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<u>Home</u> > <u>A History of Muslim Philosophy Volume 1, Book 3</u> > <u>Part 5: Political Thinkers</u> > <u>Chapter 34: Abu</u> <u>Hanifah and Abu Yusuf</u> > <u>Bibliography</u>

# Chapter 34: Abu Hanifah and Abu Yusuf

# A. Abu Hanifah

### Life

It was under the circumstances explained at the close of the preceding chapter that Abu Hanifah appeared on the scene and began his work. His original name was Nu'man bin Thabit. Born in Kufah, capital of Iraq, in 80/699 according to authentic reports, in the reign of 'Abd al–Malik bin Marwan, when Hajjaj bin Yusuf ruled over Iraq, he lived the first 52 years of his life in the Umayyad regime, the latter 18 in the 'Abbasid reign. He was 15 years old when Hajjaj left the stage, at the time of 'Umar bin 'Abd al–'Aziz when he was a youth. The stormy days of the rule of Yazid bin Muhallab, Khalid bin 'Abd Allah al–Qasri and Nasr bin Sayyar, over Iraq, passed before his eyes.

He himself was a victim of the persecution of ibn Hubairah, the last Umayyad governor. He saw the rise of the 'Abbasid movement with its centre at Kufah, his home town, which remained virtually the main stronghold of the new born 'Abbasid State before the founding of Baghdad. His death occurred in 150/767 during the reign of Mansur, the second 'Abbasid Caliph.

Abu Hanifah's ancestors belong to Kabul. His grandfather, Zuta (according to some, the pronunciation is Zauta), came to Kufah as a prisoner of war, accepted Islam, and settled there under the friendly protection of Banu Taim Allah. Zuta was a trader by profession and was known to 'Ali, the "Right-going" Caliph; in fact, he was close enough to him and sometimes entertained him with gifts. 1 Abu Hanifah's father, Thabit, also owned a business at Kufah. According to a report coming from Abu Hanifah, he owned a bakery there.2

Abu Hanifah's own account of his education describes him as applying himself first to recitation (reading the Qur'an properly), Hadith (Tradition), grammar, poetry, literature, philosophy and other subjects in vogue in those days. 3 Then he turned to specialize in dialectical theology and mastered it to such a degree that people looked to him as an authority in that science. His student, Zufar (bin al-Hudhail),

reported that his master told him that at first he took such an interest in theology that people would lift their fingers towards him. 4 In another report Abu Hanifah says that at one time he was a past master in the art of controversy and spent most of his time in debates. As Basra was the main venue of these contests, he had been there about 20 times, occasionally staying there for six months or so at a stretch and remained engaged in controversies with the different sects of Kharijites, the Ibadiyyah, the Sufriyyah, and Hashwiyyah.5

It may be easily concluded from this that he was well versed in philosophy, logic, and theological divergences of the numerous sects without which a man cannot enter the field of controversy at all. The beautiful use that he later made of reason and common sense in the interpretation of Law and the resolving of abstruse legal problems won him immortal fame and a great deal to the intellectual training which he had received earlier from these exercises of logical argumentation.

After keeping himself busy in polemical controversies for a long time and growing sick of them, he turned to *Fiqh*, i.e. Islamic Law. Here, with the strength of mind that he possessed, he could not interest himself in the Traditionist school (*ahl al-hadith*). He, therefore, joined the Iraqi school of reason with its centre at Kufah. This school of law traced its origin to 'Ali and ibn Mas'ud (d. 32/652), after whom their disciples Shuriah (d. 78/697), 'Alqamah (d. 62/681), and Masruq (d. 63/682) became its accredited leaders, followed in their turn by Ibrahim Nakh'i (d. 95/714) and Hammad (d. 120/737). Abu Hanifah took Hammad for his master and kept him company for 18 years, until the latter's death. Frequently, he also consulted other learned masters of Law and Tradition in the Hijaz on the occasions of pilgrimage, and acquainted himself also with the Traditionist school of thought.

On Hammad's death he was chosen to succeed him. He occupied that place for 30 years, delivering lectures and discourses, issuing legal verdicts, and doing the work which formed the foundation of the Hanafi School of law named after him. In these 30 years he answered some 60,000 (according to other estimates, 83,000) legal queries, all of which were later compiled under different heads in his lifetime. Some seven to 800 of his students spread to different parts of the Islamic world and filled important seats of learning. They were entrusted with issuing legal opinions and guiding the education of the masses, and became objects of heartfelt veneration for the multitudes. About 50 of them were appointed judges after his death during the 'Abbasid reign. The law was codified by him was adopted as the law of the great part of the Muslim world. The 'Abbasids, the Saljuqs, the Ottomans, and the Mughuls accepted it and with millions of people still following it today.

Abu Hanifa, like his forefathers, earned his living by trade. He dealt in a kind of cloth, called *khazz*, in Kufah. Gradually, his business flourished until he had a factory where this cloth was manufactured. The business was not restricted to Kufah; his goods had a good market in far off places. The growing recognition of his integrity converted his firm into a bank where people deposited huge sums of money on trust. These deposits ran to 50 million dirhams at the time of his death.

Extensive experience of financial and commercial matters gave him a deep insight into various aspects

of law such as seldom falls to the lot of a theoretical lawyer. Later on, when he set himself to the task of codifying the Law of Islam this personal experience proved of immense help to him. A further testimony to his deep understanding and proficient handling of practical affairs is provided by the fact that when in 145/762 Mansur undertook the task of constructing the new city of Baghdad, he appointed Abu Hanifah to supervise the work and for four years it remained under his supervision.9

In his private life he was most pious, a man of known integrity. Once he sent out his partner in business to sell some merchandise. A part of the goods to be sold were defective and he instructed his partner to let the buyer know the defect. The partner, however, forgot to do so, and returned after selling the whole without apprising the buyer of the defect. Abu Hanifah did not keep the money. He gave away the whole of it (and it amounted to 35,000 dirhams) to charity. 10

His chroniclers have recorded occasions when ignorant people would come to his firm selling goods at lower rates than what they were worth. Abu Hanifah would tell them that their wares were worth more than what they would put them at, and bought them at their actual rates. 11 All his contemporaries speak highly of his honesty. The famous learned divine, 'Abd Allah bin Mubarak 12 said, "I have yet to see a more pious man than Abu Hanifah. What will you say about the man to whom they offered the world and its wealth and he kicked it away, who was flogged and remained steadfast, and who never accepted those posts and honours which people hankered after."

Justice ibn Shubrumah said, "The world followed him but he would have none of it. As for us, the world would have none of us and we run after it." 13 According to Hassan bin Ziyad, Abu Hanifah never accepted a gift or favour from the rich. 14

He was also very generous, never sparing in spending, particularly on the learned and the scholarly. A part of his profits was ear–marked for them and expended throughout the year, and whatever of it was left over was distributed among them. Extending them such help he would say, "Be pleased to spend it on your needs, and thank none but God for it. I do not give you anything of mine for it is a bounty from God. He has given it to me for your sake." 15 A number of his students depended entirely on him, particularly Yusuf. He met all the expenses of the latter's house since his parents were poor and wanted their son to give up studies and take to some work to earn a living. 16

That was the man who tackled in the first half of the second/eighth century the knotty problems arising from the awkward circumstances that followed the "Right-guided" Caliphate.

# **Abu Hanifah's Pronouncements and Opinions**

First of all, we shall take those problems about which his opinions as recorded by himself are available to us. He has no prolific writer, therefore, in order to know his views we have to generally resort to other reliable sources. But on certain issues, mainly raised by the above–mentioned sects (the Shi'ites, the Kharijites, the Murji'ites, and the Mu'tazilites) he has written, against his wont, with his own pen, drawing

up in brief but eloquent words the creed and doctrine of the *ahl al-sunnah w-al-jama'ah* (lit., the followers of the Prophet and his Companions' tradition) who formed (as they still do) by far the largest section of the Muslim community. Naturally, in an estimate of his work the first place must be given to what flows from his pen.

#### Al-Figh al-Akbar

We have already stated in the preceding chapter how the differences that cropped up among the Muslims during 'Ali's reign and the first years of the Umayyad regime led to the birth of four big sects in the community, which not only expressed but also adopted as tenets of faith contradictory opinions on certain vital issues affecting the constitution of Muslim society, the Islamic State, the sources of Islamic Law, and the decisions in regard to these matters was clear; it was embodied in the practice of the great divines and men of learning. But nobody had drawn up in clear cut words and put it into the form of a treatise. Abu Hanifah was the first person to put down perspicuously in his famous work, *al-Fiqh al-Akbar*, 17 the Sunni point of view regarding matters of divergence against the doctrines of other sects.

