be known as *kharaji* land.

In this way 'Umar I created, for the Muslim community, a vast inalienable domain to be administered by the Caliphs in favour of the community for all time to come. Hence he wrote to Sa'd b. Abi Waqqas, his army chief in Iraq: "If I divide the land among those that are present, nothing will be left to the others who come later." He insured a permanent source of revenue for the Muslim Empire, commensurate with its requirements for defence and other purposes. Finally, he prevented, for the time being, the settlement of the Muslims in the conquered terri-

10. Berchem, op. cit., p. 18.

11. Borrowed by the Arabs from the administrative language of the Byzantines. It was probably Greek in origin. Originally, it meant tribute and was an alternative word for *jizyah*. By the first century A.H. it was taken to mean yields of the fields and hence came to mean the tax on landed property as opposed to *jizyah* which was now used exclusively as poll-tax (*Encyclopaedia of Islam*, under "Kharaj").

tory as he forbade them to buy or cultivate land in the conquered territories.

The principle of State ownership of the *kharaj* land did not, however, last long. 'Umar's attempt to prevent the settlement of the Arabs in the conquered territories was not kept up by his successors. The military camps of Basrah and Kufah established on the fringes of the desert soon became flourishing towns surrounded by cultivated land mostly owned by the conquering Muslims. Many grants of cultivated and uncultivated land[12] were made by 'Uthman, the third Caliph.

Furthermore, it was found impossible to prevent the Arabs from buying land from the indigenous population. This economic necessity led 'Uthman and the Caliphs after him to repeal 'Umar's law against sale and authorised the Muslims to buy land from the *dhimmis*. With the spread of Islam amongst the landed classes, these Muslims refused to pay the *kharaj* and paid only the tithe on their new lands.

12. Concessions of cultivated land were made from the *Sawafi*, which literally means "chosen," and is a name given by the Arabs to lands that belonged to the previous Persian royal family and those who escaped or were killed in the conquest. These lands were so considerable that they gave 'Uthman fifty million dirhams (a silver coin equal to about 10 pre-1913 British pence or 19 U.S. cents) in revenue (Maqrizi. *Khitat* [Jerusalem, '1936], I, 96), or even a third of the total revenue of the Sawad. These lands were annexed by 'Umar as public domains and managed directly for the benefit of the treasury. 'Uthman allotted them among some of the important Muslim personalities as concessions of usufruct, *iqta' ijarah*. Berchem says that 'Uthman gave these lands in full property, i.e., *iqta' tamlik* This is extremely doubtful because the *Sawafi* were still considered a separate class until ths year 102 A.D.

'Umar II submitted to the *fait accompli* in the case of lands that had been acquired during the hundred years previous to his rule and accepted the tithe on them, but he forbade any new property to be acquired after that date. The latter provision was ignored soon after his death.[13] He even liberated from the *kharaj* all *dhimmis* who adopted Islam on the grounds of equality between Muslims, hence destroying the whole system established by 'Umar I; but that law was soon repealed after his death and the theory of 'Umar I prevailed again.[14]

By the Abbasid period, Iraq ceased to be an alien conquered territory and became the centre of the Islamic Empire and its land was owned mostly by the Muslims. A new theory for *kharaj* was called for, other than a humiliating tribute imposed on the land of the *dhimmis*. Hence we find Abu Hanifah, who lived during the early Abbasid period, declaring *Sawad* as *mulk*[15] (freehold) to its owners and *kharaj* as mere land-tax which must be paid by Muslims as well as by *dhimmis* on the lands of Iraq (excluding Basrah which remained a tithe land). He further considered that this tax was not payable if the land was not cultivated and could not exceed half of the crop, no matter how small the produce

13. Berchem, op. cit., p. 41.
14. Ibid.
15. The correct pronunciation of the word in literary Arabic is *milk* and not *mulk*. However, the latter pronunciation is more universally used due to its extensive use in the Turkish Codes, and better understood. Hence it will be adopted throughout this work in spite of the fact that it is wrong Arabic.

was.[16]

Probably because of the influence of the Hanafite School, as well as in order to improve the conditions of the peasants who were by then almost exclusively Muslims, the Caliph Mamun (199-218/813-833) reduced the *kharaj* in 193/808, from one-half to two-fifths of the gross produce.

As rights in land, the type of its tenure and the rate of taxation to which it should be subjected are very closely related to land belonging to the category of '*ushr* and *kharaj*, or *fay*' land, it is desirable to examine this in some detail.

As the views of the Muslim jurists have exercised

16. Muslim jurists found it difficult to explain the nature of *kharaj*. Three of the four orthodox Muslim schools, Hanbali, Shafi'i and Maliki, held on to the theory of State ownership of the *kharaji* land. They considered that it was *waqf*, or inalienable state, domain reserved for the benefit of the whole Muslim community. It cannot, therefore, be alienated, i.e. converted into private property (*mulk*). *Kharaj* was a permanent charge on land due to the State in virtue of its ownership of the land. It was considered as a species of rent charged for an indefinite period. Thus Mawardi who belonged to the Shafi'i School writes of *kharaj* as *kharaj ijarah*, or rental *kharaj*, as opposed to *kharaj jizyah* or capitation *kharaj*, a term which he uses for the tax levied upon *ahl al-'ahd* or the people who, by treaty of peace, were allowed to retain ownership of their land. The latter depends entirely on the religious condition of the people and relapses at their conversion (Berchem, op. cit., p. 142). *Kharaj*, however, does not satisfy all the conditions of rent in the Islamic law because the period is not limited, the amount in the case of proportion of produce is not definite. Furthermore, whereas the lease becomes invalid unless renewed, at the death of the lessee, the *kharaj* land passes to the heirs of the occupier. Hence in the Muslim law books of these three sects, *kharaj* is classed as a section by itself distinct from rent. See also *al-Istikhraj li-Ahkam al-Kharaj*, by Abil Faraj, 'Abd al Rahman ibn Ahmad ibn Rajab al-Hanbali (Cairo, 1934), p. 30. The fourth Muslim school led by Abu Hanifah and his two disciples considered that the Head of the State was free to grant it as *mulk* to its holders or keep it as *waqf*.

considerable influence in shaping land policies, we shall treat these first.

Views of the Muslim Jurists

The Muslim jurists of various schools of thought have discussed this subject at great length, and considerable difference exists in regard to certain aspects. However, we shall confine our discussions mainly to the Hanafite School which was the dominant school of thought in the Abbasid and Ottoman Empires.[17]

The Hanafite jurists divide the land of the Muslim world into two classes—*'ushri* and *kharaji* lands. The principal fact determining the legal character of any given piece of land is its geographical situation. This, however, may be modified in the case of conquered territories by the action of the conqueror. In the first place, all land which is situated in Arabia proper is *'ushri* land; while, speaking generally, all the land of conquered countries is *kharaji* land, although it may, under certain circumstances, become *'ushri* land. This classification is based on a distinction which is drawn between the different rivers of the world: thus, land which is watered by Arab streams is said to be watered by the "water of *'ushr*," and is in consequence *'ushri* land; while land which is watered by other streams is said to be watered by the "water of the *kharaj*," and it is, therefore, *kharaji* land. This, however, is again complicated, since,

17. This subject has been very ably discussed by James Harry Scott in his book *Affecting Foreigners in Egypt*, (Edin burg 1908, especially Chap XI: "The Land Laws of Turkey and Egypt," to which the attention of th reader is invited, and from which we have drawn considerarly in this sectio

rain-water is looked upon as "water of the *'ushr*".

'Ushri lands may be divided into two classes: first, lands which are *'ushri* of right, including all the lands of Arabia proper, watered by Muslim streams; and, secondly, those which have been made *'ushri* lands on conquest by the *Imam* or Head of the Muslim State. The second class may again be subdivided into two classes, for in certain cases the conqueror is obliged to declare the land *ushri*, while in others he may do so at his option. Thus, if the conquered land is watered by the "water of the *'ushr*," that is, either by a Muslim river or by rain-water, it *ipso facto*, becomes *'ushri* on conquest, and this irrespective of whether it is owned by Muslims or not; if the conquered land is watered by the "water of the *kharaj*" it must still become *ushri* on conquest, if it is delivered over to the Muslim conquerors, or if the inhabitants of the country immediately embrace Islam. On the other hand, if the conquered land is watered by the "water of the *kharaj*" and the inhabitants do not immediately become Muslims, but do so before the conqueror has decided what he intends to do with the land, the *Imam* has the option of declaring it either *'ushri* or *kharaji*, as he pleases. Thus *kharaji* land is all land watered by the waters of the *kharaj* which has not been declared *'ushri* on conquest.

The religion of the owner of the land has thus a certain influence on the legal character of the land since, except in the case of land watered by the "water of the *'ushr*," which is *'ushri* irrespective of the religion of its owner, all *'ushri* land must be

owned by Muslims. And this principle receives further support from the rule that a piece of *'ushri* land which is watered by the "water of the *kharaj*" becomes *kharaji* if it passes from the hands of a Muslim and is owned by a non-Muslim. Apart from this, the declaration made by the Head of the State at the time of the conquest is final, unless the land ceases to be Muslim or unless there is a change in the nature of the water which irrigates the land.

The principal importance of this distinction is in reference to taxation. Owners of *'ushri* land pay a tax of one-tenth of their gross yield. The tax on *kharaji* land is of two kinds: the first is a proportional tax[18] based on the gross yield, but this must in all cases be greater than that paid on *'ushri* land; the actual amount is fixed by the conqueror, but it must not be less than a fifth or greater than a half; the land thus taxed is that which is capable of producing what are called the more costly crops, such as cotton or saffron. The second is a fixed tax[19] due from the land as soon as it is fit for cultivation, whether it be actually under cultivation or not. It was fixed once for all by the Caliph 'Umar at one qafiz[20] of the produce, and one dirham in silver for each unit of the measure in use in the country where the land is situated; it is exigible either in kind, or in money, according to the value of the produce, and for each agricultural

18. In Arabic the term is *kharaj muqasamah.*

19. In Arabic the term is *wazifah.*

20. A hollow measure of capacity equivalent to 8 ratls. One ratl equals 0.408 litres or one pound.

year. In principle, after the constitution has once been declared at the time of the conquest, there can be no change from proportional to the fixed *kharaj*, or *vice versa*; and if any difficulty should arise in the future as to the character of the holding, the only method of solution is to refer to the original constitution at the time of the conquest. Both the *'ushr* and the proportional *kharaj* take into consideration the productivity of the land taxed, but the fixed *kharaj* does not. There is, in consequence, a provision in virtue of which this tax may be reduced if the land becomes entirely unproductive.

The *kharaj* lands in the Ottoman Empire came to be called *miri* lands.[21] *Miri* lands formed the greater part of the lands within the Ottoman territory. On the one hand, the Islamic law accepts the principle that all land which is *res nullius* belongs to God, and hence to His representative, the Prophet or the Caliph. On the other hand, when new territory was conquered, provided the original owners were not allowed to continue their ownership as *'ushri* land, the Head of the State was entitled to reserve a fifth of the land as his own share, the remainder being granted as *'ushri* to his followers who acquired the right of *mulk*,[22] or was dedicated as *waqf*; or if neither of these happened, it was continued in the possession of the original owners as *kharaji* land, which only entitled these possessors to a beneficial

21. Also called *ameri*, belonging to the *Amir* or Head of the State.

22. *'Ushri* lands in the Ottoman Empire were called *mulk* and formed only a small part of the total lands under cultivation.

or usufructuary right, the properties, or actual ownership of the land, being considered as still residing in the State or the sovereign. As a result, the State lands formed the largest area of lands under cultivation.

Iqta' *Tenure of* Fay' *Lands*. In order to provide for due cultivation of *kharaj* or *miri* lands, which were still in the possession of the State, the Muslim law allowed the sovereign to make grants of such lands to private individuals, the grant being called *iqta'*, which means literally a portion cut away. The grantee of an *iqta'* was obliged to cultivate the land granted to him, subject to the liability of being dispossessed if he failed to do so; thus, according to a tradition: "Every individual who, during three years, shall leave uncultivated a piece of land of which he has possession, shall lose his rights over the same; and if a third party appears, who will cultivate it, this latter shall have a greater right to possess it than the former owner."[23] this grant of State lands by the sovereign might either confer on the grantee a full right of *mulk*, or simply a restricted usufructuary right; but even in the case of *mulk*, or simply a restricted usufructuary right; but even in the case of *mulk*, the condition applied, and if the land remained uncultivated, the grantee could be dispossessed. This restricted right was, according to the later development in Muslim law, essentially personal to

23. The earlier history of *iqta'* has been discussed in the next chapter entitled "The Concept of Land Rights in Islam".

the grantee, and did not pass to his heirs after his death. The grant was, in principle, in the nature of a reward for services rendered, usually military services, and, in consequence, it was possible that the heir might continue in possession on the death of his ancestor, not so much because he was heir, but as a reward for services rendered by him, and entitling him to a grant on his own account. These restricted grants were essentially temporary, since not only did the condition of cultivation apply, but the State was always at liberty to revoke its grant.

It is rather difficult to render an exact English translation of *iqta'*. It originally meant the act of bestowing or allotting a cut-off piece of land. The nearest translation in English can be rendered as "fief," though it must be understood that it is not exactly the same thing as the fiefs of medieval Europe.

Originally, lands were bestowed upon deserving persons as a token of appreciation of their services rendered in the cause of Islam. Abu Yusuf mentions[24] that occasionally during the earlier period of Islam these lands were also given to political opponents to pacify and possibly to attach them to Islam or at least Muslims. Persons to whom these lands were granted had the full right to dispose these of by sale.

The institution of *iqta'* in its final form was introduced by 'Umar II. Originally the only obligation

24. Abu Yusuf, *Kitab al-Kharaj*, p. 32. Also Becker, op. cit., p. 238.

tion on *fay'* lands was to pay the tithe, which is corroborated by Abu Yusuf and by Becker. Abu Yusuf mentions that the system of *iqta'*, originated by the Prophet, continued until the early Abbasid period. During this period it was clearly understood that a person to whom *iqta'* had been given by the State could not have his land taken away from him and given to someone else. Such an act would be simply usurpation. He further mentions that, besides the absolute rights of the inheritor, the same rights belonged to the buyer who acquires *iqta'*.

However, one discerns from his writings that the Abbasid rulers had already started to regard *iqta'* grants as a looser form of possession in which the State had the real right of property (we shall discuss later how this tendency became stronger and stronger) and administers a warning to the rulers to this effect.

Later on, we find that with the progress of Muslim conquest the policy began to change. It is unfortunate that the changing policy was not frankly recognised and openly advocated, but traditions in support of this policy began to crop up.

Finally we meet with traditions showing a directly negative tendency towards *iqta'*. It is said that neither Abu Bakr, 'Umar I, nor 'Ali gave fiefs—only 'Uthman did.[25] However, this view is not correct. Maqrizi has given examples of *iqta'* granted by

25. Al-Baladhuri, *Futuh al-Buldan*, Ed. de Goeje (Leyden, 1866), pp. 53-55 ; tr. Philip K. Hitti, *The Origins of the Islamic State*, New York, 1916.

'Umar in spite of his general orders to the contrary. But this was more an exception than the rule. Maqrizi further mentions that *iqta's* were also granted by 'Ali.[26]

In Abu Yusuf we find observations and traditions which show the general trends of development for the *iqta'* institution. The original purpose of acquiring an *iqta'* was rather unlimited but it began to be hedged later. This conclusion is supported by the evidence of several European scholars.

Lammens[27] mentions that in the town communities of Hijaz a well-developed sense of individual possession prevailed, and landed property was common for the wealthy part of the population. There is much contradictory evidence on the subject, especially the later traditions are far from satisfactory, and many eminent Muslim writers seem to have been misled by the mass of contradictory traditions, but Abu Yusuf proves systematically reliable.[28] He quietly looks beyond this web of contradictions, stating that the Prophet gave fiefs and thereby reconciled people with Islam, that the Caliphs gave fiefs after him.

In the course of time, the original *iqta'* underwent a great change. The right of full and complete ownership gave way to a more limited right of exploitation and possibly inheritance. A number of terms were

26. Al-Maqrizi, op. cit., I, 351.

27. H, Lammens, *La Cite Arabe de Taif a la Veille de l'Hegire*, Melanges de l'Universite Saint-Joseph, Beyrouth, 1922, tome 8, fasc. 4.

28. Lokkegaard, *Islamic Taxation in the Classic Period*, p. 19.

coined to express the varying types of *iqta'*, which we need not discuss. The newer types of grants were subject to the payment of rent, or tax, which was always higher than the tithe.

During the dark days of the Abbasid period, extensive fiefs began to be given to the military in lieu of their pay and these naturally were free of tax.

An especially privileged fief was the so-called *igar*. The term is said to be connected with the original meaning of sinking in the ground and then of abatement, namely, of the tax. Others have related it with the meaning ordinarily conveyed by the word *hima*, so that it means a protection against tax collection. In any case, it contains this form of protection for the feudal lord that he is liable only to pay a reduced tax, not to the tax collectors, but directly to the *Bait al-Mal*, either in the capital or in the provincial towns.

In all the above-mentioned types of fief we do not meet with any indication that has to do with special military fiefs. Persons other than military persons had had access to them. Nor is it possible, as pointed out by Poliak,[29] following the precedent of Becker, to fix a certain point of time at which they have passed into military fiefs properly speaking. The fact that later on the military, to a large extent, got such fiefs, does not show that the structure of these *iqta's* had been altered, but only that the military came to play an ever-increasing role and, as a matter of consequence, made up the main body of that privileged

29. A. N. Poliak, "Classification of Land and Its Technical Terms," *American Journal of Semitic Languages and Literature* (Chicago), January 194

class to whom the State transferred the profit of these economic concessions.

The question arises whether, in the sway of Islamic domination, we must meet with traces of *iqta'* as a special military function with an abandonment of its old element of *locatio*, or, in other words, whether we find military fiefs in a proper sense, where a person got certain areas assigned in which he might settle down, draw his living from the income of the fief in return for services rendered, without paying any tax to the State, while the whole income is regarded as wages and a means to secure the maintenance of armament.

We have before us a probable connecting point for the spreading of such a precedent in the assignation of *fay'* found in the shape of *hawalah* and *tasabbub*. Both these types of assignation belong to the darker period of the Abbasid administration, as they were employed when the State treasury could not meet the claims put on it and then directed its claimants to occupy a particular region for a certain period until the said amount of money had been obtained. The same allowance was also sometimes given in return for an immediately necessary loan. The seriousness of the matter was, of course, more conspicuous when the assignees themselves were allowed to enforce the tax payment upon the peasants. More commonly, however, it seems to have been procured by the officials who had the charge of collecting the taxes or had the *locatio* of it on hand. But even in such cases the soldiers undoubt-

edly took part in the collection under the command of a tax-collector. The fact that the assignation of *tasabbub* had been particularly employed in regions where the central government had difficulties in gathering the taxes shows that on such occasions it was taken into account that the methods employed might hasten the tax payment. Of course, this procedure was apt to bring about the ruin of the province concerned in the long run. How common the method was is indicated by the fact that taxes were simply divided into such as were carried to the capital and those assigned to the province.