The first question relevant to our discussion answered by him in the book is regarding the position of the "Right-guided" Caliphs. The dissenting sects had posed the question about some of them whether they were rightly raised to the office of the Caliphate. Some wanted to know who were superior to whom, and whether there was any among them who could not be called a Muslim at all. These questions were not merely queries regarding some personages of old history; in fact, they mooted another fundamental question, viz., whether the way these Caliphs were elected to their office was to be recognized as the constitutional way of electing the Head of the Islamic State or not. Moreover, if the title of anyone of them proved doubtful, the question would be raised whether the decisions taken by "consensus of opinion" in his regime would form part of the Islamic Law or not, whether his own decision would continue to form precedents in law or cease to operate as such.

Besides that, the questions whether they were entitled to the Caliphate, whether they were endowed with faith at all, and whether some of them were superior to others, naturally gave rise to another question of a very vital import, and that was, whether the Muslims of later times could repose any trust in either the members or the collective decisions of the early Islamic community brought up under the direct care and supervision of the Prophet of God, the people through whom the teachings of the Qur'an, the Prophet's Tradition, and the Islamic Law came to be transmitted to later generations.

The second question related to the position of the Prophet's Companions. One of the sects, the Shi'ah, called the vast majority of these Companions sinners, gone astray and even infidels, because they had selected the first three Caliphs to rule them, and a fair number were put outside the pale of faith or declared "transgressors" by the Kharijites and the Mu'tazilites for reasons of their own. This, too, was not a purely historical question, for it naturally led one to ask whether the laws and traditions transmitted by persons of doubtful *bona fides* to posterity would remain authentic sources of Islamic Law or not.

The third basic question dealt within the book relates to "faith," its definition and distinction from disbelief, and the consequences of sin, issues of grave controversy and debate in those days among the Kharijites, the Murji'ites, and the Mu'tazilites. This again was not merely a theological question but one that was closely related to the constitution of Muslim society and its answer affected the civic rights and social relations of Muslims. A question that closely followed from it was whether in a Muslim State governed by the sinful and the wrong–doer, it was possible to perform correctly such religious duties as the Friday and other prayers, or political functions like dispensing justice or participating in war.

Abu Hanifah's answers to these questions embodying the Sunni creed are as follows:

1. "The best of men after the Prophet of God (on who be peace) was Abu Bakr. After him was 'Umar, after him 'Uthman, and after him 'Ali. They were all just men and abided by the right." 18 'Aqidah Tahawiyyah further explains it like this, "We believe Abu Bakr (with whom God be pleased) to be the best of men after the Prophet of God (on whom be an everlasting peace). We recognize his title as the Caliphate as prior to that of others, then 'Umar's, then 'Uthman's, then 'Ali's – and they are the Right-guided Caliphs and the 'Right-going leaders." 19

It is a matter of interest to note that personally Abu Hanifah loved 'Ali more than 'Uthman,20 and believed that neither of them should be ranked above the other.21 Formulating the creed, however, he accepted whole-heartedly the decision of the majority of his day in choosing 'Uthman as Caliph after 'Umar, and agreed that in the ranking of the "Right-guided" Caliphs the order of their Caliphate was also the order of their superiority to one another.

2. "The Companions of the Prophet are not to be spoken of but respectfully." 22 'Aqidah Tahawiyyah elucidates it further, "We treat all the Companions of the Prophet respectfully. We do not love anyone of them beyond measure, nor censure anyone of them. We do not like one who bears them or mentions them with disrespect. We mention them in none but a good way." 23

Abu Hanifah did not hesitate to express his opinion on the mutual war of the Companions, and said unambiguously that in the war between 'Ali and his adversaries (and evidently the participants of the battles of the Camel and Siffin are included among them) 'Ali stood by right more than they, 24 yet he altogether refrained from inflicting reproach on the other side.

3. "Faith is synonymous with owning and believing. To have faith is to own and believe (in God and his Prophet)." In al-Wasiyyah it is explained in these words, "To have faith in something is to own it with the tongue and believe in from the heart," and further, "Faith is not owning alone, nor believing alone." In another place we find, "Action is something different from faith, and faith is different from action. Often a man is exempt from a certain action but he is not exempt from faith. For instance, it may be said that a poor man is exempt from the payment of *zakat* (prescribed charity), but it cannot be said that he is exempt from bearing faith, also." Thus, Abu Hanifah refuted the Kharijite theory that action formed part of faith and hence sin was synonymous with disbelief, or, in other words, that a crime necessarily meant

treason.

4. "We do not ex-communicate a Muslim for any sin, however grave it may be, unless he affirms that it is 'allowed.' We do not divest him of belief. We call him a believer. A believer may be a transgressor, without being an infidel."27

In *al-Wasiyyah* he writes, "The sinners among the followers of Mohammad (on whom be peace) are all believers, not infidels." *Aqidah Tahawiyyah* elucidates further, "A man does not go out of the pale of faith except by denying the creed that had put him inside it." A discussion of the Kharijites with Abu Hanifah over this issue throws further light on this doctrine and its social consequences. A large part of them once came to him and said, "There are two biers at the gate of the Mosque. One is of a drunkard who died drinking, the other of a woman who had gotten herself illicitly pregnant and too her own life in shame."

"To which community did they belong? Jews were they?" he asked.

"No," they said.

"Christians, then, or Majusis?"

"No," they answered again.

"Then, to which community did they belong?" he asked.

"To the community which bears witness to the creed of Islam," they replied.

"Is that one-third of the faith or one-fourth of faith?" he asked.

They said, "There is no one-third or one-fourth of faith."

"After all, what part of faith is this bearing witness to the creed of Islam?" he said.

"The whole faith," they said.

"When you yourself call them faithful, what is it you want of me?" he asked.

"We ask whether they would go to heaven or hell."

He replied, "If you ask me that, I will say about them what the Prophet of God, Abraham, said about sinners worse than they, 'Oh God, he who follows me is mine, and he who disobeys – Thou art the Forgiving, the Compassionate', or what the Prophet of God, Jesus, said about sinners worse than they, 'If You punish them they are Your creatures, and if You forgive them, Thou art All–powerful and wise', or what the Prophet of God, Noah, said, 'Their reckoning rests with God, would that you understood, and I do not wish to turn my back upon the believers.'"30

Hearing this, the Kharijites felt out-witted and avowed their mistake.31

5. "Prayers can be offered behind any of the faithful, good or bad." 32 'Aqidah Tahawiyyah elucidates it further like this, "The pilgrimage and jihad (war) will continue to be performed to the Day of Judgment under the rulers of the faithful, whether they be good or bad. Nothing will make them unlawful or discontinue them." 33

Al-Jassas has more clearly explained Abu Hanifah's point of view in this matter. "Some people," he writes, "suppose that Abu Hanifah approves the Imamate or Caliphate of the corrupt. If it has been deliberately invented, the misunderstanding probably springs from this that Abu Hanifah (and not he alone, all the learned scholars of Iraq whose opinions are widely known are one with him in this) says that if a judge is himself just, his decisions will be accepted, no matter how corrupt a master has appointed him, and prayer may be lawfully offered behind corrupt masters despite their corruption. This attitude is absolutely correct in its own place, but it does not mean that Abu Hanifah finds no fault with the Caliphate of the corrupt."34

These elucidations make it clear that Abu Hanifa, unlike the Kharijites and Muʻtazilites, differentiated between Caliphs *de jure* and Caliphs *de facto*. A necessary corollary to the position taken by the abovementioned sects was that in the absence of a just and pious ruler, i.e. a Caliph *de jure*, all functions of Muslim society and State would remain suspended. There would be no pilgrimage and no Friday or other congregational prayer, the courts would stop, and there would no other religious, social, or political work. Abu Hanifah, on the other hand, contended that if at a time the Muslims were deprived of a Caliph *de jure*, the functions of their society would continue to be exercised lawfully under a Caliph *de facto*, though his right to caliphate may be disputable. In the pages to come we shall point out what, according to him, were the essential pre–requisites of a lawful Caliphate and what he thought of corrupt and unjust Caliphs.