All these forces helped to develop the feudal system in Islam to be like its counterpart which was already in existence in the West. This system did not exist at the time of the Prophet and his early successors. At that time the holders of such lands had distinct personal private rights in landed property.

Iqta' *in the Ottoman Empire*. An extension of the system of military tenure existed in Turkey from a very early date. The military tenure was of two kinds: *Ziamet* and *Timar*, and the holders were called *Sipahis*. This system appears to have had much that resembled the tenure of the *agrilimitrophi* of the Roman Empire, whereby the Roman veterans were granted a right over lands on the frontier, provided they held themselves in readiness to repel invasion; the State was the true *dominus*, the soldier-proprietor had merely a right of *emphyteusis*. Creasy[30] in explain-

30. E.S. Creasy, *History of the Ottoman Turks* (London, 1854), I, 170-80, founded on Von Hammer.

ing the zeal of the Ottoman soldiers, which so often proved irresistible, suggests that there may have been a more material motive of impulsion than the vision of Paradise, that there may also have been a prospect of landed estate in this world. "The *Ziam,* who signalized his prowess, might hope for elevation to the rank of Bey; and the *Timariot*, who brought in ten prisoners, or ten enemies' heads, was entitled to have his manor enlarged into a *ziamet*. The Muslim, who did not possess either *ziamet* or *timar* and was not enrolled in the regular paid troops, still served as a zealous volunteer on horse or foot according to his means; and besides the prospect of enriching himself by the plunder of the province that was to be invaded or the city that was to be besieged, he looked forward to winning by daring deeds one of the *timars* that at the end of the war would be formed out of the newly-conquered territory, or which the casualties of the campaign would leave vacant." The earlier struggles of the crescent in Europe must have amply provided the conditions necessary for a repetition of the Roman system of *agrilimitrophi*. There is a special point of interest in this account just quoted since it suggests an amendment by the Turks of Muslim law. The conquered territory, we notice, was not given as *'ushri* land but was granted under a tenure conveying a much more limited right, and this although the granters were true Muslims. This would account for the small amount of *mulk* land in the Ottoman Empire.

The *ziamets* and *timars* were grants of land made to the Muslim soldiery from the conquered territory added to the Ottoman dominions in Europe. *Timar* was the smaller fief and consisted of from three to five hundred acres, and the holder had to provide a certain number of armed horsemen in time of war, proportionate to the amount of the revenue; the *ziamets* consisted of five hundred acres or more and were held by a similar tenure; each was transmissible to the eldest son on death. The *sipahis* were obliged to reside on their estates in order to be in a better position to perform their duties of military service, but apparently the duties of cultivation were performed by a class of persons living on land in a position of subordination to the *sipahis*. The tenure of these cultivators is not clear, but it seems that they were obliged to remain on land at their superior's pleasure, that they could not alienate or pledge the lands they cultivated, nor give them in *waqf*; that the superior could compel them to work for him and that if they did not cultivate the land, they were liable to be deprived of it at their lord's pleasure. These cultivators appear for the most part to have been Christians, and may well have been in possession before the conquest.

There was undoubtedly much in the system of *ziamets* and *timars* which resembled the beginnings out of which was developed the feudal system in Europe, and it appears that some at least of the evils of that system were developing when Sulaiman I (1494-1566, came to the throne in 1521) introduced

legislation reforming the tenure. In the first place, he aimed at checking the evils of subinfeudation : no *timar* was to be allowed to exist if its revenues fell below a certain value, but a number of *timars* might be united together to form one *ziamet.* A *ziamet* could not be subdivided, nor split up into *timars*, except only in case where the *sipahi* was killed in battle, having more than one son. Several persons might jointly hold a fief, but this required the express authorisation of the government and was not encouraged, the joint fief being looked upon as a single *ziamet*. The fiefs could not be alienated in any way but passed from father to son, and, in default of male heirs, the fief reverted to the State. New grants of these lapsed fiefs could be made but in principle only by the sovereign himself, though in practice the smaller fiefs were sometimes granted to new holders by the viziers, but in this case there was no relation created between the grantor or the grantee, the grant was made in the name of the *Sultan* and there was no one between the *Sultan* and the *sipahi*. The *sipahi* was the vassal of his *Sultan*.[31] The second part of Sulaiman's reform was directed towards the improvement of the tenants (called *rayah*) who cultivated the *timar* and *ziamet* lands; the regulations introduced for this purpose are called the "Code of the *Rayah*". The new regulations limited and defined the rents and services which the *rayah* who occupied the land was to pay to his feudal

31. The number of larger fiefs or *ziamets* in Sulaiman's time was 3192; that of the smaller fiefs or *timars* was 50,160. Creasy, op. cit., I, 327.

lord. It is impossible to give any description of this part of the Turkish law which applied with uniform correctness to all parts of the *Sultan's* dominions. But the general effect of Sulaiman's legislation may be stated to have been that of recognising in the *rayah* rights of property in the land which he tilled, subject to the payment of certain rents and dues and the performance of certain services for his feudal superior. The reader who understands the difference between the position of a modern copyholder and that of a medieval villain towards the lord of the manor will well understand the important boon which the enlightened wisdom of the Turkish law-giver secured, if he did not originate it. The reforms proved unfortunately shortlived, for under Murad III, venality, corruption and favouritism appear to have had full sway, and the *timars* and *ziamets* were sold to Jews or other traffickers, to be again sold or farmed out by them in spite of the law. Although Murad IV abolished those abuses, the system of *ziamets* and *timars* had, by the period of the *Tanzimat*, come to be considered as one of the gravest obstacles to reform, and the principal object of the Law of 1858 was to abolish the system and encourage the actual cultivators. This was to be brougt about by the introduction of a system of *tapu* holdings.

The Law of 1858 abolished the *ziamet* and *timar* tenures and introduced a new system, in virtue of which the actual possessors of the *miri* lands, the cultivators, should find themselves in direct relation-ship with the State, the *sipahi* being swept away.

The *miri* lands were to be granted directly by the government to the cultivators, together with a title deed or *tapu*. The holder of a *tapu* was entitled to cultivate the land as he pleased; he was free to pledge or alienate it, provided he received the express permission of the State; and on his death the land passed on to his lawful heirs, without the necessity for any new *tapu* being granted. If, however, the possessor died without heirs, the land passed to the inhabitants of the village to which he belonged.[32]

The only restriction on the right of alienation was that the holder was not to give the land in *waqf*. The reason for this limitation is obvious; the effect of the alienation would be to destroy the ultimate right of *proprietas* of the State and transfer it irrevocably to a *universitas*. The permission of the State was also necessary before the holder could build houses or plant trees on his land since, according to the Muslim law, trees and houses belong to the planter or builder in *mulk*. In return for the grant of these extensive rights, the holder was obliged to make a certain payment to the government at the time of the original grant; and he was also liable to the rule of the *Shari'ah* whereby, if the land remained uncultivated for three years, the holder was dispossessed. This new system closely resembled *emphyteusis*, the principal distinction being that the *vectigal* was a single payment

32. This suggests the existence of common proprietory rights in the village communities, rights which are a common feature of the Middle Eastern countries.

made on entry and not an annual charge.

Waqf *Lands*. Although there is no direct reference to *waqf* as an institution in the Qur'an, it became quite widespread.[33]

Waqf land is land that has been made the object of a transaction whereby the original owner transfers the right of *proprietas* to a *universitas*, while the revenues are to be used in a particular manner specified in the agreement of transfer. *Waqf*, according to the *Hidayah*,[34] means, in its primitive sense, stopping or detention. In its legal sense it means the setting apart of a given piece of property in such a way that the rights of the person who has been made owner continue, while the use and enjoyment are for the advantage of some charitable purpose. It adds that, according to the disciples of Abu Hanifah, "*waqf* signifies the appropriation of a particular article in such a manner as subjects it to the rules of Divine property, whence the appropriator's right in it is extinguished and it becomes a property of God by the advantage of its resulting to His creatures." We may define *waqf* generally as a transaction in virtue of which the right of ownership, whether of movable or immovable, is transferred irrevocably to a religious or charitable institution, in such a way that the thing transferred can never again be made the subject of a pledge or alienation, while the revenue is devoted to a special purpose

33. Details will be discussed in Chapter 5, entitled "The Institution of *Waqf*."

34. *Hidayah*, II, 231.

which is usually of a religious or charitable nature. This definition is sufficiently wide to include the two different kinds of *waqf*, the *waqf* of Muslim law and the *waqf* introduced by custom. If we had been dealing with Roman law, we might have aptly distinguished these two kinds of *waqf* by describing them respectively as *jus civile waqf* and Praetorian *waqf*: the first is the *waqf* recognised by Muslim law and is called *waqf shar'i*, while the second is an innovation of the Turkish customary law, sanctioned by the *fatwa* of the '*ulama*' and which may be called the *waqf a'adi* or customary *waqf*.

Waqf shar'i may, strictly speaking, be of two kinds, either *waqf* appropriated for the benefit of religion, or public *waqfs* which are appropriated for the benefit of the poor or for the welfare of mankind. For all practical purposes they may, however, be treated as the same. Any form of property, movable or immovable, may be given in *waqf* of this kind, but once it has been set apart it can never again be alienated, nor can it be diverted in any way from its special destination. Lands or holdings or books may be the object of a *waqf*, or the revenues of lands or buildings may be thus set apart to maintain mosques, schools, libraries, hospitals, fountains, cemeteries, or provide revenues for any other form of religious or charitable purpose. The founder of the *waqf* must have the right of *mulk* over the property set apart. The act of constitution requires to be made in the form of an official instrument before a religious court and registered by the Department of *Awqaf*; an

informal constitution is valid only at the discretion of the founder. Any conditions whatsoever may be made by the founder as to the employment of the revenue or the administration of the property, provided always that the disposition is final. The act of constitution should appoint an inspector and an administrator; if there is no inspector, the administrator is subject to the inspection of the *qadi*. The instructions of the founder are binding on the administrator and he may be dismissed by the *qadi* if he fails to fulfil his instructions or is guilty of misappropriation. The founder has absolute liberty in regard to the appointment of an administrator and may appoint himself, his wife, or any member of his family; he may even arrange an order of succession to the post as among members of his family. He may also create a life interest in the revenues in favour of himself or any member of his family, provided that, on the death of the life-renter, the revenues revert to the religious or charitable purpose.

The offices of inspector and administrator are, in principle, gratuitous. Strictly speaking, the administrator of the *waqf* is not expected to pocket any of the income from the *waqf*. All income of the *waqf*, over and above that fixed for any foundation or purpose, ought properly to form a reserve fund, but the control of the authorities has generally been lax.[35] This being so, the system of *waqf* is sometimes used

35. Gatteschi, p. 89, quoting from D'Ohsson, *Tableau General de l'Empire Ottoman*, Paris, 1797.

for other than charitable purposes. On the one hand, it may be used to prevent an heir dissipating the ancestral estates; thus the parent constitutes his estate as *waqf*, appointing his heir as administrator and arranging for the succession of the office within his family. Only a certain part of the revenue is devoted to a charitable purpose and the remainder is, therefore, at the disposal of the administrator. Again, since a *waqf* cannot be touched even by the most despotic ruler, the same device has been adopted to prevent the confiscation of the family estate by the sovereign; unfortunately, the ruler can always confiscate all revenue which is not devoted to charitable purposes.

Although, strictly speaking, *waqf* property is absolutely inalienable, it is permitted to the administrator to exchange one piece of immovable property for another, provided the exchange is advantageous to the charity. The property may also be given on lease according to the conditions laid down in the act of constitution. There are two forms of lease—the ordinary contract with an annual payment, and another by which the "lessee" pays a sum to the administrator on entry, receiving a perpetual right over the property "let," subject to the payment of an annual sum. The right passes to the heirs of the lessee, subject to a small fee paid to a mosque or a charitable institution on each entry.

Customary *waqf* is constituted by the grantor making a sale of his estate to a mosque at a nominal price, the *nuda proprietas* passes to the mosque, while

the use and enjoyment remain in the hands of the grantor and his heirs who, in return, are liable for the upkeep of the estate and who pay a small annual sum or *hikr*, equivalent to the interest on the price originally paid by the mosque. When the family of the grantor dies out, the estate becomes the absolute property of the mosque. The grantor acquires, as a result of transaction, a right similar to *emphyteusis*, which cannot be touched by his creditors but which he may alienate with the consent of the administrator. The grantor may not build on the estate without the consent of the mosque, but if he receives this consent, the buildings are at his disposal either to keep them as his own in *mulk* or to include them in the *waqf*. The full property reverts to the mosque on the failure of heirs to the grantor, or if the grantor or his heir fails during three years to pay the annual sum due.[36]

Tenancy. In Islamic jurisprudence the tenancy called *musaqah* involves the same conditions for its holder as those of the Talmudic *satla*. The share of the tenant might be half of the produce, as it was in Sassanid times. But it might be less, as, for instance, a third or a fourth; or there might be a sliding scale.[37] This is the only type of tenancy which is considered good by jurists. The stumbling block in the other tenancies is the desire to eliminate the

36. The number of these customary *waqfs* was very great in the Ottoman Empire and it may be said that the greater part of the immovable property was immobilised in this way (Gatteschi, p. 95).

37. Abu Yusuf, op. cit., p. 50.

possibility of speculative dealings disadvantageous to the tenant. Such speculative dealings, according to Abu Hanifah, are void in accord with the Hijaz and the Medina school, while Ibn Abi Laila, Abu Yusuf and the Kufah school do not regard other types of tenancies with disfavour.[38] Shafi'i recommends fixed cash rent irrespective of the eventual output. Tenancy against a fixed rent, as well as metayage, has its roots far back in Babylonian times,[39] and it was practised in the Muslim countries. Two other types of tenancies in the early centuries of Islam were the *muzara'ah*[40] and the *mukakarah* tenancies.

The Muzara'ah. In most cases it was for one or two years. The stipulations connected with it are (at least according to some authorities) somewhat less profitable than those of the *musaqah*. The tenant received a third or a fourth of the output. The owner was able to decide the kind of crops which should be grown.[41]

The Mukabarah. In this, the owner furnishes draught cattle, implements and seed corn,[42] and the

38. Shafi'i, *Kitab al-Umm*, III, 239.

39. Rachel Clay, "The Tenure of Land in Babylonia and Assyria," Univ. of London, Institute of Archaeology, Discussion Paper No. 1, 1938.

40. Abu Yusuf, op. cit., p. 51.

41. The principal concern of the Islamic jurists, however, seems to be that the owner must not isolate the rights of the tenant by, for instance, growing a crop which cannot ripen for harvest before the end of the year. See J. Newman, *The Agricultural Life of the Jews in Babylonia* (London, 1932), p. 49.

42. Al-Bajuni, *Hashiyat al-Alamah al-Fadilah* (Bulaq, 1889), Vol. II.

conditions of the tenant are proportionately less remunerative. A similar agreement underlies the *muqadarah*.[43] The many different terms used for tenancies testify to a certain differentiation according to variations in the mutual obligations of the owner and the farmer and their proportional gains, according to individual circumstances.

Some differences of opinion exist as to whether the owner or the tenant is liable to pay the land-tax to the State. The difficulty arises from the fact that, according to most of the schools, a Muslim is not expected to pay the *kharaj* tax as he paid *'ushr*, while, on the other hand, a *dhimmi* was not allowed to pay *'ushr*. Malik asserts that when a Muslim rents the land of a *dhimmi*, it runs according to the same terms as if he tenanted it from the authorities; and, as in that way he incurs the payment of the *jizyah*[44] of the output, Malik declares it to be undesirable. On the contrary, Shafi'i is of opinion that as *kharaj* is paid only for the soil, no humiliation is involved by such a payment. The Hanafites let the owner pay the tax while the tenancy is a private affair between the owner and the tenant. In similar cases, it is assumed by some scholars[45] that a Muslim tenant pays the *'ushr* besides the *kharaj* to the owner, a solution which betrays a certain lack of common

43. Al-Qalqashandi, *Subh al-A'sha* (Cairo, 1912), XII, 141.

44. The words *jizyah* and *kharaj* seem to be used interchangeably.

45. D.S. Margoliouth, *The Table Talk of a Mesopotamian Judge* (Oriental Translation Fund, London, 1921), p. 3.

sense.

In the case of a sub-lease, much the same views are represented. The actual holder must pay the *'ushr* unless he be a *dhimmi*, while the farm rent lies upon the real tenant.

To sum up. (1) The system of full private property rights prevailed in agricultural lands in the early Islamic period.

(2) These lands were subjet to a land-tax called "tithe," and were called *'ushri* lands.

(3) When Islam spread out of Arabia, lands in the conquered areas were subject to varying tenures according to the treaties.

(4) The owners were generally allowed to remain in possession of their lands, subject to a payment of land-tax called *kharaj*, and such lands were called *kharaji* lands.

(5) This tax was generally 20% of the gross produce, but in no case could exceed 50% of the gross produce.

(6) Ample evidence exists that the Prophet and the successive Caliphs bestowed pieces of lands upon individuals from State lands (known as *fay'*) which conferred absolute private rights in land.

(7) During the course of history, these rights became less and less absolute, and more and more subject to the control of the ruler.

(8) In order to save their lands from the whims of the rulers, the institution of *waqf* started growing in importance and reached colossal magnitude during the Ottoman rule, giving rise to a new type of tenure

in land, called *waqf* lands.

(9) The system of tenancy is allowed in Islam and has been quite widespread in the Muslim countries, throughout the period of Islamic history.

5

THE INSTITUTION OF WAQF

Waqf is an Arabic word meaning "to prevent, to restrain". In Muslim legal terminology it means primarily "to protect a thing, to prevent it from becoming a property of a third person".[1] According to the Hanafi school of Muslim law, *waqf* implies the limitation of a man's power to do what he likes with his property.

One of the first words used in this connection was *hubs*, plural, *ahbas*; a dialectal usage in North Africa gives *hubus*, hence the French word *hubous*. This word is still used in North Africa and means "to retain" or "to hold," also "to imprison". The usual word, however, in all the Muslim world is *waqf*, plural, *awqaf*. The Turks use the same word with their own pronuciation, *veqf*, *evqaf*. The importance of this institution can be realised from the fact that, in most of the Muslim countries, there is either a separate ministry or a special deparment to take care of the administration of the *waqfs*. The origins of this institution are somewhat obscure; it is claimed that large estates were turned into *waqfs* by early

1. H.A.R. Gibb and J. H. Kramers, Eds., *Shorter Encyclopaedia of Islam* (London : Luzac, 1953), p. 624.

Caliphs in order to secure a permanent source of revenue for the State.[2]

In many respects *waqf* is a purely Muslim[3] institution, though a prototype of *waqf* is mentioned to be existing in earlier civilisations. In its effects and incidents it bears resemblance to the "Trust" of English Equity, but there are striking differences.