6. "We do not say that sin does not do a believer any harm. We neither say that a believer will never go to hell, nor that he will live eternally in hell if he is a transgressor. 35 "We also do not say, like the Murji'ites, that our good deeds will be certainly rewarded and our bad deeds undoubtedly forgiven." 36

'Aqidah Tahawiyyah has a further addition to it, "We decide in respect of no believer that he is destined to go to heaven or to hell. We do not accuse any Muslim of infidelity, polytheism, or hypocrisy, unless we see him actually engaged in them. As for intentions and motives we leave them to God to judge."37

Thus, Abu Hanifah steered a middle course through the opinions held by the Murji'ites, the Kharijites, and the Mu'tazilites, and formulated a doctrine of balance which, on the one hand, preserves the Muslim society from disintegration through mutual hatred and violence, and, on the other, insures against its falling into moral indiscipline and getting emboldened to commit sins with impunity.

#### **Abu Hanifah on State and Caliphate**

The opinions mentioned above related to issues which had cropped up in consequence of the political turmoil of the day and vitally affected the legal system and the political turmoil of the day and vitally affected the legal system and the political and social orders of Muslim society. Now, let us examine Abu Hanifah's views concerning the State and Caliphate. Since there is no work of his own touching these matters, we have to resort to the following two kinds of sources for information: first, his opinions quoted in the traditions and books of the Hanafi School and, secondly, the attitude he adopted towards his contemporary governments of the Umayyads and the 'Abbasids. The latter also includes a number of spoken words coming from his mouth during the course of his struggle with these governments, and these throw further light on his points of view under discussion.

# The Problem of Sovereignty and Legislation

Abu Hanifah's views on sovereignty were identical with the generally known basic view of Islam on this issue, namely, 1) that the true sovereign is God, 2) that the Prophet is to be obeyed as God's accredited vicegerent, and 3) that the *Shariʻah*, i.e. the Law of God and His Prophet, is the supreme Law to which all must submit with demur or reservation. Abu Hanifa, pre-eminently a jurist, has stated this doctrine rather in terms of law than of politics. He says, "When I find an order in the Book of God, I take it from there. When I do not find it there I take from the accredited practice, word, or tradition of the Prophet, coming down to us through reliable sources. When I do not find it either in the Book of God or in the Prophet's Sunnah, I follow the (agreed) opinion of the Prophet's Companions. In case of difference of opinion among them I adopt the opinion from outside... As for others, I have as much right to sift and draw conclusions as they have."38

Ibn Hazm states, "All his students are agreed that Abu Hanifah's practice was that even a weak tradition was to be preferred to (one's own opinion formed by analogical reasoning (qiyas) or private judgment (ra'y)."39

This leaves absolutely no doubt that Abu Hanifah regarded the Qur'an and the Sunna as the final authority. Legal sovereignty, according to him, rested with God and the Prophet, and reason and judgment (*qiyas* and *ra'y*) were to be employed in the service of legislation only in matters where they had given no instruction. The precedence given by him even to an "isolated" opinion of the Companions was also based on the possibility of their being aware of some instruction from the Prophet (about the matter under reference) which may have been the basis of the opinion.

That was also why, when he saw a difference among the Companions, he accepted the opinion of some of them rather than differ with all of them – he would avoid the danger of going against the Sunnah, even inadvertently. In any case, he employed to the utmost power of reasoning and judgment to find out whose opinion seemed best to approximate the Sunnah.

The charge that he preferred to his own discretion to a clear ordinance (*nass*) was laid at his door even in his life–time but he refuted it say, "God knows that he who stated that I preferred my own discretion to 'ordinance' told a lie and accused me unjustly. How can we dare use our discretion when we have an 'ordinance?" 40 The Caliph Mansur once wrote to him saying that he had heard that he (Abu Hanifah) gave precedence to deductions from analogy over the Prophets tradition. In reply, he wrote, "Oh Commander of the Faithful, what you have heard is incorrect. I go first by the Book of God, then by the Sunnah of the Prophet, then the decisions of Abu Bakr, 'Umar, 'Uthman, and 'Ali and then the decisions of other Companions, but when I find disagreement among them, I resort to discretion".41

### **Establishment of the Caliphate**

Regarding the Caliphate his views were most clear cut and unambiguous. According to him, to seize power by force and later regularize it by exacting allegiance under duress was no lawful way of being chosen for it. A Caliph should be chosen after consultation and in conference with the wise that are entitled to give opinion (*ahl al-ra'y*). Abu Hanifah expressed this opinion in face of the peril of losing his life. Mansur's Chamberlain, Rabi' bin Yunus, relates that the Caliph summoned Malik ibn Abi Dhi'b and Abu Hanifah before himself and asked, "What do you say about this power that God has given me over the people, am I not deserving of it?"

Malik answered, "Had you not deserved, God would not have conferred it on you."

Said ibn Abi Dhi'b, "God grants the kingdom of the world to whom He pleases, but the kingdom of the hereafter is given to him who strives for it and is helped by God to make way to it. The help of God will attend you if you obey him; in case you disobey, it will keep away from you. As for the Caliphate, the truth is that only a conference of the God–fearing can institute it, and one who seizes it by force has no righteousness in him. You and your associates are deprived of the help of God, and have turned aside from truth. Now, if you ask the Almighty to grant you peace and try to gain nearness to Him with deeds of piety, you may win His grace, otherwise, you are only a self–seeker."

Abu Hanifa tells us that when ibn Abi Dhi'b spoke those words, Malik and he folded their clothes about them expecting his head to be off his shoulders that very moment and his blood to fall on these clothes. But Mansur turned to Abu Hanifah and inquired, "What say you?"

He replied, "The man who sincerely seeks the right path to guide himself eschews wrath. If you consult your conscience you will see that you have not invited us for the sake of God but make us say, out of dread, something that suits you and that should reach the people. The truth is, you have become a Caliph without even a couple of men from amongst the *ahl al-fatwa* (those whose opinion is respected as authoritative) agreeing to it, whereas a Caliph should be chosen with the conference and concurrence of Muslims. You know, Abu Bakr refrained from making decisions for six months until the (news of the) Yemenites' allegiance arrived."

Then all three rose and went their way. Mansur dispatched Rabi' after them with a bag full of coins for each with instructions that if Malik accepted it, it should be made over to him, but if Abu Hanifah or ibn Dhi'b accepted it, he should bring their heads to him. When the gift was offered to Malik he took it, but when Rabi' offered it to ibn Abi Dhi'b he said that he did not consider it lawful for Mansur himself, how could it be lawful for him. And Abu Hanifah said, "I will not touch it, not even if you cut off my head." When Mansur heard it, he said, "Their contentment has saved their lives."42

# A Caliph's Qualifications

Until Abu Hanifah's time the qualifications which entitled a man to Caliphate were not described at length as they were complied later by scholars like Mawardi and ibn Khaldun. They were for free, and well versed in religion, and sound body and mind. Two things, however, were doubtful and needed clarification: first, whether a ruthless or corrupt person could be a Caliph or not; secondly, whether it was necessary for a Caliph to belong to the tribe of Quraish.

Abu Hanifah's opinion with regard to the first was that a Caliph must be a just person. One who is cruel and corrupt cannot be a Caliph, a judge, a governor, a pronouncer of legal verdict (Mufti), or an arbiter. If such a person comes to office, his Caliphate will be null and void and the public owes him no obedience. However, notwithstanding his usurpation of power, all the social dealings and obligations executed by Muslims under him in accordance with the *Shari'ah* will have legal sanction and the just decisions of the judges appointed by him will take effect.

Abu Bakr al–Jassas, a well–known Hanafi jurist, has explained this point in greater detail. He observes, "It is not lawful that a cruel or corrupt person should be a prophet or his successor (*Khalifah*) or a judge or hold any office by virtue of which he should be in a position to impose his will on the people in matters relating to religion; he cannot, for example, be a Mufti or a witness or a reporter of the Prophet's traditions. The Qur'anic verse, "*My covenant does not extend to the wrongdoers*" 43 shows that all those people who come to the helm of affairs in matters connected with religion must be just and virtuous.