Where a *waqf* is made of property, "The proprietory right of the grantor is divested and it remains thenceforth in the implied ownership of the Almighty. The usufruct alone is applied for the benefit of human beings and the subject of the dedication becomes inalienable and non-heritable in perpetuity."[4] Such dedication must be for a pious purpose. The Islamic concept of "pious" is very wide. Every object which tends to the good of mankind, individually or collectively, is a pious purpose. A dedication to a mosque signifies the support of a place of worship for human beings; to a caravanserai, the maintenance of a place of rest for travellers. Similarly, a provision for one's children and descendants, kindred or neighbours, is a pious object under Muslim law.

Evaluation of Waqf, *Evidence of Traditions*. According to the general opinion of the Muslim theologians, there were no *waqfs* in Arabia befores Islam,

2. G. Heyworth-Dunne, *Land Tenure in Islam*, The Muslim World Series, No. 6, Cairo, 1953.

3. We have deliberately used the word "Muslim" and not "Islamic".

4. Syed Ameer Ali, *Student's Handbook of Muhammadan Law*, London 1882.

either in houses or lands.[5] The jurists trace the institution to the Prophet, although there is no evidence of this in the Qur'an. In comparison with other subjects the support for this institution in traditions is very slight, although it is always said by the legists that the Companions of the Prophet and the first Caliphs used to make *waqfs*. In a tradition narrated by Anas b. Malik it is said that the Prophet wished to purchase gardens from Banu Nadir in order to build a mosque. They refused to take the purchase money, however, and gave the land for the sake of God.[6] According to a report by Ibn 'Umar, on which the legists lay chief stress, 'Umar, at the partition of Khaibar, acquired lands which were very valuable and asked the Prophet whether he should give them away as charity. The Prophet replied: "Retain the thing itself and devote its fruits to pious purpose." 'Umar did this with the proviso that the land should neither be sold nor bequeathed. He gave it as charity for the poor, (needy) relatives, slaves, wanderers, guests, and for the propagation of the faith. In another version of this tradition the reference is to a palm garden called Thamgh.[7] In both cases, however, the reference is to one and the same piece of ground in Khaibar which was called Thamgh.[8] A third report by Anas b. Malik concerns a family endowment. In keeping with the pronouncement of the Qur'an

5. Shafi'i, *Kitab al-Umm*, III, 275, 280.
6. Bukhari.
7. Ibid.
8. Cf. Nawawi, *Sharh Sahih Muslim*.

(iii. 92):

"By no means shall ye attain righteousness unless you give (freely) of that which ye love; and whatever ye give, of a truth God knoweth it well"

Abu Talhah gave the Prophet his favourite piece of ground, the Bairuba' garden (in Medina) where the Prophet used to go to enjoy the shade and drink water. The Prophet, however, gave it back to him with the observation that he should make it an endowment for his relatives. Abu Talhah thereupon gave the garden as a charity for Ubayy and Hasan.[9] In other traditions quoted by Bukhari and others regarding the making *waqf* of movables, it is only a case of simple charity.

The legists seek to trace the institution of *waqf* back to the Prophet through these traditions. It is remarkable, however, that the oldest legists are not agreed on essential points of the *waqf*. In this connection, Shafi'i's polemics against unnamed opponents, certainly including Abu Hanifah, are interesting.[10] Shafi'i seems to have contributed to the success of the views on *waqf* which later became predominant. Abu Yusuf is said to have first declared for the irrevocability of the *waqf*, when on a pilgrimage he saw in Medina the numerous *waqfs* of the Muslims. All this suggests that the institution of *waqf* arose only after the death of the Prophet in the course of the first century A.H. and assumed rigid legal forms only in the second century. Its origin is to be

9. Bukhari.
10. For details, see Shafi'i, of. cit., Chap. III, 275 *sqq*.

sought in the strongly marked impulse to charitable deeds which is characteristic of Islam. Shafi'i[11] calls it a *sadaqah muharramah*. In addition, there was the fact that the Arabs found in the conquered lands foundations for public benefit, for churches, monasteries, orphanages, and poorhouses and may have adopted this form for the practice of the charity recommended by their religion. These endowments of the Byzantine period were inalienable, and managed by "administrators" and were under the supervision of the bishops.[12] Becker had already come to the same conclusion[13] when he showed that the custom is of making *waqf* of sites in the towns and not of agricultural land.

Waqf *As A Charitable Institution—Generally Inalienable*. The *waqf* was originally dedicated to the establishment of schools, mosques, libraries, hospitals, etc., and for the care of indigent families. The Caliph 'Umar I, guided by the idea of Divine ownership and charitable nature of the institution, set aside large estates for the purposes mentioned above. The income belonged to the Muslim community, while the capital was God's.[14]

Thus, we find that the precept of giving charity to the poor is the starting point of the institution of *waqf* and this institution is found in all Muslim

11. Ibid.

12. Duff, "The Charitable Faundations of Byzantium," in *Cambridge Legal Essays*, 1926, pp. 83 ff.

13. C.H. Becker, *Islamstudien*, p. 604.

14. Heyworth-Dunne, op. cit., p. 18.

countries with a varying degree of local difference.s

One of the first duties imposed by Islam on its adherents was that of giving charity to the poor. A traditional saying of the Prophet runs:

"Man's deeds come to an end with his death, and only three things do not pass away from the world with him, namely, charity which endures forever, knowledge and learning, and sons who have been brought up as upright men and who continue to pray even after their father has departed."

This view is supported by Heffening[15] who mentions that in the earlier Islamic era lands in the countries conquered by Muslim armies became the property of the Muslim community, but these were allowed to remain in the hands of the previous owners in payment of *kharaj* and could neither be sold nor pledged by them. All these lands originally became the *waqf* of the Muslim community.

The most important feature of the *waqf* institution, in the unanimous opinion of Muslim jurists, is that it is irrevocable. The founder cannot retract and annul the dedication if the court has already issued a certificate of dedication and if the dedication has already passed into the hands of the agents to whom the foundation of the *waqf* has committed the management of the property and its supervision. If the *waqf* has been established in pursuance of a will, the endowment becomes as a rule irrevocable with the death of the founder.

From this rule are excepted *waqf* properties the revenues of which previously belonged to the State,

15. W. Heffening, "Waqf," *Shorter Encyclopaedia of Islam*, p. 624.

and which were dedicated by permission of the *Sultan*, and devoted to objects not of public benefit. Endowments of this category can be annulled with the consent of the *Sultan*. In this way the authorities frequently confiscated the revenues of many *waqf* foundations which had been established for the benefit of the descendants of their founder.

This rule, that there is no going back on a dedication, rendered the assets of the *waqf* completely immobile and inalienable. This principle applied both to buildings covered with roofs, from which an income could be derived, and to any landed property on which there were no buildings but which brought in a revenue, such as land designed for the growing of grain or for plantations. *Waqf* property was thus in the nature of a "frozen asset"; it could not be sold or transferred to other hands in any shape or form.

In the course of time, however, under pressure of economic needs, the secular lawgiver raised objections against this principle of non-transference in perpetuity. Even in the earliest periods of Islam this principle was weakened by a regulation of the *Shari'ah* law which allowed *waqf* property to be exchanged for other assets. In the very first century of the Muslim era permission was given, under certain conditions, to exchange *waqf* property for *mulk* land, which, however, had to be converted into a *waqf* foundation. One of the Islamic authorities, Abu Yusuf, allowed such exchanges in cases where the revenues from the *waqf* property de-

preciated from natural causes, such as drought and famine, on condition that the *mulk* land, which was taken in exchange for the *waqf* property, did not bring in less than the latter. Ottoman law established a right of exchange, if the founder stipulated such a right in the deed of dedication, and if the land was not productive. Exchange was forbidden if it caused a monetary loss to the *waqf*; similarly, it was obligatory that the asset received in exchange should be of equal value having regard to its location and its capacities for development and appreciation as the assets of the former *waqf*. It was permissible even to exchange *waqf* property for money; only in this case it was obligatory to invest the money at once in the acquisition of some other property.

In the earlier period of the history of Islam it was customary to devote *waqf* foundations to the benefit of religious and charitable institutions in the two holy cities of Mecca and Medina, and the supervision and administration of these foundations was entrusted to the guardians of the two holy cities. Later, when the danger arose of the property being confiscated by Turkish *Sultans*, it became an established practice to transfer the immovable property, which served as *waqf* foundations throughout the Ottoman Empire, outside of Mecca and Medina to the guardianship of the custodians of holy properties in the two holy cities. With the spread of this custom the need arose to appoint agents who should manage the religious

foundations in their localities. When the Imperial power grew stronger, the headquarters of the administration were established at Constantinople, and from the sixteenth century onwards the State began little by little to transfer to its own hands the management of the *waqf* property. In 1591, there already existed a special office of Director General of the *Waqf*. Sultan Muhammad II (1451-81) made a serious attempt to put an end to the many abuses in the management of the *waqf* and to place the supervision of its revenues in the hands of State authorities. It may be noted that among the first reforms of the nineteenth century in Turkey was one for transferring the management of the *waqf* to an "administrative office," which in 1840 was converted into the Awqaf Ministry. This Ministry developed rapidly into one of the most powerful institutions in the Ottoman Empire on account of its control of numerous properties—all kinds of agricultural lands, city plots and buildings. The great majority of the foundations were put under the Awqaf Ministry, except those *waqfs* which were not considered as true *waqfs*.

The power of creating dedications is not confined to Muslims alone. Non-Muslim subjects in a Muslim country are permitted to found religious endowments on the same conditions and with the same limitations as apply to Muslims. In virtue of the tolerance extended by the Muslim law to non-Muslims, and also by reason of State policy and governmental considerations, the Turkish *Sultans* from the earliest

periods adopted a liberal attitude to the religious institutions in the conquered areas. Not only this, they themselves gave assistance to Christians and Jews who came to settle in the territories of the Ottoman Empire. The privileges which were granted to Christians and Jews were based on the proclamation made by Sultan Muhammad at the capture of Constantinople in 1453. The rights of the Christian Church were confirmed afresh by the Manifesto of Sultan Abdul Majid in 1856. The provisions of Muslim law, as also the Ottoman laws and regulations amending or modifying them, governed all the *waqf* foundations, whether Muslim or non-Muslim.[16] The basic principles of the *waqf*, viz. the irrevocability of the dedication and inalienability of the property in perpetuity are features common to all kinds of endowments, irrespective of the religious denomination. The *waqf* foundations of Christians and Jews were placed under the supervision of the religious leaders of each community. They could be assigned to the category of exceptional *waqf* which was not in any way attached to the administration of the Muslim *waqf*, and over which the Awqaf Department had no control.

Waqf *in the Ottoman Empire*. The institution of *waqf* was widespread in the Ottoman Empire. The increase in the number of foundations and of the wealth of the *waqfs* under the Turkish rule was already a grave and disturbing problem in the six-

16. A. Granott, *Land System in Palestine*, London, 1952.

teenth century. It has been estimated that nearly three-fourths of all the landed properties in the Empire were *waqf* lands.[17] Muslim religious sentiment was not the only cause of this; there were also other factors, such as the desire to release the property from taxes or to save it from falling into the hands of stronger men, since, on being handed over to the *waqf* foundation, it became a property which could never be transferred to other hands. Anyone who wished to protect his property against the plots of the powerful or against confiscation for the benefit of the State—a not uncommon practice in the Ottoman Empire—had no other way open to him except to proclaim his immovable properties, houses, or shops, or factories, such as flour mills, soap-works, lime kilns, and oil or sugar factories—as *waqf* foundations for the benefit of mosques or schools, and so ensure to his descendants the income from the property, or at least part of it, as they were appointed to manage these.

Another reason for establishing *awqaf* was to circumvent the rules of inheritance as, according to the commandments of the Qur'an, women must have their share of an estate. With the *waqf*, the landowner can stipulate that male heirs only should be entitled to inherit the income from the *waqf* property.

At various times the Ottoman Government made regulations calculated to break down the barrier of the non-transferability of *waqf* property in perpetuity,

17. Ibid.

or to limit to a perceptible degree the application of this principle. From this point of view the regulation that *waqf* land could serve as security for debts, introduced in the nineteenth century, was the most important innovation. According to this regulation, it was permissible to sell *waqf* property in the lifetime of the founder, and even after his death, for the payment of debts. Only a few restrictions on this right were laid down by the law. A portion of the landed property which was required to assure the borrower a minimum for his subsistence was forbidden to be sold. The same was the case with the house in which the borrower and his family resided. These regulations were prompted by the desire to restrict the institution which hampered economic development, or to diminish, as far as possible, the loss which it caused. In the end this principle, that *waqf* property was not to be permanently transferred, became only a legal fiction. Exception to this rule was the category of true or complete *waqf*, relating to *mulk* land. Even here, however, it was still allowed to make exchanges, so as to mitigate the freezing of *waqf* property. And, in fact, cases were always happening, and continue to happen today, of exchange of *waqf* assets for other immovable property including city plots and houses. *Waqf* managers were at liberty to exchange these assets for some other property of greater, or at any rate not less, value than the previous assets. For such exchanges, however, the consent of the authorities who supervised this property was necessary.

At the time of the establishment of the *waqf*, the dedicator had the right to lay down, according to his own wishes, what should be the manner and the order in which the dedicated property should be restored to his descendants. When, however, regulations regarding *waqf* were made during the Ottoman rule, it was provided that restoration of dedicated property should take place only in favour of the dedicator's direct descendants, one after the other, without a break. Consequently, the right of inheritance could be claimed by sons and daughters alone to the exclusion of relatives of collateral lines And when the sons and daughters had predeceased their father, the grandchildren could not inherit. When there was no offspring to keep alive the name of their father, dedicated property was freed from its originally stipulated fetters, the property thus becoming vacant and reverting to the State. By a subsequent Ottoman law the rules of inheritance as to *waqf* property became less stringent; on payment of a certain sum by way of compensation, the property was allowed to be transferred also to relatives of collateral lines.

With respect to the use made of the foundations, three categories may be distinguished in *waqf* property. To the first category belongs the property of foundations with religious objects, which consists essentially of the assets in the ownership of mosques —buildings belonging to religious institutions and devoted to Divine worship and similarly religious schools, their libraries and furniture, and also religious books and implements of Divine worship.

The second category of *waqf* property comprises assets intended for the benefit of the community and possessing a definitely social character, such as foundations for the assistance of the poor and charitable institutions; public inns for caravans, hostels for wayfarers, and accommodation for visitors; hospitals and mental asylums; educational institutions, like schools, orphanages, and libraries; foundations for objects which benefit the general public, like wells, baths, and public wash-houses and bakeries, cemeteries, roads and bridges, mosques adjoining highways, ornamental fountains and so forth.

Special mention should be made of the assets of the "ordinary *waqf*," produced from immovable property acquired by the mosques as a safe investment for money at their disposal. The mosques used to pay, as a rule, a much lower price than the real value of the property—about half—but they left the seller, in return for waiving his ownership, certain rights over the land, such as the right of usufruct, i.e. the right to use the land and to dispose of its produce. He had, however, to make every year a small payment proportionate to the price of the property at the time of its sale. From this form of *waqf* the transition was easy to the third form of *waqf* property —family foundations, the essential object of which was to assure the right of usufruct of the property to the founder and his offspring, according to a certain line of inheritance. The establishment of such foundations was prompted, among other things, by the desire of the founder to protect himself and his

descendants after him against the unbridled licence of the authorities, and also to avoid the danger of having his property confiscated by the State. From this point of view the establishment of *waqf* was advantageous to the property owner, since the property was protected not only against forcible expropriation or the demand of creditors, but also against the neighbour's right of pre-emption, as the law laid down that where a *waqf* property was put up for sale the landowner had a right of pre-emption over any other purchaser.

In practice, the *waqf* system in the Ottoman Empire blocked the way to profitable exploitation of most of the good land, and thus the progress of agriculture in the country. It is the general opinion of scholars that this system—and especially the arbitrary manner in which it was often applied in the Ottoman Empire—brought about not only the great economic backwardness, but also its financial straits.

The existence of the *waqf* constituted a threat to the profitable use of land—a threat which engaged the attention of all reformers in Turkey. Under an *Irada* (a decree of the *Sultan* of Turkey) of 1867, a committee was appointed to examine this problem with the object of suppressing the *waqf*, but the work of this committee was of little practical consequence, except that the Ottoman Government sought to limit to some extent the spread of the *waqf* system, and, with this in view, it aspired to prevent the conversion of *miri* into *mulk* land, because legally property

of the latter class only could be dedicated as *waqf*. This aim on the part of the authorities is very clearly marked in the Ottoman laws of the later period.

In the course of time, the *waqf* system produced adverse economic effects in another manner. As generations went by and the descendants of those who had dedicated the *waqf* multiplied, the revenue from the dedicated property became so much subdivided that the beneficiaries ceased to be interested in it and they, therefore, left the *waqf* property unattended and unimproved. With the increase in the number of beneficiaries from the foundations, quarrels and disputes between them also increased, leading to cases and suits in the courts, so that the Arabs coined a proverb: "Half the *waqf* goes to the judges." The regime of the *waqf*, to which in a certain period of the Ottoman rule in Palestine and Syria a great part of the lands was subjected, sapped the energy which the peasants would have put into the cultivation of the land if they could have been sure that the labour on it would be for their own benefit. A striking proof of this was to be found in Syria, where villages the lands of which belonged to private owners were getting on well, whereas villages on *waqf* land were desolate and their inhabitants starving.

Valid or True Waqf. Establishing of true or right *waqf* requires that a person has an unencumbered title to the property—it must be *mulk*—and that the proceeds from the true *waqf* are allocated to chari-

table purposes.[18]

With the foundation of the endowment, which has to be established by an official title deed, the possibility of the property being restored to the person dedicating it is entirely removed; this is effected by the insertion in the title deed or deed of dedication as an explicit .condition the right of using the property in perpetuity. In this title deed the person from whom the *waqf* is acquired defines the exact object for which he hands over his property. If the *waqf* deed did not contain this definition, or if the original object had ceased to be attainable, as in the case where the institution for the benefit of which the dedication was made no longer existed or where the heirs of the dedicator who had permission to enjoy the proceeds had died, the *waqf* property reverted to the State.[19]

Waqf *of Agricultural Land. Waqf* interests in land are of two kinds: (*a*) True *waqf*, called *waqf sahih*[20] and (*b*) quasi *waqf*, called *waqf ghair sahih*.

In Muslim law, as previously indicated, property can be dedicated as *waqf* only by the owner. It follows that land held in *mulk* ownership only may be made *waqf*. The *miri*-holder may not declare a *waqf* of his *miri* holding.

18. This was the original concept which underwent many changes, which are discussed later.

19. A. Granott, op. cit.

20. True *waqf* is governed by the *Shari'ah* laws and the will of the founder has to follow the rules and procedure laid down in the *Shari'ah* laws. *Waqf* of this category is rare outside the towns.

Mulk of all kinds may be dedicated as *waqf*. *Mulk* trees and buildings on *miri* can be dedicated, though the *miri* site remains undedicated. A dedication of buildings and trees, independent of land, thus is valid, but not if the dedicator is also *mulk* owner of the site.