This verse categorically proves that the Caliphate of the corrupt is unlawful. No person of wicked reputation can be a Caliph. If any of that character should install himself in that office, the people are under no obligation to follow or obey him. The same was meant by the Prophet of God (on whom be peace) when he said that none among the created was entitled to command obedience in defiance of the Creator. The verse is also conclusive that no corrupt person can become a judge, a governor, or a magistrate, and if he becomes one, his orders will not be valid. Nor can his evidence be acceptable, nor his transmission of a report from neither the Prophet of God, nor the verdict (*fatwa*) of which he is the pronouncer."44

Al-Jassas further affirms that this was Abu Hanifah's opinion. He regrets how unjust it is to accuse him of allowing the Caliphate of the corrupt. We have already alluded to that controversy and

need not repeat it here.

Al-Dhahabi also affirms this to be Abu Hanifah's view. According to him, Abu Hanifah held that the caliph who misused public money (*fay'*) or gave unjust orders was not entitled to remain Caliph and his orders were not valid.45

About the second question Abu Hanifah's opinion was that the Caliph should belong to the tribe of Quraish. 46 Not this alone; it was the agreed view of all the Sunnites. 47 However, they held this view not because the Caliphate was constitutionally the exclusive right of one tribe, but because in the particular circumstances of those days only a Quraishite Caliphate could hold all Muslims together. In other words, this opinion was based on political expediency of time and not on any legal constitutional right of the Quraish. Ibn Khaldun explains in detail that in those days the Arabs were the mainstay of the State and there were far more chances of the Arabs agreeing on a Quraishite Caliph than on anyone from some other tribe.

The chances of strife and rift that lay in the choice of a non–Quraishite Caliph were so many that none could afford to put the Caliphate in that peril. 48 That incidentally unfolds the wisdom and implications of the Prophet's timely instruction that the Imams should be chosen from the Quraish. 49 Had the Caliph's office been forever forbidden to the non–Quraishite, 'Umar would not have said at the hour of his death, "If Hudhaifa's freed slave Salim, were alive, I would have proposed him my successor."50

The Prophet, while instructing the Caliphate should go to the Quraish; he had made it clear that this office would be held by the Quraish as long as they retained certain merits. 51 This clearly implied that when the Quraish became bereft of those merits, the Caliphate should devolve on the non–Quraish. This was the essential difference between the view of the Sunnites, including Abu Hanifah on one side and that of the Kharijites and Mu'tazilites on the other. The latter allowed Caliphate for the non–Quraishites irrespective of all conditions. Not only that, they went a step further and said that the non–Quraishites had a better title to it. Their main anxiety seemed to be democracy, even though it might lead to confusion and disintegration. With the Sunnites, democracy and the stability of the State were equally important considerations.

# The Exchequer and the Public's Right of Ownership

The most reprehensible of all indulgences of the Caliphs of his day in eyes of Abu Hanifah were their reckless waste of public exchequer and their illegal seizure of people's properties. As we have already quoted al–Dhahabi, according to Abu Hanifah, oppression and illegitimate use of public money in a ruler rendered his title to Caliphate void. Not only that, he even did not allow the tokens of goodwill and presents received from foreign States to be made the personal property of the Caliph. These things were also deposited into the treasure, not with the Caliph or his family, for the obvious reason that had he not been the head of State and thereby become conspicuous in the international world, none would have sent him those presents.52 He also objected to the Caliph's squandering of public money and his giving

gifts out of it. This was one of the main reasons why he himself accepted no gifts from the Caliphs.

# **Separation of the Judiciary from the Executive**

His views on the position of the judiciary *vis-a-vis* the executive were unequivocal. If justice was to be ensured, he said, the judiciary must be independent of the executive. Not only that, the judge must also be able to enforce his decree against the Caliph if the latter encroached upon the rights of people. Towards the close of his life when he was sure that the Government would not let him live any more, he gathered his disciples and addressed himself to them. Among other important things, he gave them this instruction, "If the Caliph is guilty of encroachment upon the rights of the people, the judge next to him in rank (i.e. the Chief Justice) should make him submit to the rule of Law."53

The main thing which prevented him from accepting an official position, particularly of a judge during the Umayyad and 'Abbasid rule was that he did not see the judiciary as independent. There was no chance of making the Caliph submit to the rule of law. On the other hand, he feared that he would be made an instrument of injustice and asked to give wrong decisions, and that not only the caliph himself but also those attached to the palace would interfere with his work.

Yazid bin 'Umar bin Hubairah was the first of the Umayyad governors of Iraq who pressed Abu Hanifah to accept office. This was in 130/747 when the upsurges in Iraq against the Umayyad regime were rising with a speed that completely overthrew that government within a couple of years. Ibn Hubairah wanted to enlist the support of influential men of learning and use them to the advantage of the Umayyad cause. He invited ibn Abi Laila, Dawud bin Abi al–Hind, ibn Shubrumah, and others and gave them lucrative appointments. Then summoning Abu Hanifah, he said, "Here I give you me seal. No order will be enforced here until you put the seal on it, and no money will be drawn from the treasury without your sanction." But Abu Hanifah declined to accept the responsibility. Yazid put him in prison and threatened him with whipping.

Then the other learned men came round Abu Hanifah and requested him to take compassion on himself. "This service is as repugnant to us," they said, "as it is to you. But we have accepted under duress, so should you." Abu Hanifah replied, "Ah! Had he asked me to count the gates of the mosque of Wasit, I would not have done it for his sake. Then how can I agree that he should write the death warrant of an innocent person and I should put the seal on that order? By God, I will accept no share of his responsibility." Ibn Hubairah then made him other offers but found him cold. At last, he decided to appoint him the Chief Judge of Kufah and swore that if Abu Hanifah declined the appointment he would have him flogged. Abu Hanifah swore in return saying that the flogging of this world was easier for him to endure than the flogging of the hereafter, reiterating that he would never accept it, even though that would cost him his life.

At last the tyrant gave him 20, or (according to another report) 30, blows of the stripe on the head. According to some accounts, he kept it up with ten stripes daily for about 11 days, but found his victim

firm like a rock. Then someone informed him that he was likely to die. Ibn Hubairah replied, "Is there none to counsel this man to ask me for a reprieve?" When Abu Hanifah heard of this he asked to be set free for Mecca, not to return to it before the final wiping out of the Umayyad dynasty.54

In the 'Abbasid period, again Mansur insisted he accept the office of a judge. As we shall presently see, Abu Hanifah, having openly participated in a revolt launched against Mansur by al–Nafs al–Zakiyyah and his brother Ibrahim, Mansur cherished such malice against him that in al–Dhahabi's words, he was all but consumed in the fire of wrath. 55 However, it was not easy to lay hands upon a person of Abu Hanifah's eminence. Mansur knew how the murder of Husain had provoked feelings of wrath against the Umayyads and how easily had they been uprooted on that account.

Therefore, instead of killing him, he would rather lure him into a cage of gold and use him to advance his ends. With this in view he offered him the post of a judge again and again, in the end asking him to become the Chief Justice of the whole of the 'Abbasid Empire, but Abu Hanifah always put him off under one pre-text or another.56

Ultimately, seeing him persist too much he told him frankly the reason why he was unable to accept these offers. On one such occasion he excused himself politely saying, "None can be fit to become a judge unless he has strength enough to impose law on you, your princes, and your commanders. I have not that strength in me. I am so built that whenever you call me, I cannot breathe easily until I leave your presence." 57 On another occasion the talk took a harsh turn.

Addressing the Caliph, he said, "Even if I accepted this office willingly, not reluctantly, sure enough I would not prove worthy of your trust. If I decided a case against your desire and you wanted me to alter the decision on pain for being pushed into the Euphrates to drown, I would rather drown than alter my decision. When talks like these led Mansur to conclude that this man could not be caught in a cage of golden bars, he resorted to open persecution. He had him whipped and flogged, put him in jail where they subjected him to tortures of hunger and thirst. Later, he was confined in a cell wherein he died, according to some, a natural death, according to others, of poisoning.58

# Freedom of Expression: A Right and a Duty

According to Abu Hanifah, freedom of expression in a Muslim society and in an Islamic State is of as much importance as the independence of the judiciary. The Qur'an terms this freedom as *amr bi al-ma'ruf* and *nahi 'an al-munkar* (enjoining the right and forbidding the wrong). No doubt, an unqualified right of freedom of expression may sometimes assume an unbecoming, mischievous, immoral, or even offensive form which no law can tolerate. But the Qur'an, by using the above–mentioned term for this freedom, clearly distinguishes it from all other kinds of freedom and, thus, circumscribing it within well–defined limits, declares it to be not only an inalienable right but also a duty of the public.