In the Ottoman Empire true *waqfs* were governed only by the Sacred Law and were not subject to Ottoman Statute Law. Since true *waqfs* could be created only from *mulk* lands, a check upon the growth of *waqf* resulted from any legal restriction upon the establishment of *mulk* interests. On the other hand, it is easy to understand that, because of the *waqf* system, the Ottoman Government was anxious to prevent by law the increase of *mulk* property.

No true *waqf* dedication of *miri* is possible; *miri* declared to be *waqf* without having previously been transformed into *mulk* remains *miri*. *Miri* declared to be *waqf* in this way belongs to the dedicator as before and may be sold by the owner to another person. On the death of the dedicator it passes to his successors, and if there are none, it belongs to the Treasury.[21]

The quasi *waqf* is constituted out of *miri* land. In such a case only the *tasarruf* is consecrated for the beneficiaries of the *waqf*, as the *raqabah* is retained by the State. Sometimes only the taxes and fees leviable on *miri* land are dedicated to the *waqf*, while in all other respects the land retains its status

21. Tyser and Ongley, *Law Relating to Waqf*, p. 11.

as *miri* land with regard to the *tasarruf* and the *raqabah*. Such lands are called *waqf* of the *takhsisat*[22] category. Still, in other cases, both the *tasarruf* and taxes are dedicated as *waqf* while only the *raqabah* is retained by the State.

A modification of the law permits a kind of "untrue" or "customary" dedication of *miri* interests. Such a dedication is not in accordance with the Sacred Law; it is merely a dedication of the interests which the State has in the produce of the land and in the fees arising therefrom. Land does not really become *waqf* but is known as *irsad* in the Sacred Law. *Waqfs* of this category are of three kinds:[23] (*a*) lands of which only the tithes and taxes have been dedicated and consecrated by the government, while the right of possession as well as ownership belongs to the treasury; (*b*) lands of which the tithes and taxes belong as before to the treasury and only the right to their possession has been dedicated and assigned to a person by the government; (*c*) lands of which both the right of possession and tithes and taxes have been dedicated and assigned to a person by the government.

Classification of Takhsisat Waqfs. *Takhsisat waqfs* are classified as: (*a*) *Mazbutah* (seized), (*b*) *Mulhakah* or *Ghair Mushartah* (non-seized), and (*c*) *Mustathna* (exceptional). *Waqfs* of class (*a*) are fully controlled by the *waqf* administration. They are, for the most

22. *Takhsisat* means appropriation of revenue.
23. For details, see Umar Hilmy, *Law of Waqf.*

part, dedications made for a charitable or religious purpose.

Waqfs of class (*b*) are controlled by their managers. The appointment of the manager is regulated by the deed of dedication. They are controlled, chiefly with respect to finance, by the *waqf* administration which has periodical inspections made through its officers, and is empowered to charge fees for this service. Such *waqfs* are, for the most part, intended to benefit the descendants of the dedicator along a line of devolution which has been defined by him.

Waqfs of class (*c*) are for most part private *waqfs*, like those in class (*b*), but are not subject to the control of or inspection by an outside authority.[24]

In all the Muslim countries, immovable *waqf* property of all kinds had been leased from time immemorial, and the relation between the holder of *waqf* and the person occupying the land had been that of landlord to lessee or tenant, but the lessees were more or less perpetual as the same tenant or his heirs continued to cultivate the same land. Thus, for all practical purposes, the tenants of *waqf* land began to regard themselves as the owners of these lands. There was thus a real danger that ulimately *waqf's* rights of ownership to the lands would fall into abeyance. To avert this danger, a number of attempts were made to limit the possibilities of leasing *waqf* property in perpetuity or for a long period.

24. H.C. Tute, *The Ottoman Land Laws* (Jerusalem, 1927), p. 12.

During the Mameluke period (1250-1516) we frequently come across a regulation forbidding the leasing of lands for more than three years. This time limit was imposed on account of the custom of the *waqf* administrators of leasing properties for a long period and so violating the fundamental principle of the *waqf* system, which was that its property should not be transferred in perpetuity to other hands. In order to abolish this practice, the *Shari'ah* law limited the validity of the lease to a short time only—one year in the case of buildings and three years in the case of agricultural land. In certain cases, when a long-term lease was advantageous to the *waqf*, the property was leased, with the consent of the court, for a longer period. Actually, leases were always being given both in perpetuity and for a fixed period, either long or short. *Waqf* property leased for a fixed period is called *ijarah wahidah* or single contract. The *Irada* of the *Sultan* of 5 April 1882, which was amended by the law of 1 February 1912, lays down that *waqf* properties of this category are not to be leased for a period longer than three years. In order to overcome the difficulties caused by the prohibition of transferring *waqf* property from one hand to another, and to mitigate to a certain extent the danger of freezing dedicated property, the Muslim law created a new form of tenure called *ijaratain*, or contract of double rent, involving two payments on the part of the lessee. If the transaction concerned is *ijarah wahidah*, the endowments were responsible in the same way as all landowners

to maintain the dedicated property and to improve and repair it. This obligation caused a marked decline in the income of the *waqf* and led to a great neglect in the maintenance of the properties. Under Sultan Selim I (1512-20) an effort was made to carry out extensive repairs to *waqf* properties so as to increase their value, which was continually declining. This policy resulted in such a heavy burden upon the State that in the reign of Sultan Sulaiman the Magnificent (1520-66), in his desire to make things easier for the Exchequer, laws were promulgated which aimed at diminishing the investments in dedicated property. For this purpose there was created the form of *ijaratain*, which may be defined as a contract between the *waqf* and one who leases from it immovable properties, containing a stipulation that the lessee was responsible for keeping it in good condition. The usufruct of the property could be transferred to the tenants, whether in perpetuity or for a long term, in return for a double payment; one payment, which was in effect the price of the right, as a rule was a large one, because it corresponded more or less to the value of the property; the second payment was a small one—a sort of annual royalty payment to the *waqf*. This form of lease was of advantage to the *waqf*, since it could hand over a property upon which the maintenance charges were excessive in comparison with the revenue from it, or which could reasonably be expected to be liable to depreciation. In this way the obligation which devolved on the *waqf* in connection

with the dedication of property was practically wiped out, while the property itself still enjoyed all the rights of protection especially afforded to the non-seized *waqf*. In such cases it was permissible for the founder to register land as *waqf* property, and at the same time to occupy it for the whole of his lifetime and also to transfer it in accordance with the general laws of inheritance of the State. The innovation of the *ijaratain*, with all its practical advantages, resulted in a very rapid increase in the number of *waqf* properties held in this form. The conversion of firm *waqf* properties, held as *ijarah wahidah* into *ijaratain*, proceeded at an especially rapid rate in the nineteenth century, mainly through the dishonesty of the local *qadis* and the *mudirs* of the *waqf*, or with their connivance, since as a rule they themselves were interested parties in these transactions. In this period extensive stretches of land were converted into *ijaratain* property, the *waqf* being the sole loser.

The leasing of *waqf* property for a long period or even in perpetuity is also known as *hikr* (a name similarly applied to the rent from property). This was given in cases where the condition of the property was such as to render it necessary to make a large capital outlay on it, and where the lessee, who took the land for a short term only, was not prepared or able to make any investment. A lease contract of this kind resembles, practically in all its details, the *ijaratain* contract. and, although there are some legal differences, they are alike in their practical

effects. In Palestine the *hikr* type of contract was frequent in the southern districts. An Order of the Palestine Government of 12 December 1921 expressly mentions this form of tenure. In Syria there are included under the name *hikr waqf* properties of the *ijaratain* category lying outside of the city areas.

The tenure in *ijaratain*, or *hikr*, form was gradually being made more permanent. Lease-holds under such contracts can be inherited and transferred to other hands. It is particularly in use with city plots and buildings. The *ijaratain* serves in practice as a means of liberating the *waqf* properties from the severe restrictions of religious law; it was based upon a desire to reconcile to some extent the conditions of this kind of tenure with the actual requirements of economic life.

There is another type of lease called the *muqata'ah*. It is created when *waqf* land is leased at a fixed rent on condition that buildings and trees thereon shall be the *mulk* of the lessee.[25] The *waqf* land in this case becomes subject to the buildings and trees as long as "there are traces of buildings, trees or vines on the site".[26] Even if no traces of buildings, trees or vines remain, the "*mutawalli* cannot cancel the lease and take the site from the hands of the possessor so long as the latter duly pays the rent at the right time".[27]

The practices mentioned above existed long

25. Goadby, *Land Laws of Palestine*, p. 83.
26. Ibid., p. 55.
27. Ibid.

before the laws and regulations that were issued by the Ottoman Government to regularise these practices. As a part of the reorganisation, the great body of *waqf* properties was placed under State control and administered by the Department of Awqaf. But there still remained a great portion of the *waqf* property administered by their *mutawallis* either under the supervision of the Awqaf Department, in the case of the non-seized or "attached *waqf*," or entirely independent from official control, as in the case of "the Exempt *Waqfs*".

The Ottoman Laws of 1864 and 1867 regulated the status of these various categories in respect of their administration and transferability, leaving the Islamic principles as to ownership of the *waqf* lands unaltered.

The new approach to State control of *waqf* properties no doubt constituted progress, as compared with the pre-existing situation, but it fell far short of what was needed for the productive development of land. It lacked two essential features : (*a*) an efficient and honest administration, and (*b*) the modification of Islamic law and customary practices so as to transform the Awqaf Department and the *aqwaf* beneficiaries from sleeping partners, as they were, in the produce of the land, into conscientious landlords willing to incur the expenses of production and to invest in land the capital so urgently required for its development.

The Awqaf Department regime and its economic effects in Iraq have been vividly summarised in the

following statement by Mr Longrigg:

"The Awqaf Department saved the *waqf* property from secular misuse, but did not save the yearly dispatch to Stanbul of surplus *waqf* revenue while its properties deteriorated; mosques crumbled; and starved officials stole."[28]

Moreover, the *waqf* institution provided the worst kind of absentee landlordism in the country.

Family Waqfs. *Waqfs* on a broad basis can be conveniently divided into two categories: (*a*) public *waqfs*, and (*b*) private *waqfs*. The first category, public *waqfs*, are constituted for the benefit of pious purposes, such as maintenance of mosques, schools, and other charitable institutions, which we have discussed in the previous pages. The second category —private *waqfs*—is a sort of family entail made inalienable while the income derived from it is used by the members of the family and their descendants in accordance with the will of the founder. A brief account of this type of *waqf* is given below.

The category of *waqf* properties which have been turned into family endowments play a very important part in the Muslim world. These are, for the most part, estates which have been transferred in perpetuity to certain families. One can discern here a certain resemblance to the Roman law on trust bequests (*fideicommission*)[29] and the corresponding, but, by no means, identical, institution of the Germanic law on

28. S.H. Longrigg, *Four Centuries of Modern Iraq* (London, 1928), p. 317.
29. See W.W. Buckland and Arnold McNair, *Roman Law and Commo Law* (Cambridge, 1936), pp. 136-40.

entailed estates.[30] In this the right of ownership is limited in several respeets, the owner being under obligation to transfer the property which has come into his hands unimpaired and in good condition to the heir, as laid down in the testament or the official title deed, which forms the legal basis of the *fideicommission* in Roman law or of the entailed estates under Germanic law. Forethought for children and descendants is also considered a charitable deed according to the precepts of Islam. If the testator desired to preserve the lands in his possession from being sold by the heirs, if he desired to prevent disputes over inheritance between his children or to protect the properties from being squandered by them after his death, or from being seized by rulers or men of power, he could lay down that the landed properties should, if the family died out, at once pass to a mosque or some other religious institution. The right of using the property dedicated to a family *waqf*, as also the enjoyment of its produce, belonged to the members of the family ; as long as a legal heir existed, the mosque or the religious institution could not claim for itself a right over the property. At the same time it was strictly forbidden to transfer the property outside the family of the testator. If there are no legally qualified heirs, the beneficiary of the dedication can come forward as heir, and the property is turned into a charitable foundation. Such

30. See Rudolf Huebner, *A History of Germanic Private Law* (London, 1918), pp. 308-15, 761-62.

a foundation is called *waqf mundaris*, i.e. annulled, because the original purpose of the founder has been annulled.

Family *waqf* foundations, called *waqf zorri*, became common under the Ottoman rule, and provided many families with a safe investment. The name *waqf zorri*, which means "for future generations," was preserved from Turkish times, and is known especially in Syria. Dedication for family foundations lost much of its effectiveness through the size of Muslim families. After some generations, the portion of the *waqf* revenue accruing to each one of the beneficiaries was reduced to such a point that they no longer had any interest in accepting it. They did not trouble to claim their miserable portion, and the money was left, in this or some other form, in the hands of the *waqf* administrator.

Family *waqf* foundations were already known in the flourishing days of the feudal regime, their establishment at that time being due to a desire to convert into a family inheritance the fief properties which were granted only for a limited period. In the reign of Sultan Mustapha I (1617-18 and also 1622-23) numerous Crown estates, as was then usual, were transferred as fiefs to leading government officials for a limited period only, and the recipients of the fiefs converted the estates into *waqf* foundations for the benefit of their families. *Waqf* dedication, therefore, served many highly-placed and wealthy persons as a ready means of ensuring to themselves and their descendants a revenue in perpetuity which should be

safe against any emergency. *Waqf* family foundations were widely resorted to by, among others, the Governors of provinces in the Ottoman Empire, in an endeavour to preserve the huge fortunes which they had amassed in places which they governed. As soon as the slightest hint reached their ears that the *Sultan* was plotting to remove them from their post, they immediately proclaimed their property before the religious court as *waqf* dedications. A certain portion of the revenues from their property was dedicated to religious purposes, but they assured the lion's share to themselves and to their heirs. The dedication of a family foundation served as a good protection for the family against arbitrary acts of the local rulers—who changed frequently with the lords of the country—since even the most powerful did not dare to touch the property of the mosques and to profane the holiness of the *waqf*. Dedication for religious or charitable purposes was no longer the primary object in the eyes of the founder of the endowment; this was only a means of assuring to his descendants in perpetuity the revenue from the property, either the whole or the greater part of it. This was effected either by fixing a yearly payment, which was specified in the dedication deed, for the benefit of his children and his children's children, or by having these appointed as administrators of the foundation with the condition that they should be able to benefit in various ways from the foundation and its revenues.

The Economic Effects of Waqf. The *waqf* system

impaired the transferability of landed property through formidable obstacles and hampered the development of the lands. The revenue from land dedicated to *waqf* was as a rule less than that from comparable land in private ownership. The tenants frequently neglected the land entrusted to them and the administrative agencies charged with supervising *waqf* administration did not establish effective standards for maintaining or improving the productivity of the land. In addition, the principle of the inalienability of the land hindered the obtaining of credit. Thus, the law and administrative practice relating to *waqf* property constituted a formidable obstacle to the utilisation of a large sector of the landed property, i.e. the type of property which from the earliest times has been considered as the most valuable kind of property in all economically backward countries. Certainly, the *waqf* system was bound to be a great hindrance to the growth of prosperity in the countries of the Middle East and to the development of proper agrarian conditions. The stoppage on the circulation of landed properties itself entailed serious loss to the national economy. On the other hand, high-handed action on the part of the State treasury or breach of trust on the part of the managers of the foundations made gaps in the fences of the *waqf*. The liberation of property from the control of the *waqf* which was brought about by such actions certainly involved great loss for the founder of the trust, but from the point of view of the national economy it could be looked upon as

blessing. The *waqf* system was a further source of suffering of the masses because they were robbed right and left in order to obtain the money required for the creation of huge *waqf* foundations. Certainly, large capitals were accumulated in this way, but in many cases it was done by oppression and exploitation of the tenants.

In the course of time the *waqf* became a source of abuses and swindles of all kinds. It was a common practice to annul the regulations of the foundations and to confiscate the property, and in this way the property was permanently lost to the *waqf*. From the fourteenth century, or even earlier, dedicated property began to be exchanged or even bought. the administrators of the foundations used to transfer property to their own name and rob the *waqfs* as much as they pleased. In these irregular conditions there was no way of saving property except by annulling the regulations of the *waqf*. Scholars of religious law and families of high lineage, who held sway locally, neglected the foundations under their supervision—religious, charitable, and educational—the means for maintaining which they received from the income of the *waqf*. *Waqf* property became a fruitful source of enrichment for the powerful and highborn in their various kinds, and only a small portion of the revenues of the foundations was expended on their proper objects. It has been mentioned that a certain village belonging to a *waqf* brought not less than 50,000 Turkish piasters a year. But the family which had leased this village

from the *waqf* authorities paid them only 1000 piasters, and the rest of the income it kept for itself. And last but not least, the *waqf* system became an important factor in the formation of large estates and in strengthening the regime of large land-ownership. The spread of the *waqf* system led to the accumulation of very big areas, which became subject to a most stable ownership, to an unchangeable regime, chiefly on account of the principle of the inalienability and indivisibility of the property which applied to all *waqf* foundations.

The religious motives of the *waqf* were subsequently superseded by a very strong movement for the immobilisation of real estate actuated by other motives remote from piety and charity. With the growing insecurity of the time, rich land-owners availed themselves of this institution in order to make their estates secure, and at least securing to themselves and their descendants the usufruct. In other words, it was a way to avoid confiscation.

The magnitude of the *waqf* properties can be well realised from the fact that three-quarters of the whole arable land in the former Ottoman Empire belonged to *waqfs*.

The value of *waqf* properties in modern Turkey was estimated at LT 50 million in 1928 while the government budget for that year estimated revenues from these properties at LT 3.5[31] million.

In Algeria under French occupation, *waqf* com-

31. *Shorter Encyclopaedia of Islam*, p. 627.

prised half the lands of the country in the middle of the nineteenth century. In Tunisia in 1883 one-third of the land belonged to this category. In Egypt in 1949, about one-eighth of the agricultural land was *waqf* land.

Although the abuses of *waqf* constitute a long and deplorable story, one must not lose sight of the very great service the *waqf* institution did to the Muslim community. The Muslim Empire had no department for public works ; bridges, roads, road-houses, caravanserais, mosques, schools, libraries, etc., all owe their existence entirely to the *waqf*. Harun al-Rashid's wife, Zubaidah (d. 10 July 831), for example, built all the roads and road-houses from Baghdad to Mecca for the use of pilgrims entirely out of a *waqf* established by her. The whole system of Muslim education depended entirely on the *waqf*. No less than forty college-mosques were in use in Cairo when the French occupied that country at the end of the eighteenth century ; there were 300 elementary schools in the same town, one was established for 400 boys and 400 girls. This was about one-fourth of the original number. All these places provided food, lodging, and clothes for teachers and students. But for the *waqf* there would have been no education and no social welfare in Muslim countries in the earlier period.[32]

To sum up. Waqf was in many respects a useful institution in its time and has a number of contributions to its credit. However, with the lapse of time it has lost much of its earlier utility.

32. Heyworth-Dunne, op. cit., p. 18.

The disadvantages of the *waqf* system are many. It allowed huge accumulation of estates without proper effective management and without purposeful administrative supervision, with the result that there was much corruption at all levels. Buildings fell into decay ; no one attempted repairs because of the pressure of the demands for funds on the part of the usufructuaries. The soil became neglected and the size of estates diminished. Peasants and beneficiaries became lazy and indolent ; the indebtedness of the cultivators often embarrassed the directors of the *waqfs*. Many men joined the ranks of the unemployed and lost all interest in work because of the fact that all their funds were tied up in this manner, thus taking away all initiative. Late in the sixteenth century, the Turks introduced a system of granting hereditary lease rights in *waqf* lands in order to increase interest in management; the experiment met with some success.

At the present time, with the modern concept of the functions of the State in educational, medical, and other public services, the *waqf* really ceases to have the same social function and could be superseded entirely by modern institutions, such as endowments and trusts. The detailed historical account of the working of this institution in Egypt and the Turkish Empire clearly shows that this institution does not form an integral part of Islam and nothing stands in the way of reforming this useful institution to fall in line with the modern times and requirements.

6

USUFRUCTUARY RIGHTS IN LAND

In all the conquered countries the Arab rulers generally conceded only the usufructuary rights to the cultivators and retained the rights of bare ownership for themselves. The *miri*[1] tenure which applied to the large majority of lands in the Ottoman Empire were held on rights of usufruct. It will, therefore, be helpful in properly understanding and appreciating the Ottoman systems of land tenure if the legal aspects of rights, property and usufructs in general were studied.

In spite of the fact that the word "property" is so commonly used, it is not easy to define. Austin[2] gives no less than eight senses in which the term is used in legal and popular language. The concept of property will be better understood if we first define the concept of law and rights.

Definition of Law. A law in the sense in which it is used by jurists and legislators may be defined as a rule of human conduct which the State will enforce either on its own initiative or on demand. The whole body of such rules is called law.[3]

1. Discussed in the next chapter.

2. John Austin, *Lectures in Jurisprudence*, 5th Ed., Ed. by R. Cambell. London, 1885.

3. Holland, *Elements of Jurisprudence*, Chapter III.

Legal Rights. A legal right is a capacity residing in one person of controlling, with the assent and assistance of the State, the actions of others.[4] If we attempt to classify the various rights with which a person may be invested we can group them in four categories [5]

(1) There are what may be called his natural rights having their origin in the fact of his existence and concerning his life, his liberty, or his honour, and these include all his so-called political rights.

(2) Rights attached strictly to his person and arising from such relationships as husband/wife, and child, guardian and ward.

(3) Rights in personam or claims against determinate persons, which are transmissible to others.

(4) Real rights or the rights he has directly to or over things, which are also transmissible.

Strictly Juristic Definition of Property. It is only the last two categories which have a pecuniary value, and it is these alone which constitute his property. In other words, property consists of rights which being transferable or assignable have a pecuniary value: This is the strictly juristic definition of property, but it hardly accords with either the popular or even the ordinary legal use of the term.

Property may then be said to consist of anything of value which can be the object, direct or indirect, of a right. Such thing may either be a material thing or what the law has assimilated to a material thing.

4. Ibid. 5. Ibid.

In order that a thing can have a value it must be a source of benefit to the owner and must be capable of exclusive appropriation. This same idea of utility and appropriation is present in the definition of property given by writers on Muslim law. "Property," says Kadry Pasha, "consists in things which man may preserve in order to make use of them when the necessity arises."

Another meaning of the word "property" is the aggregate of a man's faculties, rights, or means, called in Roman law a man's patrimony; at least that name is given to such part of the aggregate as descends to his general representative on his demise, or is applicable to the discharge of his obligations if he is insolvent. It is tantamount to the term "estate and effects" or perhaps to the term "assets". In this sense it implies rights in personam as well as rights of every other class. It is evident that a man's rights as against determinate persons are just as much applicable to the discharge of his debts and devolve just as much to his general representatives as his *jura in rem.*

The Origin of Usufruct. Usufruct is an old Roman institution. It meant the right to enjoy the property of another and to take the fruits but not to alter the character of the property even though he may thereby increase its value. The usufructuary could release or surrender his rights to the owner, but he could not alienate them absolutely to a third person. He could, however, assign by way of pledge or mortgage his interest to another. The actual legal right

mained with him. In case a usufruct was created by legacy, it was the duty of the usufructuary, in the absence of any contrary directions in the testament, to pay the taxes.[6] It gave indefinite rights of enjoyment, almost the same as those of the owner.[7] A usufruct was usually granted for a lifetime, not more, but sometimes for a fixed term when it was granted to a corporation; its limit under Justinian was then one hundred years. Even if the term was fixed, death of the usufructuary ended it.[8] The usufructuary was entitled to the possession of the property and could make any lawful use of it. His use, however, was required to be exercised in such a way that the reversionary interests should not be impaired. In case of land, it was incumbent upon him to cultivate it in a proper way.

Usufructuary Rights. The legal aspects of usufruct have been comprehensively dealt with in the Louisiana Civil Code from the Western standards and in the Egyptian Civil Code from the Eastern standards. We give a summary of these below. In spite of a certain amount of repetition, the two Codes are dealt with separately, as the differences are quite considerable.

Usufruct as Envisaged in Louisiana Code.[9] Accord-

6. W.L. Burdick, *Principles of Roman Law and Their Relation to Modern Law* (Rochester, N.Y., 1839), pp. 357-58.

7. W.W. Buckland and Arnold D. McNair, *Roman Law and Common Law—A Comparison in Outline* (Cambridge, 1936), p. 101.

8. *Idem, A Textbook of Roman Law, From Augustus to Justinian* (2nd ed., Cambridge, 1932), p. 469.

9. Joseph Dainsow, Ed., *Civil Code of Louisiana, Rev. of* 1870 *with Amendments of* 1927 (Minnesota: West Publ. Co., St. Paul, 1947), pp. 100-01.

ing to the Louisiana Civil Code, usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantages which it may produce, provided it be without altering the substance of the thing.

The obligation of not altering the substance of the thing takes place only in the case of perfect usufruct.

There are two kinds of usufruct, which is of things which the usufructuary can enjoy without changing their substance, though their substance may be diminished or deteriorated naturally by time or by the use to which they are applied, such as a house, a piece of land, etc.; and imperfect or quasi usufruct, which is of things which would be useless to the usufructuary if he did not consume or expend them, or change the substance of them, as money, grain, etc.

Perfect usufruct does not transfer to the usufructuary the ownership of the things subject to the usufruct; the usufructuary is bound to use them as a prudent administrator would do, to preserve them as much as possible, in order to restore them to the owner as soon as the usufruct terminates.

Imperfect usufruct, on the contrary, transfers to the usufructuary the ownership of the things subject to the usufruct, so that he may consume, sell, or dispose them of, as he thinks proper, subject to certain limitations hereinafter prescribed.

Usufruct is an incorporeal thing because it con-

sists in a right.

Usufruct is divisible, for if this right is vested in several persons at a time, there is but one usufruct, which is divided among them, each having his portion. The reason is that the object of this right is receiving the fruits of the thing, which are corporeal and divisible.

Usufruct may, from its origin, be conferred on several persons in divided or undivided portions.

The Rights of the Usufructuary. All kinds of fruits, natural, cultivated, or civil, produced during the existence of the usufruct by the things subject to it belong to the usufructuary. Natural fruits are such as are the spontaneous product of the earth; the product and increase of cattle are likewise natural fruits. Civil fruits are rents of real property, the interest of money and annuities. All other kinds of revenue or income derived from property by the operation of the law or private agreement are civil fruits.

The natural fruits, or such as are the product of industry, hanging by branches, or by roots, at the time when the usufruct is open, belong to the usufructuary.

Fruits in the same state at the moment when the usufruct is at an end belong to the owner without being obliged to compensate the other either for work or seeds.

Rents and income of property, interest of money and annuities, and other civil fruits, are supposed to be obtained day by day and they belong to the

usufructuary in proportion to the duration of his usufruct, and are due to him, though they may not be collected at the expiration of his usufruct.

The usufructuary has a right to draw all the profits which are usually produced by the thing subject to the usufruct. Accordingly, he may cut trees on land of which he has the usufruct, take from it earth, stone, sand, and other materials, but for his own use only, and for the amelioration and cultivation of land provided he acts in that respect as a prudent administrator, and without abusing this right.

The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct if they are actually worked before the commencement of the usufruct, but he has no right to mines and quarries not opened.

The usufructuary enjoys the increase brought about by alluvion to the land of which he has the usufruct but has no right to islands formed in a stream not navigable opposite the land; they belong to the riparian proprietors, as is prescribed in the title.

In like manner, he has no right, not even the right of enjoyment, to the treasure which may be discovered in the land of which he has the usufruct, unless he himself has discovered it, in which case he shall enjoy only the right granted by law to such persons as find a treasure in a piece of land which is the property of another person.

The usufructuary enjoys the right of servitudes, ways or others due to the inheritance of which he

has the usufruct ; if this inheritance is enclosed within other lands of him who has established such usufruct, a way must be gratuitously furnished to the usufructuary by the owner of the land or by his heirs.

The usufructuary can maintain all actions against the owner and third persons which may be necessary to insure him the possession, enjoyment and preservation of his right.

Usufruct as Treated in the Egyptian Civil Code.[10] For our study, the Egyptian Code is preferable as it takes account of the situation in the neighbouring countries, past history and current practice.

Of the three groups of rights which are involved in full ownership, two of them, use and enjoyment, are during the continuance of the usufruct vested in the usufructuary ; the third, the right of disposal, is alone vested in the bare owner, and this he can exercise only subject to the usufruct. Thus a usufruct is a restriction of the right of ownership, so extensive as to deprive the owner for the time being of almost all the advantages of his right. For this reason the right of the owner, thus denuded of its benefits, is called "bare ownership".

Although a usufruct normally implies these extensive powers of user and enjoyment, the legislation authorises restriction in the deed which constitutes the usufruct, whether it be the result of an agreement or a gift. It may be reduced to a mere right of per-

10. *Civil Code of Native Egyptian Tribunals*, 28 Oct. 1883 ; *Civil Code of Mixed Tribunals*, 1876, Cairo. Arabic and French text.

sonal user or to a right of habitation. Strictly speaking, a mere right of user implies only the right to use the thing but not to take its products. But in France, the beneficiary of a right of user is allowed to enjoy such portion of the fruits as is necessary for the reasonable user of the thing. The right of habitation explains itself; it is the right to dwell in a house and is a particular case of user. The rights of user and habitation are personal; in other words, unlike complete usufruct, they cannot be assigned, leased, or otherwise disposed of. They are restricted usufructs and accordingly possess the characteristics of usufructs; that is, they are real rights of which the maximum duration is limited to the life of the beneficiary.

We have seen that the right of the owner may also be restricted by the existence of servitudes over his property, but a servitude is to be distinguished from a usufruct in two ways. First, the nature of the acts of user or enjoyment which the beneficiary of a servitude is entitled to perform is defined and specified, whereas the usufructuary powers in this respect are, as a rule, as extensive and unmodified as those of an owner. Second, a servitude is a burden imposed on one immovable for the benefit of another immovable, whereas a usufruct is always for the benefit of a person, and for this reason the Roman writers, having divided servitudes into real and personal, placed usufructs in the latter category.

Usufruct, as defined by the Egyptian Codes, is the right of using and enjoying property, the bare

ownership of which belongs to another. This definition for the purposes of analysis may be expanded as follows : Usufruct is a real right to use and enjoy a movable or an immovable belonging to another during life or for a fixed time.

In legal theory, a usufruct is essentially a life-interest, that is to say, it terminates in all cases with the death of the usufructuary and is not transmissible to his heirs or legatees. It may, however, be created for a specific period or made dependent on a condition, but even in these cases it will come to an end on the death of the usufructuary supervening before the expiration of the period or the realisation of the condition. For this reason a usufruct is often called a personal right in the sense that its existence is bound up with that of a person.

Although a usufruct is in its nature temporary, and it is this characteristic which distinguishes it from ownership, yet there are exceptional instances of usufructs which are prepetual. In Roman law there was *emphyteusis* which was the right of a person who was not the owner of a piece of land to use it in perpetuity. In Egypt there are two kinds of tenure of property, *waqfs* and *kharaj* land, which seem to be of the nature of perpetual usufructs, and it is in view of these that the Codes seem to allow that, as between the State and corporations, perpetual usufructs are permissible.

The object of a usufruct is a thing of which the bare ownership belongs to another.

Thus, the usufruct and the bare ownership,

although both are fragments of ownership, are two distinct rights exercised concurrently and simultaneously over the same thing, but not incompatible with the other because the powers which they confer are different and do not overlap.

This separation of the usufruct and the bare ownership has two important consequences.

(1) The usufructuary and the bare owner are not in a state of indivision because indivision exists where several persons have rights of the same nature, that is, rights conferring the same powers over the same thing, and the relation between the usufructuary and the bare owner cannot be terminated by a partition.

(2) The usufruct can be transferred or seized by the creditors of the usufructuary ; in the case of an immovable, it can be hypothecated apart from bare ownership. We shall see that this is an important difference between the usufruct and real servitudes which being considered as "qualities of things" cannot be dealt with apart from ownership.

The Egyptian Codes do not specify the ways in which usufructs can be created other than by *usucapio* it seems to be implied that they can be created only by the will of man). However, there exist in European legislations usufructs which exist in virtue of the law, quite independent of the will of the parties. For example, in French law, the usufruct of the property of minors up to the age of eighteen belong to the father during marriage, and to the surviving parent after dissolution. Accordingly, although legal

usufructs do not find a place in the Codes, the Egyptian Tribunals and especially the Mixed Tribunals[1] were called upon to give effect to such usufructs established by the personal law of foreigners having property in Egypt.

With this reserve it may be said that in Egypt usufructs are always the voluntary creations of man. They are always the result of either a gift or contract of value or a legacy. They may be created in one of the three ways : the owner may transfer the usufruct by deed of sale or gift reserving to himself the reversion or bare ownership ; or he may transfer the bare ownership reserving the usufruct to himself ; or he may transfer the usufruct to one person and the bare ownership to another.

It has sometimes been doubted if a usufruct which is essentially a temporary and terminable right, can be acquired by *usucapio*. In the first place the possession of a usufruct is not precarious as regards the usufruct itself, but only as regards the ownership. The usufructuary's title does not imply the recognition of any superior right of usufruct in which his own must ultimately be merged.

Again, a usufruct is undoubtedly a right in *rem*. The Mixed Code, which, however, has not been reproduced in the Native Code, expressly enacts that "the usufruct of tributary lands is acquired by prescription after five years' possession, provided the possessor cultivates the land".

11. The Tribunals were abolished on 15 October 1949.

It appears, therefore, that while the acquisition of a usufruct by prescription is opposed to neither the spirit nor the letter of the Egyptian Codes, the faculty is of theoretical rather than practical application.

In the first place, the five years' prescription without just title or good faith would be difficult to establish, because it would be rare that a person possessing an immovable under these conditions would have any interest in claiming to possess as usufructuary and not as owner ; the owner would require to be of prodigious apathy and indifference.

The prescription of five years with good faith and just title is not impossible. For instance, a person might grant by a deed of sale the usufruct of an immovable of which he is not owner to another, who, believing in good faith that he has dealt with the owner, exercises the usufruct during five years. At the end of the period he will have acquired the usufruct by prescription.

A usufruct can be validly created by a person who is owner of the thing to which the usufruct is to apply and who also has the legal capacity necessary for the alienation of his property. The reason for this double condition is that a usufruct being a fragment of ownership, its creation is a partial alienation of the property, and as such can be operated only by the owner having the necessary legal capacity. It is permissible to create a usufruct successively reversible to specified persons, but, in order to be valid, all such persons must be living and legally capable at the time of the creation. The law, however, makes

an exception in favour of the beneficiaries of a *waqf*. The constitution of *waqf* involves the creation of a series of successive usufructs, but it is not necessary that all these beneficiaries should be living and legally capable at the time of the constitution of the *waqf*.

The rights and obligations which arise from usufruct are governed by conditions imposed by the deed by which it is created. Thus, the parties are free to extend or restrict the powers of the usufructuary provided that the essential qualities of the usufruct are not effected. The usufruct which we shall study will be the normal type unmodified by any special provisions in the deed by which it was created.

With this reserve the rights of the usufructuary may be grouped under three heads: (1) Enjoyment; (2) Administration; (3) Disposition.

Enjoyment. Two restrictions are imposed on the powers of enjoyment of the usufructuary: (*a*) The first is that the property must be used according to the object for which it was intended. Thus, the usufructuary cannot turn arable into grazing land, or convert private residences into shops or offices.

(*b*) The second restriction is contained in the definition of a usufruct: he must not put the property to such uses or enjoy it in such a way as to injure the rights or diminish the enjoyment of the owner. He must, allowing for wear and tear, restore the thing at the end of the usufruct in the same condition as he received it.

On the other hand, the usufructuary has the

benefit of any right of servitude existing for the benefit of the thing and of any covenant which the owner has entered into for the purpose of increasing the utility or enjoyment of the thing.

The most characteristic attribute of the usufruct is the right to appropriate the fruits and certain casual products which have been assimilated to fruits. Unfortunately, on this point there is a strange lacuna in the Egyptian Codes. Although on several occasions, the Egyptian Codes refer to the acquisition of fruits, they do not define the term. The Muslim law also fails us as it contains only a few vague and general indications.

A fruit may be defined as whatever a thing produces periodically according to its nature without altering or diminishing its substance. This condition would again exclude treasures and antiquities as well as the materials of a house which had been pulled down, or a tree uprooted by the wind. The periods may be fixed by Nature as in the case of crops, or by the will of man as in the case of rents.

However, the output of a mine or quarry, which consists of portions of the thing itself of which the supply must in time be exhausted, is assimilated to fruits if the mine or quarry was being worked at the commencement of the usufruct. The reason is that to work a mine or quarry is a way of enjoyment of the property, and being presumably adopted with the approval of the owner, the usufructuary is justified in continuing it and in appropriating the proceeds. He is not, however, entitled to open and work a

mine or quarry for the first time during the continuance of the usufruct.

Fruits are divided into three classes, natural, industrial and civil. Natural fruits are those which are produced spontaneously by the thing without the intervention or the aid of man, such as grass, fishes in a river, or the offspring of animals in a wild state.

Industrial fruits are produced by the thing but with the aid of man, such as crops grown on cultivated land or the offspring of domesticated animals.

These two classes are the only fruits which are, in the strict sense, actual periodical products of the thing itself; for civil fruits are only so called by metaphor and are not natural products. Human industry, moreover, has so extended the field of its operations that natural fruits tend to disappear and be absorbed in industrial fruits. Indeed, it is difficult to find examples of fruits which are produced quite independently of man's aid. The distinction is now of almost no practical importance.

Civil fruits are periodical payments due in virtue of a contract which has the thing for its object. They are the legal results of the contract and are only indirectly and in a metaphorical sense produced by the thing. Such are interests on a sum of money, dividends, rents, instalments of an annuity, etc.

The Roman law and its European offshoots have established an important difference between natural and industrial fruits, on the one hand, and civil fruits on the other with regard to the manner of their acquisition. The ownership of the former is acquired

only from the moment they are either separated from the thing or gathered in, whereas the latter are deemed to accrue day by day and to belong to the usufructuary in proportion to the duration of his enjoyment, without consideration of the date on which they became due.