Abu Hanifah was particularly conscious of this right and duty because the political order of his day had

rid the people of this right to such an extent that they actually doubted if it had anything of the nature of a duty about it. We have pointed out elsewhere that the Murji'ites, by preaching ultra-liberal doctrines were emboldening people towards sin. The Hashwiyyah professed that "Enjoining the right and forbidding the wrong" where the government was involved was mischievous and the Umayyad and 'Abbasid governments crushed the spirit of the people to raise a voice against the corruption and high-handedness of the ruling cliques. Abu Hanifah, with both speech and action, attempted to resurrect this spirit among the people and elucidated the extent to which it could be exploited. This is clear from Abu Hanifah's answer to a question from Ibrahim al-Sa'igh related by al-Jassas.59

Abu Hanifah asserted the right of freedom of expression against law courts in the same manner, as well. If any court of law gave a wrong decision, he would not hesitate to point out whatever flaws of law or procedure he found in it. With him the respect of the courts did not mean letting the courts give wrong decisions. He was forbidden to pronounce verdicts on this account for a long time.60

He was zealous in the matter of freedom of expression that he did not consider it lawful to imprison or otherwise punish a person who spoke ill, even of a legitimate ruler or his just government, not even it he went to the extent of abusing the Caliph and expressing an intention to kill him, until there was resolve on his part of an armed revolt or breach of peace. He argued this from an incident during the Caliphate of 'Ali. Five people were arrested and brought before him on the charge of abusing him openly in the streets of Kufah. One of them was also accused of saying that he would assassinate him. 'Ali ordered their release. It was said, "But they intended to kill you." He asked in reply, "But should I kill them only for expressing the intention to kill me?" It was added, "But they also abused you." He said, "If you like you may also abuse them."

# The Question of Rebellion against Tyrannical Rule

Another important question that baffled the people of those days was whether or not it was lawful for the Muslim to rise in revolt against a ruler who perpetrated tyranny or transgressed the limits of *Shari'ah*. The Sunnis themselves were divided on this. A large section of the Traditionists (*ahl al-hadith*) allowed that they could raise voice against his tyranny and speak their mind before him but they could not rise in rebellion, even though he should seize upon their lawful rights and indulge in unjust bloodshed and open transgression. 61 But Abu Hanifah's creed in this matter was that the Caliphate of an unjust incumbent was basically wrong and insupportable, and deserved to be overthrown, that people not only had the right, but it was their duty to rise in rebellion against it, that such a rebellion was not only allowed but obligatory, provided, however, that it promised to succeed in replacing the tyrant or transgressor by a just and virtuous ruler, and not fizzle out in mere loss of lives and power.

#### **Private Council and Codification of Islamic Law**

Abu Hanifah's greatest work which won him lasting eminence in the history of Islam was that he filled, on his own initiative, the vast gap caused in the Islamic legal system by the discontinuance of the *shura* (the

Consultative Council) after the "Right-guided" Caliphate. We have already alluded to the consequences that followed this ill-happening. The loss resulting from this state of affairs lasting over a century was a matter of grave concern to every thinking person. The State had extended its boundaries from Spain to Sind, taking in its fold scores of peoples with various cultures, customs, rites, and habits of their own.

Facing it at home were problems relating to finance, commerce, agriculture, industry, marital relations, and the rest. There were civil and criminal cases to decide and ever–new constitutional, legal and procedural problems to solve. Abroad, the relations of this large State with the other States of the world, and issues like war, peace, diplomatic relations, foreign trade, communications (by land and sea), customs, etc., demanded urgent attention.

As the Muslims were a people with a distinct ideology, and claimed to guide themselves by principles and law of their own, it was necessary for them to solve their problems in the light of that ideology and those laws and principles.

But the institution of *Shura* having been discontinued there was no other properly established body or institution in which the trusted scholars, jurists, and lawyers of the community should meet to deliberate and devise such an authentic solution of every outstanding legal issue, as should be recognized as the accredited and uniform law of the land throughout the State. Thus, Islam was faced with a mighty challenge and there was no machinery to meet it.

The loss was being felt all round, from the Caliph to the governors and judges. It was not easy for every judge, lawyer, or head of a department to decide the innumerable problems that rose every day, there and then, on the strength of his own knowledge or by dint of his own understanding. Not only that, such individual decisions also conflicted with one another and created confusion. But a body was verdict carried authority could be established only the Government which, unluckily, lay in the hands of such people as knew for certain that they enjoyed no esteem or confidence with the public, nor were they prepared to face, nay, even endure, the learned, who, they feared, would confront them with things they would not like. They also knew that laws enacted under their patronage could never be accepted as parts of the Law of Islam.

Ibn al-Muqaffa' proposed to Mansur that in order to stop this gap he should convene a council of the learned lawyers of all schools of thought who should sit together and express their opinions on the various problems at hand. After hearing these opinions the Caliph himself should pronounce his decision on every case and that decision should be adopted as law. But Mansur knew his own position too well to make this mistake. His decisions could not equal decisions of Abu Bakr and 'Umar. They could, at best, have the whole realm that would respect and willingly follow a law enacted by him. He could make a secular law all right, but he could not make a law which would become incorporated in the Islamic juridical code.

In these circumstances it struck Abu Hanifah to try an entirely new path to redeem the loss, and this was

to institute a private legislative body, on his own initiative, independent of the Government. Only a farsighted person like him could think of such a plan and only he could dare the adventure who trusted his own resources, character, and moral prestige well enough to be sure that the laws passed by a body raised under his auspices would enforce themselves by dint of their excellence in sufficiency, precision, adaptability, and the moral influence of their devisers, even without any political sanction behind them, and they would be adopted by the people of their own accord, and recognized by the different governments of their own free-will.

Abu Hanifah was no seer of the hidden future to perceive the results which his efforts produced within half a century of his departure, but he knew himself and his colleagues well enough. He knew the collective temperament of his community and had an eye on the circumstances of this day. With the perfect eye of a man of sharp intelligence and foresight he gauged that he could fill the yawning gap with his private endeavour if he would, and that surely it would be filled satisfactorily.

Abu Hanifah's own students, trained under his care and guidance in his college of law for years in deliberating over legal questions, looking into them in the proper scientific spirit, and arriving at conclusions with arguments, formed the members of this council. Almost all of them had learned the Qur'an, literature, history, and *Sirah* (biography of the Prophet) not only from Abu Hanifah, but also from many other learned scholars of the day. Many of them had specialized in certain branches.

Some had made a name in the field of "arguing conclusions by analogy," others for incomparable knowledge of the Prophet's traditions and precedents set by the Companions, judges, and Caliphs of old. Others yet had a reputation for interpreting the Qur'an or for being skilled in a particular branch of law or in grammar on *Sirah*. Abu Hanifah himself once described them by saying, "These are 36 men of whom 28 are fit to be judges, six to pronounce legal verdicts, and two good enough to teach judges and jurists."62

The procedure of work adopted in this council as reported by the authentic chroniclers of Abu Hanifah should be described in their own words. Al-Muwaffaq bin Ahmad al-Makki (d. 568/1172) writes, "Abu Hanifah framed his legal system with the consultations of his learned students. His passion to do all that he could for the sake of his religion and his love of God, the Prophet, and the believers did not allow him to undertake his work by himself to the disregard of his student colleagues.

He put every problem before them, threw light on its various aspects, carefully heard all that each one of them had to say on it and put forth his own point of view for their consideration. These deliberations and discussions were so exhaustive that some questions took a month or even more to decide. At last, when unanimity was achieved, Abu Yusuf recorded it in the fundamental compilations of Hanafi Law."63

Ibn al-Bazzaz al-Kardari (d. 827/1424), author of *Fatawa Bazzayyah* in his *Manaqib al-Imam al A'zam*, "His students debated each question to their heart's content and discussed it from every point of view. Abu Hanifah, all the while, sat quietly listening to the discussion. When it was his turn to speak, there

was such a silence in the house, as if there was none other present."64 "Abd Allah bin Mubarak tells that once the discussion on an issue lasted three days. On the evening of the third day he heard cries of *Allah–u Akbar* (God is most Great) from within and understood that a solution had been achieved.65

It is recorded by another student, Abu 'Abd Allah, that when Abu Hanifah had his views recorded on an issue, he had them afterwards read out to him to ensure their correctness. His own words are, "I read out the Imam's words to him. Abu Yusuf (in recording the proceedings) used to record his own views, too, therein. Hence, I tried to read out the Imam's words only, leaving out those of Abu Yusuf. Once I made a slip and read the other view, also. The Imam at once cut in, 'Whose view is this second?'"66

Another thing that we gather from al-Makki is that the work of classification of this council's decisions under different heads and chapters also was completed in the life-time of Abu Hanifah. He says, "Abu Hanifah is the first man to gather the knowledge of the *Shari'ah* (Islamic Law). None before him had done this work – Abu Hanifah compiled it in books, under different heads and chapters."67

This council recorded decisions on about 83,000 legal issues. These embraced not only those questions with which the public or the state was currently or had formerly been confronted but also others that might arise in the future. Possibilities were conceived and discussed freely to ensure that if ever they turned into actualities there should be laws ready to meet them. They related to almost all branches of law, internal (covered under the term *al-siyar*),68 constitutional, civil, criminal, of evidence, of procedure, laws governing different aspects of economic life, marriage, divorce, and inheritance, personal, and aspects of economic life, and those dealing with worship. We can find all these subject–heads among the contents of books compiled by Abu Yusuf and later by Mohammad bin Hassan al–Shaibani from the material provided by the deliberations of this "legislative council."

This regular codification of law soon deprived individuals of the confidence they enjoyed in its absences in their efforts at law-making. The opinions and verdicts of scattered individuals, be they doctors or judges of repute, could not carry weight before the wholesomely judicious and precise decisions arrived at in council of legists presided over and guided by a man of Abu Hanifah's foresight and calibre, after thorough sifting of the Qur'anic injunctions and the Prophet's Tradition and keeping in view of precedents and the verdicts of the scholars of old, drawn as they were with thoughtful and steady labour, bearing in mind the principles of *ijtihad* (deducing conclusions with thorough discretion) in the light of the *Shari'ah*, embracing all aspects of life, and able to meet all exigencies. Therefore, as soon as it came to light, the common people, the rulers, the judges, all felt forced to turn to it. It answered the demand of the day. As a matter of fact, it was the long awaited help which everybody had been seeking.

The famous legist Yahya bin Adam (d. 203/818) tells that the opinions of other jurists paled into insignificance before those of Abu Hanifah, his ideas spread everywhere, the judges, rulers, and officers of every place decided their cases in accordance with his law; in short, everything went according to it.69 By the time of al-Mamun (198 – 218/813 – 833) it had acquired such popularity that one day Premier Fadl bin Sahl was advised by a jurist who was hostile towards Abu Hanifah, to issue orders to stop the

use of Abu Hanifah's code. Fadl invited the wise and prudent man to advise him on this. They told him not to take this step for it would not succeed. On the other hand, the whole country, they said, would turn against the Government, adding that the man who had given him the counsel was surely a fool. The Premier agreed with them, saying that he himself did not see any wisdom in the course, nor was the Caliph likely to agree to it.70

Thus came about the historical reality that a system of law was devised by a private legislative council became the law of countries and empires on the strength of its merits and the moral prestige of those who framed it. It had also another important consequence in that it opened up for Muslim thinkers' new lines for codification of Islamic Law. The chief legal systems devised later may have differed from it in their methods of deduction and in their results, but they were all inspired by and based on this model.

# **B.** Abu Yusuf

In Abu Hanifah's lifetime, the relations between the Hanafi School of Law and the 'Abbasid rulers were strained, owing to his political creed and non-co-operation with the Government. The effect of this lasted for a long while after his death. The leaders of this school stuck to their policy of indifference towards authority. Thus, when after the death of Abu Hanifah, his great student Zufar bin Hadhail (d. 158/775) was asked to accept the post of a judge, he flatly refused it and fled to find safety in concealment. 71 On the Government's side, was also the tendency from the days of Mansur to the early years of Harun's reign was to resist the influence of this school of thought.

Mansur and his successors earnestly desired that the gap in the legal system of the State, detailed in our previous discussion, should be filled by some other system of codification. Both Mansur and Mahdi in their respective reigns endeavoured to bring Malik to the fore. 72 Harun also in 174/791, on the occasion of the pilgrimage, expressed his desire to make his book *al-Muwatta*' the law of the land. 73 At long last, a man of great strength and character belonging to the Hanafi School of Thought rose to bring this state of affairs to an end. With his great ability and personal influence he delivered the Empire from a continued state of legal chaos. The Hanafi code was made the law of the land which gave the whole Empire a uniform system of law. This man was Abu Yusuf, the ablest of the disciples of Abu Hanifah.

#### **Brief Life Sketch**

Abu Yusuf's (b. 113/731) personal name was Yaʻqub. His father came from an Arab tribe of Bajilah, his mother of the Ansars of Medina with whom his father was also connected by ties of alliance; hence his family was known as Ansar. He chose to specialize in law after completing his elementary education and took his lessons from 'Abd al–Rahman bin Abi Laila.

Then he joined the school of Abu Hanifah and became permanently attached to him. His parents were extremely poor and did not want their son to continue his education. When Abu Hanifah came to know of it, he undertook to defray all the expenses not of the boy alone, but of the whole family. He himself said

that Abu Hanifah never gave him occasion to express his want before him. On and off, he would send so much money to his family as would relieve him of worry on that account.74

From the beginning, Abu Hanifah was very optimistic about his ward. When his father wanted to withdraw him from the school, the Imam told him not do so, for, if it pleased God, the lad promised to turn out to be a great man.75

Apart from Abu Hanifah, Abu Yusuf learned a good deal from other famous scholars of the day and made himself well acquainted with Tradition, Qur'anic commentary, biography of the Prophet, history, language, literature, and scholastic theology. Particularly well versed in traditions, he knew them by heart, and men like Yahya bin Mu'in, Ahmad bin Hanbal, and 'Ali bin al-Madini declared him thiqah76(dependable – a particular term used for a person of known veracity on whom reliance is placed in the transmission of traditions). His contemporaries all agreed that he was the outstanding among the disciples of Abu Hanifah.

Talhah bin Mohammad says, he was the greatest jurist of his age, none excelled him. 77 Dawud bin Rashid thinks that it would have been enough source of pride for Abu Hanifah if he had produced only this one disciple. 78 Abu Hanifah himself had great respect for him. He used to say that all of all his students the most acquisitive and adorned with learning was Abu Yusuf. 79 Once he was very ill and little hope was left of his life. Abu Hanifah, when coming out of the house after inquiring after his health, deplored that if the youth died he (Abu Hanifah) would not leave behind him a scholar more learned than himself. 80

For 16 years after the death of Abu Hanifah, he, too, in keeping with traditions of his school, remained indifferent to the Government. Nevertheless, he continued the intellectual and educative work of his master, adding to it the compilation of several books on almost all branches of law, and recording the decisions of Abu Hanifah's times supplemented with his own opinions.81

When these books spread throughout the country, they not only influenced the intellectual circles, but also impressed the courts and high officials connected with various government departments in favour of the Hanafi School of Thought, since there existed no other classified code of law to satisfy their wants as these books did. Malik's *al-Muwatta'* had come into the field long before, but it was not sufficiently comprehensive and elaborately classified to meet the needs of a government. 82 Thus, Abu Yusuf's intellectual and literary work took hold of the minds of people before he came to power. It lacked only formal political sanction to enforce it as the law of the land.

Had Abu Yusuf's position been economically sound, he might have followed in the footsteps of his master and lived in continued indifference towards the Government. But he was a poor man and Abu Hanifah's death had robbed him of his generous support. Reduced by poverty to live a miserable existence, he was obliged one day to sell off a girder of his wife's house, for which he was reproached by his mother-in-law in a manner he could not endure, and this forced him to look for employment. He

made for Baghdad and arrived there in 166/782, saw the Caliph al-Mahdi who appointed him the judge of eastern Baghdad, an office he continued to hold until the end of al-Hadi's reign.

When Harun al–Rashid became Caliph Abu Yusuf steadily gained such influence that he at last appointed him Chief Justice of the whole 'Abbasid Empire. This was the first occasion that such a post was created in the Muslim State. None before Abu Yusuf had held the post of Chief Justice of the State in either the "Right–guided" Caliphate or the Umayyad and 'Abbasid rule. 83 His position was not only that of the head of the Supreme Court of the realm, as we may conceive from the practice of our modern institutions, it also invested him with the authority of the Minister of Law, that is to say, he did not merely have to judge cases and appoint judges for the lower courts, he had also to advise the Government on all legal matters, internal as external.