These principles will be best explained by an illustration of their application. An owner grants the usufruct of a house which is let for an annual rent on a long lease which the usufructuary is bound to respect. The only mode of enjoyment open to the usufructuary is to receive and appropriate the rent as it becomes due. The creation of a usufruct under such conditions is really an assignment of the rents. Let us suppose that the usufruct is created on the 1st of March and is terminated after twenty-seven months. During the first year the usufructuary would take ten-twelfths of the annual rentals and the owner two-twelfths; in the second year he would take the whole; and in the third, as the usufruct would terminate on the 31st of May, he would be entitled only to five-twelfths. Thus the revenue to which the usufructuary is entitled would correspond exactly to the duration of his enjoyment.

The fairness of this system is unimpeachable. It would be impossible to imagine a partition of the revenue which would more exactly correspond to the value of the respective rights of the bare owner and the usufructuary. The chances arising from the dates on which the rents become due and the risks of their collection are eliminated. The end of each day brings

with it a revenue corresponding to the amount of the annual rental divided by the number of days in the year.

But this system is too theoretical and too mathematical to be conveniently applied to natural and industrial fruits. From the nature of things they are exposed to chances and risks which cannot be eliminated, and nobody can affirm that they have been really acquired and appropriated until they have been separated from the thing which has produced them and safely gathered in. Until this has been done they can only be said to be fruits in expectancy. Accordingly, the usufructuary is entitled only to such of the fruits as actually came to maturity and are effectively gathered in by him during the contination of the usufruct.

By application of this principle to a usufruct of agricultural land, the crop standing and not gathered in at the commencement of the usufruct will belong to the usufructuary, althcugh it has been sown by the owner. But by way of compensation the bare owner would take the crop in the same condition at the expiration of the usufruct, although it had been sown by the usufructuary. In other words, the usufructuary takes the land in the condition in which it was at the date of the commencement of the usufruct, and the owner receives it back in the condition in which it is at the end.

If, in consequence of this system of allotment of the crops, the usufructuary reaps the benefit of a crop planted by the owner or a preceding usufructuary

or *vice versa*; if the owner profits by the labour and cultivation of the usufructuary no indemnity is due in either case. It is considered that in the long run the chances will be equalised, and it is thought better to risk an occasional disappointment than to open the door to dispute and litigation by authorising claims and counter-claims by the usufructuary and the owner, respectively, at the beginning and end of the usufruct.[12]

Powers of Disposal. The usufruct of free, as distinguished from tied-up, property, such as a *waqf*, can be alienated by the usufructuary either gratuitously or onerously. But the alienation by the usufructuary of his usufruct does not change its nature; nor can it confer any greater right than that which the alienor himself had. Accordingly the usufruct will be extinguished if the alienor dies before the alienee; but the death of the alienee will be without effect, and if it occurs before the death of the alienor, the usufruct will pass to his heirs for that part of the term which is still unexpired.[13]

Obligations of the Usufructuary. Before considering the obligations of the usufructuary, it may not be out of place to mention what in general terms are the obligations of the bare owner towards the usufructuary. These consist, in the first place, of the positive obligation to place the thing at the disposal of the usufructuary, and, in the second place, of a negative obligation, not to place any obstacle in the

12. Halton, I, 55-59.

13. Ibid., I, 67.

way of the latter's enjoyment of the thing. The role of the bare owner is in other respects purely passive, and he cannot be compelled to take any action or make any outlay to procure the enjoyment for the usufructuary. The sanction of the first obligation is an action for delivery, and of the second an action for damages for the deprivation of enjoyment.

The obligations of the usufructuary may be summed up by saying that he takes the thing in the state in which it is at the time of the creation of the usufruct; after enjoying it according to its destination, he or his heirs must return it to the bare owner, at the expiration of the usufruct, in the same condition as it was at the commencement, allowance being made for fair wear and tear. This is only fair, because if the usufruct was purchased for value, then the price will have been fixed according to the condition of the object of the usufruct, and after inspection by the usufructuary; if it is gratuitous it would be unjust to impose any further sacrifices on the owner beyond his act of generosity. The law also indicates certain subsidiary obligations, but they for the most part have for object to assure the execution of the principal obligations as set forth above.

The usufructuary has to bear the expenses of maintaining the property and cannot require the owner to make any outlay. The usufructuary is not responsible for any loss or deterioration befalling the property through no fault on his part. The Muslim law also exonerates the usufructuary from all responsibility in the case of loss or deterioration of the

thing not due to his fault or negligence.

The usufructuary pays the annual taxes.

Causes of the Extinction of the Usufruct.[14] Following are the causes which lead to the extinction of usufruct : (1) expiration of the time fixed ; (2) surrender ; (3) loss of the property ; (4) improper use of the thing ; (5) non-fulfilment of the conditions ; (6) non-user during five years. To these must be added three causes which are not specially mentioned in the Codes but which result from general principles : (7) dissolution of the right of the owner ; (8) confusion ; (9) adverse prescription by a third party. As we have seen, the usufruct is essentially a life-interest and all cases terminate with the death of the usufructuary, but usufructs may be created for a shorter term. The life of the usufructuary is the maximum duration of the usufruct, but the law has fixed no minimum. Thus the usufruct may be granted for a term of years to be subject to a resolutory condition which may terminate it during the lifetime of the usufructuary.

The Egyptian Codes admit the possibility of perpetual usufruct granted by or in favour of the State and doubtless had in view the *kharaji* lands, which have since ceased to have those special characteristics which distinguished them from other tenures. In practice, the usufructuary rights were generally allowed to be inherited.

14. Ibid., I, 79.

7

OTTOMAN LAND LAWS

The present systems of land tenure in most of the Middle Eastern countries are based on the Ottoman land laws, as each of these countries formed a part of the Ottoman Empire at some stage of their history. With the exception of Egypt, all these countries, viz. Iraq, Syria, Lebanon, Palestine and Jordan, were under Turkish rule up to the First World War.

To evaluate properly the land tenure systems of some of the Middle Eastern countries, it will, therefore, be helpful to describe in some detail the Turkish land laws, which were codified into a comprehensive land code in 1858. Before dealing with the Land Code, however, we shall briefly describe the situation which prevailed prior to 1858.

Situation Prior to 1858. The land laws of the Ottoman Empire applied, in name at least, throughout the whole of the Sultan's wide dominions. In practice, their application to the territories more remote from Constantinople was considerably modified by local customs. It appears that the Ottoman land laws were never applied in Egypt.

Prior to 1858 lands of all kinds, except *waqfs* of the perfect class,[1] were governed by the Civil Law

1. Discussed in section relating to *waqf* lands.

based primarily on Islamic law and usage, which is codified in the *Mejelle*.[2] At that time it was easy to convert *miri*[3] land into *mulk*[4] by building or planting whereby the right of possession was transferred from the State to the individual. On acquiring *mulk* rights in this way, the individual was under considerable inducement to pass the land into the *waqf* class by dedication. He could do so on terms which would ensure all its benefits to himself and his descendants, while property was protected through the strongest legal and religious sanctions known to Muslim law against seizure by the State or its officers.

Its result was the progressive deprivation of the State of very valuable rights. One of the main objects of the Land Code was to put a stop to this process.

An equally important object was to bring the persons who cultivate State lands into direct relations with their overlord. Before the passage of the Land Code these lands were managed by feudatories and farmers, who purchased the right to collect tithes by payments in money or service. The interest of such persons lay in immediate and rapid acquisition—in other words, in extortion. It was opposed to the interests of the State, which would have been best secured by the development and extension of cultivation, and the well-being of the cultivator.

The Land Code, therefore, contains provisions which are designed to bring the State into direct relations with the cultivators of its lands.[5]

2. Turkish Civil Code.
3-4. Discussed later.
5. R.C. Tute, *The Ottoman Land Laws*, p. 2.

The means adopted to achieve this are fully dealt with in the articles of the Land Code, and in the provisions of subsequent legislation.

It may be stated here that the provisions of the Land Code were not an altogether new creation of the Ottoman legislators. A code on the subject had been promulgated several centuries earlier and various laws modifying it had been enacted. The basic ideas set forth in the Land Code combine fundamental concepts of the traditional Muslim land law with customs and usages relating to land use which had grown in these areas throughout the centuries.[6]

The Ottoman Land Code was designed primarily to regulate the status of *miri* (State) lands and to provide proper title to holders of such land.

The nature of the title was defined by the Land Code of 1858 and the subsequent enactments which modernised the Ottoman Land Law and extended the rights of the *miri*-holder. Of the latter, the most important are the Law of 22 May 1867, which extended the rights of inheritance in *miri* land; the Law of 2 May 1868, which gave to foreigners the right to hold immovables in the Ottoman Empire; the Forest Law of 1868; the Law of January 1882 as to sale of immovables for payment of debt; the Law of August 1875 as to succession to private interests in *waqfs* possessed in *ijaratain*; the Expropriation Law of 1878; the Mining Law of 1886; and the "Provisional Laws" promulgated after the Turkish Revolution of 1909,

6. Frederic M. Goadby and Moses J. Doukhan, *The Land Laws of Palestine* (Tel Aviv, 1935), p. 13.

the most important of which were the Laws relating to the inheritance of immovable property (February 1914); the Law concerning the right of certain corporate bodies to own immovable property of 28 February 1913; the Law for mortgage of immovable property of 9 March 1913; the Law regulating the right to dispose of immovable property of April 1913; the Law of partition of joint immovable property of 14 December 1913; and the Law as to leasing of immovable property of February 1914. In addition, there are *Iradahs*,[7] judgments of the Court of Appeals, regulations, and instructions which further define and limit rights in land. For example, the State Domains Department in Iraq has traced and compiled no less than ninety-one laws, regulations, instructions, *Iradahs*, etc., in connection with land rights.

Further, these laws must be read in the light of the *Mejelle* which was compiled in 1869 by the Ottoman Government from the Common Law and Islamic maxims (of the Hanafi school) and where the land laws are silent, the *Mejelle* applies. No detailed discussion of the Land Code is intended; it must suffice to indicate briefly its major features. The Land Code itself was mostly a codification of the various land laws issued in the Ottoman Empire up to 1858 relating to the system of land rights. The main principles which underlie the land code and subsequent Ottoman legislation are summarised below, though justice cannot be done in a brief

7. Decrees.

summary of such a comprehensive legislation. The Land Code contains 132 articles and is divided into three main sections.

The Land Code (Art. 1) divides the lands of the Ottoman Empire into their traditional five categories of *mulk* or freehold, *waqf* or religious foundation, *matruk* or vacant land, *mawat* or dead land, and *miri* or State lands. Apart from *mulk* and true *waqf*, of which the *raqabah* does not belong to the State and which follow the *Shari'ah* laws as to their disposition,[8] the Code confirms the principle of State ownership of the *raqabah* in respect of the other classes of land. The *raqabah* cannot be alienated in respect of these classes except by a special *Iradah*[9] which must be justified by the sacred law.[10]

The Land Code 1858 authorised the use of land which previously had been considered "dead" (Art. 103). The right of possession and cultivation was granted to individuals ; in other words, the possessor in this legal relationship (*tasarruf*) had, while he was in possession, the usufructus of the land. Although the possessor of the right could not transfer the property in the land to other persons, his right of usufructus was transferable under the Land Code.[11]

8. Land Code, Art. 2 and Art. 4, Part I.

9. Ibid., Art. 121, *Law of Disposition*, Art. 8.

10. On justifying circumstances prescribed by the *Shari'ah* law, see N... Chiha, *Traite de la propriete imobiliere en Droit Ottoman* (Cairo, 1906), p. 3... F.M. Goadby and M. J. Doukhan, op. cit., p. 41.

11. See Arts. 5 and 91-102 of the Land Code and Arts. 1271 and 1675 ... the *Mejelle*; regarding forests, see also Law of 1876, Forest Law of 1869, Art... 1 and 21-26 and Instructions dated 1876 (*Dastur*, III, 300) ; regarding tax... to be charged on wood cut from village forests, see also Art. 25 of the Fore... Law and Instructions dated 1876, regarding pasture grounds, see also *Irada*... dated 1858.

In the case of *miri* land, the Code permits alienation of the right of *tasarruf* to those in possession of land who can prove previous continuous possession of it. The right to transfer *tasarruf* is granted by "the agent of the government appointed for this purpose. Those who acquire possession will receive a title deel bearing the Imperial Seal" (Art. 3).

The holder of the right of *tasarruf* (*mutasarrif*) had to pay two kinds of rent. Under the law he was not authorised, except with the express permission of the State, to dig up the soil to make bricks (Art. 12), erect buildings (Arts. 31 and 32), or plant trees on the land (Arts. 25 and 29), or uproot natural trees growing thereon (Art. 28), or to use any part of it as a burial place (Art. 33). Further, he may not, without the permission of the State, transfer (Arts. 36, 37, 117, and 120), bequeath (Art. 38), or mortgage the land (Art. 116). Partition of such land among the heirs of the *mutasarrif* also required official leave (Art. 17). Finally, land could not be transferred into other than that of the *takhsisat* category.[12]

In 1911, however, the right of *tasarruf* had been extended by law on the Disposition of Immovable Property[13] which provided that the *tapu*-holder (*mutasarrif*) may use his soil for making bricks, erecting

12. Land Code, Art. 121; see also Art. 15 of the Tapu Law of 1859 and Art. 8 of the Law of Disposition.

13. Art. 7; see also Law on Quarrying (1889) and *Iradah* (1890).

buildings,[14] planting trees (Art. 5), or uprooting naturally grown trees,[15] without securing the advance or *ad-hoc* approval of the authorities. The *tapu*-holder, however, has a right over the surface of the land only; mining rights belong to the State and are assignable separately from the land.[16] Similarly, treasures and relics of antiquity found on the land are subject to separate laws contained in the Books of the Sacred Law (Art. 107).

The right of *tasarruf* is contingent on cultivation in the case of arable land and other forms of exploitation in the case, e.g., of meadows. Thus, if the *tapu*-holder leaves his *tapu* land uncultivated for three years in succession without a valid excuse,[17] he forfeits his right of *tasarruf* and can recover it only on payment of its *tapu* value.[18] Otherwise it becomes

14. Art. 5. Provided he pays a fixed annual charge in lieu of the tithe on the site so used. See also *Iradah* of Sept. 1897 (Compilation of Turkish Financial Laws, I, 130); *Iradah* dated 1906 (*New Dastur*, I, 99). For the assessment of this charge, see *Order of the Dafter Khaqani dated* 1887, and Young, VI, 54.

15. Art. 5; see also *Iradah* dated 1876 (Young, op. cit., VI, 53); Forest Law, Art. 91.

16. Land Code, Art. 107; see also Mining Law dated 4 March 1906 (Young, op. cit., VI, 17); and Law as to Quarries (ibid., p. 38).

17. Valid excuses were specified in the Land Code to be the resting of the soil, flood, imprisonment of the *tapu*-holder (Art. 98), emigration of all or part of the inhabitants of the village or town (Art. 72), service in the Army (Art. 73), minority, unsoundness of mind, etc. (Art. 76).

18. The *tapu* value, also called *bedel tapu*, or more generally in Iraq as *bedel mithl* (equivalent value) is defined in Art. 59 of the Land Code as the price to be fixed by impartial experts who know the extent, dimensions, boundaries, and value of the land according to its productive capacity and situation. Artificial increase of the value of the land as, for instance, in the case of speculation and other sentimental reasons, are discounted in the assessment of the *bedel mithl*.

mahlul (vacant) and "shall be put up to auction and adjudicated to the highest bidder" (Land Code, Arts. 68, 71 and 74).

The right of *tasarruf* is heritable, but it does not follow the inheritance laws of the *Shari'ah* as in the case of *mulk*. The right of *intiqal* (right of devolution) is distinct from *irth* (inheritance) which applies to *mulk*.[19] This right of transfer had gradually been extended by laws and decrees prior to the Land Code. In the absence of specified heirs who have the right of *intiqal*, land devolves on some other relatives, or on payment of *bedel tapu* on three classes of strangers. The tendency was to change the right of *tapu* of certain heirs to a right of transfer, i.e. devolution without payment of *bedel tapu*. The Land Code granted the right of transfer to three degrees of heirs and the right of *tapu* to further nine degrees against appropriate payment. The Law of 22, May 1867 extended the right of transfer to eight degrees and the right of *tapu* to three degrees.[20] The latter law was replaced by the law relating to the inheritance of immovable property of 6 March 1913, which further extended the right of

19. In the case of sale also the term used for *miri* land is *faragh* (evacuation) as distinct from *bai'* (sale for *mulk* properties).

20. Land Code, Arts. 54 and 55 : under these articles the right of *intiqal* was granted exclusively to (1) children of both sexes equally, (2) father, (3) mother. The law of 1867 extended this right to eight degrees and included grandchildren, brothers, sisters, half-brothers, half-sisters, and surviving spouse in addition to the three degrees above mentioned.

transfer.[21]

With the extension of the right of *intiqal* to those heirs who previously had only a right of *tapu* by the Land Code and more particularly by the law of 1867, the right of *tapu* since 1867 was limited to three classes only: (1) those who have inherited *mulk* trees or buildings on the land, (2) co-possessors, or those who had joint interests, and (3) "to those inhabitants of the locality where the land is situated, as are in need or want of it" (Art. 54 of the Land Code). This right is only a right of pre-emption or first refusal, available in the absence of heirs who have a right to *intiqal* and conditional on payment of *bedel tapu*. It could be exercised within a period of ten years in the case of (1), five years in the case of (2) and only one year in the case of (3) above (Art. 54 of the Land Code).

If there were no heirs and no right to *tapu*, or if those who had the right of *tapu* refused to pay the *tapu* value, the land became *mahlul* and was put up to auction and adjudicated to the highest bidder.[22]

Perhaps the most important provision of the Land Code is Art. 78 which establishes what is called *haqq al-qarar* or acquisition by prescription. Owing to its special significance, it is quoted below in full :

21. This law divided succession into four degrees : (1) direct descendants, (2) parents and their descendants, (3) grandparents and their descendants, (4) spouse. The successor in an antecedent degree excludes those in the latter degree except in two cases : (*a*) surviving parents receive one-sixth in the presence of descendants, (*b*) surviving spouse receives one-fourth in the presence of descendants, and one-half in the presence of heirs in degrees (2) and (3).

22. Land Code, Arts. 60 and 64.

Article 78. Everyone who has possessed and cultivated State or Mawqufa land for ten years without dispute (*bila niza*) acquires a right by prescription; and wbether he has a valid title deed or not, the land cannot be regarded as vacant, and he shall be given a new title deed gratuitously.

Nevertheless, if such person admits and confesses that he took possession of the land without any right when it was vacant, the land shall be offered to him on payment of the *tapu* value, without taking into account the lapse of time.

If he does not accept, it shall be put up to auction and adjudicated to the highest bidder.