Abu Yusuf's appointment to this office bore three far–reaching results. In the first place, instead of a college where he lectured students, or a study from which he issued books, a vast field of work now engaged his attention – a field in which he dealt practically with the affairs of the biggest empire of the day. This provided him with opportunities of applying the Hanafi law to the actual affairs of life, thus making it, in fact, a practical system of low. Secondly, as the appointment and removal of judges was now entrusted to his charge, scholars connected with the Hanafi School were appointed judges in most of the places, and through them the Hanafi law automatically became the law of the realm. Thirdly, with the help of his great moral and intellectual influence he converted the Muslim State, which had assumed an autocratic character since the time of the Umayyads and was going, in a way without a constitution, into a State guided to a large extent by the constitution. Nay, he actually wrote a book of constitution for it, which has luckily come down to us intact in the shape of *Kitab al–Kharuj*.

Before we speak of this work on constitution, it is necessary to remove a widespread misunderstanding. Abu Yusuf's biographers have described such stories about him as often present him as the reader as one given to flattery and skilled wresting the law to suit the desires of Kings. But if we make the events recorded in history relating to Abu Yusuf's attitude to the Caliphs and their ministers and generals, it becomes impossible for us to believe that a mere flatterer could dare have it. In Hadi's time, when he was the judge of eastern Baghdad, he decided a case against the Caliph himself.84

In Harun's time an old Christian filed a suit for a garden against the Caliph. Abu Yusuf not only heard the case, both confronting each other, but also asked the Caliph to deny on oath that he refused to accept the claimant's title to it. Even after this he was sorry for the rest of his life why he did not make the Caliph stand side by side with the suitor. 85 He declared 'Ali bin 'Isa, Prime Minister of Harun al-Rashid, an unreliable witness because, he said, he had heard him call himself the Caliph's slave. "If he is a slave in fact," he contended, his witness cannot be accepted. If he is not and calls himself so for flatter, he is a liar and cannot be trusted."86 The same punishment he gave to a general of Harun's forces.87

'Abd Allah bin Mubarak states that he used to go to Harun's palace riding right up to the private enclosures (where even the Premier must go on foot) and the Caliph was always the first to greet him.88

Harun was once asked why he had raised Abu Yusuf so high. He replied, "In whatever branch of knowledge I tried him I found him perfect. Besides, he is upright and a man of solid character. If there is another like him I would be please to see him." 89

When he died (182/798) Harun himself accompanied the funeral procession on foot, led the funeral prayer, buried him in his own family graveyard and said it was a bereavement on which all the believers should condole with one another. 90 But nothing bears out all that has been said above so well as his work *Kitab al–Kharaj*. A perusal of its introduction alone will tell that it is just beyond an adulator to say such things as he did while addressing a king.

#### Kitab al-Kharaj

In Harun al-Rashid, Abu Yusuf found a king of the most conflicting disposition and humours, at once a fierce soldier, a luxurious monarch, and a God-fearing man. Abu al-Faraj Asbahani describes him in a sentence, "He would most easily melt into tears in response to an exhortation or admonition, but would be most unrelentingly cruel in response to something that kindled his wrath."91

Abu Yusuf, prudently avoiding to touch upon the Caliph's failings, skilfully set to work on his religious sentiment bringing to bear his great moral and intellectual influence to the task, and pursued this steadily until the Caliph's heart was won and he proposed for him the assignment of preparing a constitution for him according to which he should guide the affairs of the State. This was how *Kitab al–Kharaj* came to be written.

The name of the book misleads one into thinking that its scope is limited to matters of revenue only. As a matter of fact, it deals with almost all the affairs of the State. Leaving aside all other details, we shall here examine its contents with only a view to seeing its basic conception of the Islamic State and its constitutional character.

#### Reversion to the "Right-guided" Caliphate

The first thing that strikes the reader who follows *Kitab al–Kharaj* closely is that Abu Yusuf desires the Caliph to give the Byzantine and Iranian traditions followed by the Umayyad and 'Abbasid kings and revert faithfully to the traditions of the "Right–guided Caliphs. Although he has not directly asked him to give up following his forefathers, yet he has never lapsed even into quoting the conduct or the decisions of the Caliph's forefathers as precedents worth following, much less those of his Umayyad predecessors. In every matter he bases his argument, either directly on the Qur'an or the Sunnah or else quotes precedents from Abu Bakr, 'Umar, 'Uthman and 'Ali.

If he has ever quoted a precedent from a later period it is not from Mansur's or Mahdi's but from that of the Umayyad Caliph 'Umar bin Abd al-Aziz. In preparing this book, he completely ignored the conventions and precedents of the whole 132 years of Umayyad and 'Abbasid reigns, except those of the two and half years of 'Umar II's reign. Abu Yusuf's work may not have meant much, had it been

done by some ingenious lawyer in his private capacity as a holy sermon for those who might like to follow it. But done as it was by the Chief Justice-cum-Law Minister of the State in his official capacity, at the express instance and request of the Caliph, it becomes something extra-ordinarily significant.

At the beginning of the book Abu Yusuf lays down the basic conception of the State before the Caliph in these words, "Oh Commander of Believers, God, the sole deserver of praise, has placed on you a heavy responsibility which carries with it a great reward and a great punishment. He has committed to your charge the affairs of this community, so that yours is the duty to work for a large number of people day and night. He has appointed you a guard over them, given you their trust, and tried you by them, for you are to conduct their affairs for them. An edifice founded on anything except fear of God does not take long to crumble. God shakes it to the foundation and makes it fall on its builders, and on them that helped in its construction... Kings will be called to account by God as a shepherd is called to account by the owner of the flock... Take not the crooked path, lest your flock should follow in your footsteps... Treat everybody alike in the Law of God, whether one is akin to you or not... Go not into the presence of God as one who has been committing excesses, for the Ruler of the Day of Retribution will judge men by their actions, and not by ranks. Guard against wasting the flock entrusted to your care, lest the owner of the flock take you to task for every little sheep of it."92

After this he continues to press it on the Caliph everywhere in the book that he is not the owner of his kingdom but the Owner's Caliph (lit. deputy),93 and that if he proved a just ruler he would see the best imaginable end, but if he proved unjust he would meet the worst punishment.94 At one place he puts before him the words of 'Umar wherein he says, "None who enjoys the right of commanding obedience has risen so high as to ask anyone to obey him in disobedience of God."95

### **Spirit of Democracy**

Abu Yusuf conceives the Caliph to be answerable not only to God but also to the public, and has quoted at several places from the sayings of the Prophet and the Companions to prove that the Muslims have an unquestionable right to criticize their rulers and that such criticism contributes to the good of the people and the State. 96 "Enjoining the right and forbidding the wrong is an inalienable right and a duty and its negligence in a community is equivalent to inviting the wrath of God upon its head." 97 It is the duty of rulers to have forbearance for truth being spoken before them, as nothing is more hurtful in a ruler than this being short-tempered and intolerant of criticism, 98 and the Muslims have a right to call him to account in respect of their lawful rights on him and of their properties that have been entrusted to his care. 99

#### **Duties of the Caliph**

The following duties of the Caliph have been specifically mentioned: To establish the rights of God and enforce the limits prescribed by him, to determine correctly the rights of other right holders and ensure their enjoyment of their rights, to revive the conventions of virtuous rulers (that have been discarded by

the wicked rulers of late), 100 to check injustice and redress the grievances of people after proper scrutiny, 101 in pursuance of orders of God, to command people to obey Him and stay away from the commission of sin, to apply the Law of God on himself and others alike, without regard to who suffers by it, 102 and to make only lawful exactions from people and expend them in lawful ways. 103

#### **Duties of Muslim Citizens**

As opposed to these, the duties of the Muslims toward their rulers, as described in this book, are the following: They have to obey them, not to commit acts of disobedience, not lift arms against them, nor reproach them (unnecessarily), nor deceive them. They have to put up with excesses, to be sincerely helpful to them, to try to check them from wrong things and to co-operate with them in all that is good. 104

# The Exchequer

He calls the exchequer a trust of God and the people instead of its being the Caliph's property. Off and on he reminds the Caliph of the words of 'Umar wherein he compares the Caliph's position in relation to the orphan's property, and states that if he is well-to-do, he should not take anything from it, in deference to the advice of God, and manage it for Him without any consideration, and if he is needy, he may take from it an amount which everybody will recognize as just and proper 105