There are a number of regulations and judgments of the Court of Appeals which define and interpret the provisions of Article 78. The most important are the following :

(1) *Haqq al-qarar* must be supported by ten years' continuous ploughing and cultivation. If a person had never sown, ploughed, or reaped the land, or he had cultivated it once or twice only and left it uncultivated at other times, he is not entitled to *haqq al-qarar* even if he had more than ten years' possession.[23]

(2) Possession must be established by personal cultivation. Municipalities and other corporate bodies are not entitled to acquire land by *haqq al-qarar*.[24] Similarly, a trader living in a town but cultivating land by leasing it to others is not entitled to *haqq al-qarar*.[25] On the other hand, *haqq al-qarar* claimed by a person who is in actual possession of the land is not refuted by the statement that the claimant has been handing the crop to somebody else.[26]

(3) *Haqq al-qarar* is not granted to aliens.[27]

23. Art. 2 of the regulations as to *tapu* organisation in the Vilayets dated 22 June 1867 (*Dastur*, II, 23).

24. Decision of the Shurai Dawlat of 1889.

25. Ruling of the Ministry of Justice, 1906.

26. Cessation of Judgment, dated 1888.

27. Decision of the Shurai Dawlat, 1912.

(4) The meaning of "without dispute" is that the holder of the land was not sued at a competent court of law within ten years of his possession.[28]

(5) For example, possession by lease-hold or by an invalid transfer implies the claimant's admission of a third party's possessory rights.[29]

(6) This principle seems also to apply when the State is the possessor as well as the owner of the land, i.e. express or implied squatting or the payment of rent and the holding of a lease-hold from the government seems to invalidate the claim to *haqq al-qarar*, although the squatter or the lessee from the State is still entitled to a title deed on payment of the *tapu* value. Article 8 of the regulations of *tapu* certificate, whose validity was fully admitted by the Turkish Courts,[30] is so worded as to imply that *tapu* certificates are to be issued only to persons claiming prescriptive rights under Art. 78 in cases in which their possession has been acquired by legal means of devolution by inheritance sale by the previous possessor or a grant by a competent authority. This subject was discussed by M. Wajih Khoury,[31] who remarks that the Ottoman decisions have invariably followed the regulations.

(7) *Haqq al-qarar* is applicable exclusively to *miri* land and to *waqf* land of the *takhsisat* category.[32] It is not applicable to *mulk*, other classes of *waqf*, *matruk* or *mawat* lands.[33] The period of limitation (*nurur zaman*) in the case of *mulk* and *waqf* land is prescribed in the *Shari'ah* laws. Article 1660 of the *Mejelle*

28. Tute, op. cit., p. 75.

29. Judgment of the Court of Cessation dated 1913; Art. 23 of the Land Code and Art. 167 of the *Mejelle*.

30. Goadby and Doukhan, op. cit., p. 260.

31. *Gazette Trib.* Lib. *Syriene*, 1932, pp. 113-14; cf. Goadby and Doukhan, op. cit.

32. See also Padel and Steeg, *De la Legislacion Fonciere Ottomane* (Paris, 1904), p. 168; N. Chiha, op. cit., p. 597; Goadby, op. cit., pp. 260-61.

33. Art. 18 of the Regulations as to Tapu Organisation in the Vilayets of 1907.

bars the courts from hearing claims to the ownership of *mulk* lands adversely possessed for fifteen years without dispute. The period in the case of *waqf* is limited to thirty-six years by Art. 1661 of the *Mejelle*. This latter period also applies in the case of *murur zaman* regarding the *raqabah* of *miri* land.[34] In the case of *tapu* land, i.e. *miri* land against which a *tapu sanad* has been granted, the period of limitation in respect of adverse possession is limited to ten years by Article 20 of the Land Code. However, the Ottoman Court of Appeals, in a judgment dated 23 August 1912, decided that "the plea of limitation cannot affect claims based on valid title deeds". This judgment in effect rendered Art. 20 of the Land Code into a dead letter.

These are, in short, the principal provisions of the land laws of the Ottoman Empire insofar as they are relevant to our purpose. From them one can infer two chief principles.

In the first place, the Ottoman legislator, although still insisting on the State ownership of the *raqabah* of the *miri* land, sought to transfer the right of *tasarruf* in *miri* land if it was cultivated or put to private use by the inhabitants. Nowhere in the laws was it intended that the State should hold the *tasarruf* as well as the *raqabah* of cultivated lands or usable meadows ; nowhere in the laws was the State intended to be a landlord responsible for the management, development, or even disposal of such land. On the contrary, several articles in the Land Code and in related laws were so worded as to make it binding on the State to part with the *tasarruf* of occupied land, whether gratuitously or against payment of an agreed price by sale to the highest bidder in an

34. *Iradah Thaniyyah* dated 1889 ; Art. 15 of the Law of Disposition.

auction. Thus, Article 78, which grants the right of *tasarruf* gratuitously to the cultivator who establishes ten years' undisputed possession, also provides that in case he does not satisfy the conditions which would confer *haqq al-qarar* upon him, he can still have the land on payment of the *tapu* value "without taking into account the lapse of time". If, however, he does not accept these terms, the land shall be put to auction and adjudged to the highest bidder. Again, in the absence of heirs to a deceased *tapu*-holder, the right to land does not revert automatically to the State, but the persons who enjoy the right of *tapu* may, in this case, exercise their right of pre-emption. If these persons do not exercise their pre-emption right, the land becomes *mahlul*; here again the law stipulates (Land Code, Art. 64) that land shall be put to auction and adjudged to the highest bidder. Similarly, if land remains uncultivated for three years without a valid excuse, and if its previous *tapu*-holder refuses to take it back on payment of *bedel tapu*, it shall be put to auction (Land Code, Arts, 68, 71, 74).

This principle also applies to *mawat* land which was revived with or without the permission of the State (Land Code, Art. 103), to land reclaimed from the sea (Art. 132), to *chiftliq*[35] (Art. 131), and to "pieces of land fit for cultivation [which] come into

35. A *chiftliq* in law is defined by Art. 131 to mean a tract of land such as needs one yoke of oxen to work it, which is cultivated and harvested every year.... But, arbitrarily speaking, it means an "estate" and includes buildings, implements, animals, and other accessories. See also Art. 31 of the Tapu Law.

existence by the receding of the water from ancient lake or river".

In short, whenever a State land is exploited, or could be exploited, the State was ready, rather it was bound, to alienate the right of *tasarruf* in land to interested private parties either gratuitously or against payment of *bedel tapu* or by sale by auction.

The second principle was that the legislator encouraged transfer to actual cultivators of the soil with a view to establishing a proprietary peasantry in the Ottoman Empire. In effect, this legislative policy sought to discourage both communal ownership and large holdings. Thus, the *sipahis* and *derabegs* were liquidated and the *multezims* and *muhassils* were replaced by public officials so that the State could get in direct contact with the cultivator of the soil. Again, Art. 8 of the Land Code states :

The whole land of a village or of a town cannot be granted in its entirety to all of the inhabitants nor to one or two persons chosen from among them. Separate pieces are granted to each inhabitant and a title is given to each showing his right of possession."

Article 130 stipulates that :

Lands of an inhabited village cannot be granted in their entirety to an individual for the purpose of making *chiftliq* but if the inhabitants of a village have dispersed . . . and the land has become subject to *tapu*, or if it is found impossible to restore it to its former state by bringing new cultivators there and settling them in separate plots to each cultivator, in such a case the land can be granted as a whole to a single person or to several persons for the purpose of making a *chiftliq*.

Furthermore, Art. 2 of the Law of 1910 concerning the right of corporate bodies to own immovable property stipulates that land which may be possessed by agricultural companies must not be situated within the boundaries of an inhabited village and lands pertaining to it. Municipalities and other corporate bodies or a trader living in a town are not entitled to *haqq al-qarar*.

Finally, according to Article 2 of the Instructions concerning *tapu* administration in the *Vilayets* to make the claim to *haqq al-qarar* unimpeachable, "it is not occupation which counts but personal and continuous sowing and ploughing". A person who did not sow or cultivate the land is not entitled to *haqq al-qarar*.

Accordingly, the basic policy objective of the Land Code and related land legislation during the period under review was: transfer of *tasarruf* in cultivated State land to small cultivators. This policy was implemented by administrative action either through formal confirmation of previous actual possession of land or by the grant of the rights inherent in *tasarruf* to those who acquired the right to land through purchase at an auction or by "administrative revival" of dead land.

The administration of these measures was put in the hands of a new department called the Department of Tapu or *Dafter Khaqani* (Imperial Register) which was established in 1858. This department formed a number of commissions in the provinces composed of public officials as well as notables from among the

inhabitants of the province under the auspices of the *wali* (the provincial governor), the *defterdar* (the provincial registration commissioner), and assisted by surveyors and appraisers. The commission was given power to evaluate real property inside and outside the towns and even to carry out a population census, as well as to investigate ownership and occupancy rights in land and issue title deeds against valid rights.

The system was at first tried on a small scale in the provinces of Bruss and Yania; then the tested regulations were embodied in a series of laws, notably the Tapu Law of 17 November 1858 and the Regulations as to Title Deeds of 1 February 1860. Fourteen years later, by the law of 1 September 1874, the system of registration was extended to title deeds relating to *mulk* properties which were previously dealt with by the *Shari'ah* courts. Further, the Law of March 1876 dealt with the issue of title deeds by the *Dafter Khaqani* to interests in *waqf* lands such as the interests of holders of *ijaratain* lease.

In practice, however, these so-called "commissions" of the Department of Tapu did not investigate rights from plot to plot. The work of the "appraisers and surveyors" was so badly done as to be for all practical purposes useless. *Tapu mamurs* (provincial registration officers of the Tapu Department) were considered the "owners" of State lands responsible for all questions concerning *tafwid* (grant of possessory title to land), escheat of land to the State, adverse possession of *miri* land and disposal of *mawat*

land. They were also responsible for the registration of ordinary transactions regarding immovable property as the issue of *sanad majaddad*, i.e. the issue of a title deed for the first time, the registering of sale, partition, transfer on death, gift, mortgage, and the redemption of mortgages on immovable property. The person who required registration had to make a written application, including a sort of affidavit from the *mukhtar* and two witnesses as to the title in the property concerned and as to the legality of the transaction. The Tapu Department then searched its records for encumbrances, e.g. mortgage or attachment, and then made a *kashf* or inquiry on the spot. In case a certificate were to be issued for the first time, the fact had to be publicly announced so as to alert other possible claimants to the land.

Although by 1918—the end of World War I—the *tapu* system and the Tapu Department had been in existence for over half a century, a considerable portion of the cultivated *miri* land had not been registered in the Tapu Department, nor had title deeds been issued for them. Although such registration was in principle mandatory, actually all registration (whether for the first time or in case of transfer, inheritance, etc.) was in practice optional ; usually the holders of possessory rights took out *tapu sanads* only when special circumstances compelled them to do so. Attempts to encourage registration by penalising delayed registration or by prohibiting the courts from hearing cases relating to land which were not supported by a *sanad khaqani* appear to have been

largely ineffective.

There was also a great deal of abuse of the powers given to *tapu mamurs* which may partly be ascribed to corruption and partly to ignorance. These abuses led subsequently to a great number of disputes. Moreover, the vagueness of most of the *sanads* issued as to boundaries, areas, etc., and in some cases the complete absence of proper investigation of the specific rights involved, resulted in a chaotic situation. The adoption of Registration and Survey Law of 1910 can be considered an open admission of the Ottoman regime's inability to administer an effective *tapu* system. This law provided for the establishment of several *ad-hoc* commissions to survey the land of the Empire, to inquire at the spot into the title and other claims to lands, and to evaluate the property for tax purposes; but the outbreak of World War I precluded the application of this law.

The *tapu* system was criticised by different writers on various grounds. For example, it was considered that this system, as it was conceived and practised before 1909, did not give sufficient freedom to the cultivators of land. In particular, the system introduced several complications where trees and buildings were erected with or without the leave of the State, as these were considered *mulk* and thus inherited according to the laws of the *Shari'ah*, whereas the right to land itself was to be exercised and/or transferred under different legal principles. Hence a proposal was made after the Turkish Revolution to simplify

considerably the land law including the rules governing *raqabah* and the transfer of the right of *tasarruf* to private individuals. The intention was to introduce thereby a uniform system of land tenure and to provide for greater freedom in land development. This scheme, however, was not carried out. The provincial laws subsequently enacted, although they confirmed the principle of State ownership of the *raqabah*, gave further rights to the cultivator already mentioned above.

The reluctance of the State to part with the *raqabah* of land was due to the desire of the State to govern land by special laws and not be tied up to the laws of the *Shari'ah*. From this viewpoint the *tapu* land had the following advantages:

(1) *Tapu* lands were inherited according to specific laws which established equality between the sexes and according to which land devolved upon a smaller number of degrees of heirs. Further, these laws could be changed whenever necessary without provoking the opposition arising out of religious feelings.

(2) The *shuf'ah*, i.e. the right of pre-emption of neighbours and co-heirs, was not applicable to *tapu* land; while *haqq al-rujhan* which replaced it was in many ways economically a sounder principle than the *shuf'ah*.

(3) *Tapu* lands could be made into a true *waqf*.

(4) In the case of *tapu* land, non-cultivation of land was penalised by escheat.

(5) Mining and other under-surface rights were

still reserved to the State.

(6) The *tapu* system provided a better basis for land taxation than the *mulk* system.

However, the *tapu* system was criticised on the ground that this system of liquidating the feudal lords had left the cultivators unable to bear the burden of cultivation and to support themselves after a bad harvest, because of their lack of capital and the meagre means in their hands. Hence this system had tended to deliver these cultivators and their lands into the hands of speculators and usurers. "The backbone of the old system," writes M. Palgrave,[36] "I mean the large entail estate proprietors, men able to meet demand, to support a failure, to lift their lesser co-landlords over a difficulty, being gone, the entire mass is fast collapsing into a chaos of feeble land-owning and produce-sharing beggars, too slender . . . to bear the yearly burden of expenditure and taxation and utterly crushed by a single bad harvest; no one has strength to carry out, or even to undertake any real improvement on his wretched little plot of ground, no one feels that ground firm enough under his feet to attempt any super-structure of capital on it ; no one cares to better what, if bettered, is only so for the increase of government dues and the ultimate ruin of legal and hereditary partition." Mr Palgrave not only raises the question of permanent proprietorship but a number of other questions affecting it, such as the absence of credit facilities, the heavy burden of

36. Quoted by C. D. Fields in his work, *Landholding and the Relation of Landlord and Tenant* (Calcutta, 1883), p. 216.

taxation, and fragmentation by hereditary partition.

A brief reference at this stage to the Turkish civil law as contained in the *Mejelle* will be helpful as some problems relating to *mulk* lands and other rights on which the Land Code is silent are dealt with in the Civil Code.

The Mejelle[37] *or the Ottoman Civil Law*. The Ottoman Civil Law was codified by a commission of experts appointed by the Emperor and was published under the title, *Mejelle*, on 10 March 1869. The commission in their report stressed the need for codifying the civil law for the guidance of the courts. The civil law in the Ottoman Empire was mostly based on *Shari'ah* law. The commission observed that sacred jurisprudence resembles a boundless ocean, and as difficult as it is to draw up pearls from the ocean, so great ability and learning are required for a man to always find in the law the necessary rules for the solution of each question. This comparison, according to better opinion, applies to the Hanafi Dogma, as to which many commentators of different ability have written, and the doctrines of which were not so clearly determined as those of the rite of *Shafi'i*. By reason of the difference in the opinions of the followers, the Hanafi jurisprudence had many subdivisions and branches, which made it very complex and difficult to understand.[38]

The nature and significance of the *Mejelle* is best

37. Also spelt as *Mojalla*.

38. W. E. Grigsby, *The Mejelle or Ottoman Civil Law* (London: Stevens and Sons Ltd., 1895), p. 111.

described in the words of the commission who, in presenting their report to the Emperor, observed:

"The Sultan, our August Emperor, desiring that, among so many other benefits that have been met with in our days, in his days he might see this most beneficial work added to them, was pleased to order the completion of a Code on the basis of the Sacred Law sufficient for the necessities of the present time, and for the solution of the legal questions which daily arise. The carrying out of this Imperial Ordinance having been entrusted to us, we met in the Supreme Court, and, having collected from the legal works of the Hanafite School, we have collected those opinions which are of more importance for the acts which arise more frequently in transactions in our time, and, having collected these, we have made one compilation of the laws (*Mejelle*), dividing it into many books, and have given to it the name of 'Legal Judgments'. Having finished the first book of this volume, together with its prologue, we have given one copy to his Highness the Sheikhul Islam, and other copies to other persons renowned for their knowledge of the Sacred Laws for review, and, having amended afterwards the work in conformity with their observations, we now present it to the consideration of your Highness."[39]

The *Mejelle* is divided into three parts:

(1) The first part explains the meaning of Muslim jurisprudence and describes the divisions of the practical part of the *Shari'ah* law.

(2) The second part consists of the next ninety-nine sections and sets out some general legal maxims.

(3) The rest of the book sets out certain legal propositions for the guidance of judges, sitting in courts other than the *Shari'ah* courts, on questions arising

39. C.R. Tyser, D.G. Demetriades, and Ismail Haqqi Effendi, *The Mejelle* (Nicosia, Cyprus, 1901), p. 11.

before them, which have to be decided by *Shari'ah* law.

Types of Land Tenure in the Turkish Empire. According to the Land Code, land in the Ottoman Empire was divided into five main categories: (1) *mulk*, (2) *miri*, (3) *waqf*, (4) *matruk*, and (5) *mawat*. Each of these is discussed below.

(1) Mulk *Land.*[40] As mentioned earlier, the original Arab conquerors of Egypt and Syria[41] did not in general dispossess the existing inhabitants. The land of the conquered countries seems from an early date to have been divided into two main classes: *'ushri* land (tithe-paying) and *kharaji* land (tribute-paying). The *'ushri* land, neglecting certain minor distinctions, was land which was delivered over to the Muslim conquerors or which was left to the inhabitants who had embraced Islam. Owners of the *'ushri* land paid a tithe of one-tenth of the gross yield. The *kharaji* land was left in the hands of non-Muslim inhabitants. This was of two kinds. Upon some land the *kharaj* was proportional to the gross yield but never less than *'ushr*. Upon other land *kharaj* was fixed and due from land as soon as it was fit for cultivation and whether it was actually under cultivation or not. *Mulk* land was in private ownership. It was the property of the proprietor, his *mulk*.[42] In addition, we find that the Code also classifies as *mulk* :

40. This is an Arabic word and the correct spelling is *milk*. However, in the Land Code and other writings it has been spelled *mulk*, we have retained the same.

41 Palestine formed a part of Syria.

42. Belin in *Journal Asiatique* (1861), p. 414.

(*a*) "Sites" for houses within towns and villages, irrespective of area, and pieces of land not exceeding half dunum[43] situated on the confines of towns and villages appurtenant to dwelling-houses.

(*b*) Land made *mulk* by special grant of the sovereign. But by far the greater part of the cultivated land of Arab countries falls under a different category.

The earliest Muslim law appears to have treated all land in private owneship as *mulk* land, of one category or another. But much land in conquered countries remained in the hands of the sovereign as Commander of the Faithful to whom, indeed, a certain proportion of the conquered lands were allotted as of right. Furthermore, we find it stated that land originally *kharaji* was not infrequently seized by the sovereign upon the death of the proprietor and thus passed under his control. Accordingly, land accumulated in the hands of the State. Also, the extensive Ottoman conquest both of Muslim and Christian lands had led to the same result. In the Ottoman Empire, therefore, a very large part of the lands of conquered territories belonged to the *miri* category. Some part of them may have been cultivated directly for the benefit of the Imperial Treasury, but cultivation was more usually secured by a system of grants of a temporary nature. The sovereign could hand out State lands as pure *mulk*, but the practice more usually followed was to give to the grantee a temporary right, reserving the ownership to the Treasury. The Sacred Law permitted the sovereign to make

43. One dunum = 1000 sq. metres.

grants (*iqta'*) of the State lands to private individuals.

This grant of State lands by the sovereign might either confer on the grantee a right of *mulk*, or simply a restricted and temporary right, which was, according to the *Shari'ah*, personal to the grantee, and did not pass to his heirs after his death.

The grant of conquered lands was frequently made not direct to the peasants but to soldiers and military leaders as a reward for their services and an obligation to perform military service was often attached to such a grant.[44]

The holder of *mulk* land enjoys full ownership, i.e. all proprietary rights are vested in him. The concept of *mulk* land is further elaborated in the Turkish Civil Code in Articles 125 and 1192.[45]

Its owner has both the *raqabah* and the *huquq-i tasarruf*, the legal ownership and the rights of possession, which taken together constitute the full *dominium* or *proprietas* as understood in the Roman law.[46]

Mulk land devolves by inheritance like movable property, and all the provisions of the law, such as those with regard to dedication, pledge or mortgage, gift, pre-emption, are applicable to it.

When the owner dies without issue, both tithe-paying land and tribute-paying land become State land by vesting the land in the Treasury.[47]

44. James Henry Scott, *Law Affecting Foreigners in Egypt* (Edinburgh, 1908), p. 117.

45. *Mejelle*, op. cit.

46. Chiha, op. cit., p. 9.

47. *The Ottoman Land Code*, Translated by Stanley Fisher, Oxford, 1919

Mulk property is the most complete form of private ownership known to Muslim law. The *mulk* owner is under no obligation to cultivate or to make any specified use of the land. He may transfer it to the *waqf* class at will, thus placing it still further beyond the reach of the State.

In the old days, the best method of insuring that property was secured from the interference of the State was to turn it into *mulk*, and then to dedicate it to a *waqf*, in such a way that its benefits were secured to the dedicator's descendants by any scheme of inheritance which he might lay down. The only way to stop this process was to stop the creation of *mulk*.

To this end the Mulk Titles Act of 1874 was passed.

It provides that, from the date of its becoming law, no one may possess land as *mulk*, unless he holds a title deed which describes it as such or unless he is permitted to do so by a *Firman* of the *Sultan*.

The result is that all claims to hold land as *mulk* which are supported neither by a title deed nor by a *Firman* must fail. In particular the improvement of urban lands no longer gives rise to a right under Article 2 (1) to hold them as *mulk*.[48]

Quasi-Mulk. Article 1272 of the *Mejelle* states that in all cases a person who drills a well or transforms a water course in *mawat* land, with the permission of the State, becomes the *mulk*-owner of these

48. Tute, op. cit., pp. 4-5.

accretions. This right is not dependent on whether the land was originally given to him as *miri* or as *mulk*.

Thus, under Article 1272, a *miri*-holder may include certain accretions to his property, and, by doing so, becomes the *mulk*-owner of these accretions, though his rights to land remain those of a *miri*-holder. The Land Code further extends the scope of this rule when it provides that buildings or plantations of trees or vines shall also be classified under the *mulk* category. The result of these provisions is to create an intermediate class of property which has conveniently been termed *quasi-mulk*.

It may here be stated that, so long as land and accretions remain in the hands of the same owner, property devolves under *mulk* inheritance; its acquisition by prescription comes under the *mulk* period of fifteen years; it is not liable to be claimed either by pre-emption or prior purchase; it cannot be dedicated as a whole to a *waqf*; on the complete disappearance of the accretions it reverts to *miri* status.

The further creation of this class of property was stopped by the Provisional Law of Disposal of 30 March 1911. After its passage accretions on *miri* land followed the status of that land, and did not rank as *mulk*, either in themselves or for the purpose of altering the legal incidents of the holding. The obligation to register *mulk* holdings was originally provided in the Mulk Titles Act of 1874.

(2) Miri *Land*. Under the Land Code, *miri* land

includes arable fields and meadows,[49] the usufruct of which is granted by the government to individuals. In the opinion of the commentators of land laws, *miri* land is that land which, at the time of the Ottoman conquest of a country, was assigned to the *Bait al-Mal* (Treasury), or land which had been granted by the *Sultan* for purposes of cultivation on condition that ownership be retained by the Treasury. It also laid down that lands becoming vacant were also left to the Treasury.

This tenure may be described as a heritable leasehold. The *mutasarrif* (usufructuary) of *miri*, of course, is not a proprietor, but a sort of a lessee.

The object of the grant is cultivation of land so that the State may drive a tithe from it. Land tenure in *miri* is a personal right and cannot, in principle, be granted to corporations, such as a monastery. The law always designates the State as owner of the land ; private individuals may acquire no other right in or over it, except a right of possession which may be assigned, with the permission of the proper representative of the State, and which may be transferred by way of inheritance. However, if the heirs do not wish to exercise that right, it reverts to the State. The lease affects only the surface of the land ; buildings may not be erected on it without official permission, and the sub-soil may not be exploited, for example, so as to produce bricks or tiles. Moreover, the status of land may not be

49. *Miri* is normally arable land and is only exceptionally pastures or woodland.

changed by the lessee.

Prior to the Land Code, possession of *miri* land was acquired (in case of sale or being left vacant) by permission or grant from *timars*[50] and *ziamets*[51] as lords of the soil, and later from the*multezims*[52] and *muhassils*.[53]

This system was abolished by the Land Code, and possession of this kind of immovable property was henceforth to be acquired by leave of and grant by the agent of the government appointed for the purpose. Those who acquired possession received a title deed bearing the Imperial Seal. The sum paid in advance for the right of possession, which was payable to the proper official for the account of the State, was called the *tapu* fee.

The fact that the *raqabah* of the *miri* lands belonged to the State enabled the State to regulate this type of land tenure in the Ottoman Land Code. Such lands were originally held by vassals or farmers, who had the right to collect tithe in return for services rendered, or moneys payable for this privilege to the State. This system left, in effect, the cultivator at the mercy of men whose interests were best served by the exploitation of the land.

The Land Code was designed to terminate this system and to bring the cultivators of *miri* land into immediate relation with their overlord, the State.

50. A *timar* was a fief with an annual revenue of less than 10,000 piasters.
51. A *ziamet* was a fief with a larger annual revenue.
52. *Multezims*=revenue farmers.
53. *Muhassils*=collectors of taxes,

The Land Code provided that, from the date of its passage, holders of *miri* should enjoy their lands under a direct grant from the *Sultan*.

In connection with these grants, the State imposed conditions which are set forth in the Land Code and in subsequent amending legislation. By this body of law the rights of the State are deliberately curtailed in several respects, while the rights of the grantees fall short of full ownership only in respects set forth in the law. A detailed enumeration of these rights is outside the scope of this study, since it would require a resume of the greater part of the Land Code and of the subsequent legislation relating to *miri* land.

In the present context it may suffice to state that the State permitted the grantee to hold land in perpetuity, provided that he obtained the grant in a proper manner (generally on payment of a fee); that he kept the land under cultivation; and that he regularly paid tithe and taxes.

The inheritance of *miri* is laid down by the Land Code and subsequent legislation on the subject of *miri* land. Such land could not be transferred by will. It could, however, be transferred by sale or gift provided that such a transaction was registered in the *Tapu* or Land Registry.[54]

As previously indicated, the Land Code limits the right of the user of *miri* land in several respects.[55] His rights are actually limited to the surface of the land for the purpose of cultivation. The *mulk*-owner,

54. Tute, op. cit., p. 8.

55. Ibid., p. 9.

on the other hand, enjoys without limitations *dominium ab coelo usque ad inferos*. Most of the prevailing restrictions were abolished by the Provisional Law of Disposal of 1911 with the result that the use of *miri* became practically unrestricted except as regards burial, mining or prospecting rights.[56]

The Ottoman commentators speak of the *miri*-holder (*mutasarrif*) as holding land from the State under a lease of indefinite duration at a double rent of which one consists in *tapu* payments (*bedel misl*), i.e. fees payable upon transfer and succession, while the other takes the form of tithe or taxes, or analogous periodical payments (*ijarah zemin*). This is the classical view of the legal nature of a *miri* holding. The resemblance of a *tapu* grant to a lease is less obvious today than it was in earlier times but, though the rights of a *miri*-holder were at one time much more limited than they are at present, there still remain certain special limitations or incidents attaching to possession of *miri* which distinguish it from *mulk*-ownership. Accordingly, a holder of *miri* land can exercise such rights only as have been expressly accorded to him by the State ; conversely, the *mulk*-owner is entitled to dispose of his land freely, subject only to those limitations which the State expressly imposed upon the owner.

The right of the holder of *miri* is subject to the eminent domain of the State. The right of *miri*

56. The State has a right to resume the land if it has remained uncultivated for three years. An act of resumption is necessary and the former holder has a right to *tapu*.

depends on an express grant by the State.

Any private interest in *miri* land is based on a grant emanating from the Tapu Office. Every such interest has thus its origin in a *tapu* grant. Although the Ottoman legislation provided explicitly that no one may hold *miri* land without having obtained a title deed,[57] this principle was honoured more in its breach than in compliance.

(3) Waqf *Land.* Next to *miri*, *waqf* land was the most important form of land tenure in the Ottoman Empire. According to the Land Code, *waqf* land was of two kinds : (*a*) *Waqf* derived from true *mulk* was originally subject to the formalities prescribed by the Sacred Law. The legal ownership and all rights of possession over this land belong to the Waqf Administration. It is not regulated by civil law but solely by conditions laid down by the founder. (*b*) Land which was dedicated by the *Sultans* or by others with imperial permission. The dedication of this land consists in the fact that some of State imposts, such as tithe and other taxes on land, so separated, have been appropriated by the government for the benefit of some object. *Waqf* land of this kind is not true *waqf*. Most of the *waqf* in the Ottoman Empire, however, was of this kind. The ownership of land which has been so dedicated belongs, as in the case of purely State land, to the Treasury.

There is another kind of such dedicated land of

57. Goadby and Doukhan, op. cit., p. 17.

which the legal ownership is vested in the Treasury and the tithes and taxes thereon belong to the State and of which only the right of possession has been appropriated for the benefit of some object, or the legal ownership is vested in the Treasury and the tithes and taxes as well as the right of possession have been appropriated for the benefit of some object.

To such dedicated land the provisions of the civil law with regatd to transfer and succession do not apply; it is cultivated and occupied by *waqf* authorities directly or by letting it, and the income is spent according to the directions of the dedicator.

(4) Matruk *Land. Matruk* lands are those lands which are left for the use of the public. They consist of two kinds : (*a*) that which is left for the general use of the public, like a public highway ; (*b*) that which is assigned to the use of the inhabitants of a particular area, generally to the inhabitants of a village or a town or of several villages or towns grouped together as, for example, pastures.

It is perhaps not strictly accurate to classify *matruk* land as land differing in class from *miri*, *mulk*, and *mawat*. A good case can be made for considering *matruk* land as belonging to the *miri* class in the broader sense. From this view the right to use *matruk* land is reserved to a specified (e.g. the inhabitants of a village) or an unspecified (e.g. the users of a highway) group of persons, in contrast to *miri* land in the narrow sense which, as previously indicated, is a personal right assigned to individuals.

There are two classes of land in which the public has rights, but which are not classed by the Code as *matruk*. They are (*a*) *moubah*, or mountainous areas, over which the general public has the right to cut wood, and (*b*) unassigned pastures. These classes are dealt with in Arts. 104 and 105, respectively, under the general heading of *mawat*.

The first of these classes cannot be resumed by the Land Registry Department, and cannot be granted by it to individuals for cultivation.

Land in the second class can be used by villages, within whose boundaries it lies, as a free pasture. But outsiders must pay fees to the State for its use.[58]

The most important characteristic of true *mairuk* lands of both classes is that they can never be acquired by an individual and may never be put to any use other than that for which they were originally intended.

(5) Mawat *Land*.[59] *Mawat* land literally means dead land. It generally denotes that land which is not cultivated. The Code describes it as follows: "Dead land is land which is occupied by no one and has not been left for the use of the public. It is such as lies at such a distance from a village or town from which a loud human voice cannot make itself heard at the nearest point where there are inhabited places, that is a mile and a half, or about half an hour's distance from there."

Another definition is as follows: "Mountains,

58. Tute, op. cit., pp. 14-15.

59. Ibid., p. 15.

rocky places, stony fields and grazing ground which are not in the possession of anyone by title deed or assigned to the public use are dead lands."

The *Hidayah* informs us that the special conditions as to land being distant from any village was inserted, according to the opinion of Abu Yusuf, because if the ground is contiguous to a village it cannot be said to be entirely useless to its inhabitants. Muhammad b. Hasan, however, holds that land contiguous to a village may be *mawat* land if the villagers do not in fact make use of it.

Land lying at more than the prescribed distance from a town or village and which is not cultivated is not necessarily *mawat*. It may be *miri* pasture or woodland. It may be *matruk* pasture or woodland. It may be *mulk*, though this is very unlikely. But if land in question does not belong to any of those categories, there remains only the category of *mawat* into which we can place it.

It is clearly both economically and financially desirable that *mawat* should be brought under cultivation if possible, and it is an ancient rule of Muslim law that whosoever cultivates lands with the permission of the chief obtains the property in them, whereas, if a person cultivates them without such permission, he does not in that case become proprietor, according to Abu Hanifah.

If the *Sultan* gives permission to someone to improve land on condition that he is to have only the *use* of the land and *not* ownership, that person, to the extent that he has received permission, has

the right of disposition over that land, but he does not become *mulk*-owner of the land.

If there remains a quantity of vacant land in the middle of the land which he has improved, that land also belongs to him.

Comparing the terms of the *Mejelle* and of the Land Code, it is inferred that in the usual case permission to cultivate *mawat* will be subject to the condition that when cultivated the land will be *miri* and the *raqabah* will still be vested in the State. It would appear accordingly that this limiting condition must always be safeguarded by the official.

For the purposes of application of the relevant provisions of the *Mejelle* and the Land Code it is necessary to determine what amounts to revival of dead land. The *Mejelle* has several articles on this subject which are in the main only an abstract of the statements in the *Hidayah*: Dead land may be revived by sowing seed, planting trees, and generally improving by irrigation, by dams, to render it more productive. If a person encloses a land he has a better right to that land than others for three years. If he has not improved it in three years, his right lapses and it can be transferred to another person.

Revival or Development of Dead Lands. The law concerning the cultivation of dead lands is covered by Articles 1270-1280 of the *Mejelle* which are reproduced below.[60]

Article 1270. Those places are termed dead lands which are

60. Grigsby, op. cit., pp. 259-61.

not the property of anyone, nor are the pasturage of a place or a village, or a forest left to the inhabitants to gather wood (baltalik), and which lie remote from inhabited places, i.e. they are so far that from the last point of the houses situated in tne place or village that the voice of a loud speaking man cannot be heard.

Article 1271. The lands near inhabited places belong to the inhabitants, in order that they may make use of them as pasturage, threshing floors, and places for timber. These places are called lands given over to the public use.

Article 1272. A man who by leave of the Sovereign has cleared and cultivated a part of dead land becomes its owner; but if the Sovereign or his representative permits a man to cultivate a dead land, on the condition that he should only have the benefit of it, and not that he should become its owner, such a man has the right to take possession in the way he was permitted, but does not become the owner of the land.

Article 1273. He who has cultivated a part of land, and has left the other parts uncultivated, becomes owner of the cultivated part, but not of the uncultivated. If, however, in the middle of the lands which he has cultivated, some part remains uncultivated, the part also belongs to him.

Article 1274. If, after a certain man has cultivated a part of dead land, other persons come and cultivate the places around its four boundaries, the person who last cultivated is bound to leave a road to him, i.e. the road is made through the last cultivated land.

Article 1275. By the words "cultivation of land," not only sowing and planting are meant, but also tilling and irrigation, as also the opening of a channel or conduit pipe for the purpose of irrigation.

Article 1276. A man who surrounds a part of dead land with a wall, or raises by means of a bank its boundary to such a degree that it is preserved from the confluence of rain water, is considered as having cultivated this part of the land.

Article 1277. The enclosing of lands by means of the heaping up of stones, or thorns, or branches of dead trees, the cleansing of it from weeds, or the burning thorns in it, or the opening a well in it, do not constitute cultivation, but simply enclosure.

Article 1278. If a man mows grass in dead land, or thorns, and, placing them around the land, cover them with earth without, however, elevating the circumference of the land in such a manner that the influx of rain water is prevented, he is not considered as having cultivated, but simply as having enclosed the land.

Article 1279. He who has enclosed a portion of dead land for three years has the right of pre-emption over that part. However, he loses this right if within three years he does not cultivate the part, and then that part can be given to another man to cultivate.

Article 1280. A man who has dug a well in dead land by leave of the Sovereign becomes the owner of it.

Mineral Rights. Section III, called Book III of the Ottoman Code, is entitled "Unclassed Lands". From our point of view the most important section is 107 which deals with mineral rights, etc., which is reproduced below :

Minerals, such as gold, silver, copper, iron, different kinds of stone, gypsum, sulphur, saltpeter, emery, coal, salt and other minerals found on State land, by whomsoever it is possessed, belong to the Treasury. The occupant of the land may not take possession of these minerals or claim any share of any mineral which is subsequently discovered. Similarly, all minerals found on mevqufe land of the taksisast kind belong also to the Treasury; neither the occupant of the land nor the wakf authority may seize them. However, in the case of both state and mevqufe land the possessor must be indemnified to the extent of the value of the land which ceases to be in his possession and under cultivation owing to the working of the minerals. In the case of

metrouk and mawat land, one-fifth of the minerals found belongs to the Treasury and the rest to the person who finds them. In the case of true wakf lands, the minerals belong to the wakf. Minerals found in mulk lands in towns and villages belong entirely to the owner of the soil. Minerals found in tithe-paying and tribute paying land belong as to one-fifth to the Treasury and the rest to the owner of the soil. The books of the Sacred Law (fiqh)[61] set forth the rules on ancient and modern coins and treasures of all kinds of which the owner is unknown which are found in any kind of land.

THE END

61. Tute, op., cit., p. 101.

ANWAR IQBAL QURESHI

FISCAL SYSTEM OF ISLAM

INSTITUTE OF ISLAMIC CULTURE