He also draws his attention to 'Umar's example in spending from the exchequer more sparingly than one would from one's private purse. He illustrates his point by reference to another instance where 'Umar, appointing a judge, a governor, and a revenue officer for Kufah, allowed them to take a goat everyday for the expense of their board, adding at the same time that a land from which the officers will pick up a goat everyday would soon be impoverished. 106 The Caliph is also asked to forbid his officials to spend public money for their private needs. 107

# **Principles of Taxation**

Abu Yusuf prescribes the following principles of taxation: Only the surplus wealth of people should be taxed and the burden of taxes should fall upon the people with their consent. The tax should vary according to the capacity of the tax–payer. Nobody should be taxed more than they can pay. The tax should be collected from the wealthy and spent on the poor. 108 Rates of tax should not be fixed so as to suck the blood of the people, nor should the tax be realized by coercive methods. 109 Government should refrain from extorting taxes which are not warranted and also forbid its officers and landlords to make such exactions. 110 Non–Muslims who accept Islam should not be charged poll–tax. 111

The practice of the "Right-guided" Caliphs is quoted as authority in this connection. He refers, for example, to the incident related to 'Ali that while in public he advised his officials to realize every penny of revenue from the payers and not to be at all lenient to them in this matter, but calling them apart he

instructed them to be careful not to beat anybody or make them stand in the sun or press them so hard that they should be obliged to sell their cattle or clothes or utensils to pay the tax. 112 Or the fact that 'Umar used to examine thoroughly his revenue officers to satisfy himself that the farmers were not dealt with too harshly in the exaction of revenue, and when the collections actually came in, the representatives of the common people were summoned to bear witness that no Muslim or non–Muslim peasant was unjustly made to pay the tax. 113

# Rights of non-Muslim Subjects

With regard to the rights of non-Muslim subjects in the Islamic State, three principles are quoted again and again on the authority of 'Umar:

- 1. Whatever agreement is made with them has to be faithfully observed.
- 2. The responsibility for the defence of the State does not lie on them, but on the Muslims alone.
- 3. They should not be burdened with excessive poll-tax and land revenue. 114

Then it is said that the poor, the blind, the old, the recluse, workers at the houses of worship, women, and children are exempt from poll-tax, that there is no *zakat* (prescribed charity) chargeable on the wealth and cattle of non-Muslims, that none is allowed to resort to beating or inflicting other physical tortures on them for exacting the capitation, as the maximum punishment for its non-payment is only simple imprisonment. To realize more than the fixed amount from them is unlawful, and the poor and the cripple among them are to be supported from the State exchequer. 115

Historical incidents are related to make the caliph see that it is for the good of the state to be kind and generous to the non–Muslim subjects. It was, according to him, magnanimity of the Muslims that in the days of 'Umar won for them the hearts of the Syrian Christians to such a degree that they loved them more than their co–religionists, the Romans.116

#### **Land Settlement**

Abu Yusuf disallows the feudal system that of settlement in which the government, in order to realize the revenue from the farmers appoints a person to over-lord them, allowing him to exact from them whatever he likes and as he likes so long as he guarantees the payment of government dues. He condemns it as a most tyrannous system that is bound to lead to the ruin of the country and vehemently advocates that it must be shunned at all costs. 117

He also calls it unlawful for the government to appropriate somebody's land and bestow it upon another. He says, "The Caliph is not authorized to dispossess any person, Muslim or non–Muslim, of anything that belongs to him unless a proved or valid right stands against him in law. To snatch from one to make over to another is like committing robbery for the sake of distributing alms. 118 Gifts of land are allowed

only if uncultivated, not owned, or not inherited pieces of land are distributed within reasonable measure for purposes of cultivation or as rewards for some real, useful social service. Such donations, too, are to be withdrawn if the donees fail to cultivate such land within three years. 119

#### **Redress of Wrong**

After this he tells Harun al-Rashid that it is not lawful for him to appoint tyrants and corrupt people to office of State or to employ them as officers of departments or governors of districts. If he did so, he would surely share the retribution of the wrongs that they do. 120 He asks him again and again to employ honest, righteous, and God fearing people to state services.

He emphasizes that in addition to their efficiency the government should also satisfy itself with regard to the moral character of its servants, and constantly keep a watch on them through its intelligence department, and if they tend to be corrupt or fall into cruel or cunning ways the caliph should know of the conduct and call them to account. 121

He also tells Harun that the Caliph should listen regularly to the grievances of the people himself, and that occurrence of injustice could be made to stop if he has open court even once a month, where every grieved person is allowed to put his grief before the caliph and the officers are made to realize that what they do may one day reach the Caliph's ear. 122

# **The Judiciary**

The judiciary, according to him is meant to dispense justice, pure and undiluted. To punish one who is not guilty or to let one who is guilty go unpunished are alike unpardonable. But not should be punished on doubt. To go wrong in forgiveness is better than going wrong in awarding punishment. There should be no interference in the course of justice, nor should anybody's recommendation, position, or status count. 123

# **Personal Liberty**

Abu Yusuf also maintains that nobody can be incarcerated on a mere accusation. The accused person must be given a regular trial, and witnesses examined. If he proves guilty, he may be imprisoned, otherwise, he should be set free. He advises the Caliph that the cases of those who lie in person should be examined and those that are found to have been put there without sufficient proof or witness should be released. For the future all the governors should be instructed not to imprison anybody on the basis of mere allegation or suspicion without giving him a fair trial. 124 He also holds that it is illegal to beat or flog an accused person. Every person's back is immune from punishment unless a court declares him worthy of the lash. 125

#### **Jail Reforms**

In the reforms that he has suggested for the improvement of prisons, he affirms that every prisoner has a right to receive his board and clothing from the Government Exchequer. He severely condemns the Umayyad and 'Abbasid practice of daily taking out the prisoners handcuffed and in chains to beg for their food and clothes. He requests the Caliph to put a stop to it and proposes that clothes suited to the season and sufficient food should be given to every prisoner by the Government.

The practice of burying the deceased heirless prisoners without wash and coffin, or without the funeral prayer, is also condemned in vigorous terms. "It is a matter of great shame for the Muslims," he says. The proper wrapping and burial of these prisoners should be a Government charge. He has also recommended that no prisoner except those guilty of murder should be kept in fetters inside the prison. 126

These are, in brief, the constitutional proposals which Abu Yusuf, as Law Minister and Chief Justice of the realm, placed before an autocrat 12 centuries ago. Placed beside the basic principles of an Islamic State and the traditions of the "Right–guided" caliphate, or compared with the teachings of his own master Abu Hanifah, they look far short of them indeed. There is no trace in them of the ideal way of choosing a Caliph. There is no mention of the advisory body, called the *shura*, guiding the administration of State affairs, nor of the idea that the wicked and the corrupt have no right to rule and if they come in, the public have a right to rise in revolt against them.

Not only that, many other important things also are missing and, judged from these and other such considerations, these proposals fall short of the true conception of an Islamic order. But this should not lead us to infer that Abu Yusuf's conception of the Islamic State was restricted to the limits of these proposals of *Kitab al–Kharuj* and that he did not want anything more than what he put down there.

On the contrary, what we find here describes what he, as a practical thinker, conceived as the maximum that was possible and worthy of achievement in the particular circumstances of that period of the 'Abbasid regime. In fact, the idea was not to present a theoretically perfect plan without regard to whether it was capable of being translated into practice or not. His intention was to draw up a constitutional plan which in addition to satisfying the minimum conditions required for the making of an Islamic State, should promise to be workable in the circumstances.

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- 11. For an instance of this see al-Makki, op. cit., pp. 219 20.
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- 14. Al-Dhahbi, op. cit., p. 26
- 15. Al-Khatib, Vo. 13, p. 360; Al-Makki, Vol 1, p. 262
- 16. lbn Khallikan, Vol 5, pp. 422 23; al-Makki, Vol 2, p. 212
- <u>17.</u> Before gaining currency as a term of the scholastics, the term Figh covered beliefs, general principles, law in fact, everything under it. The differentiation was made by calling beliefs and general principles Figh al–Akbar, the fundamental or the main Figh, and Abu Hanifah gave the name to his compendium.

Recently, some scholars have doubted the authenticity of some parts of this book; they believe them to have been included later. However, the authenticity of those parts which we discuss here is undoubted, as whatever other sources we tap to collect Abu Hanifah's opinions on these matters, we find these tallying with them.

For instance, Abu Hanifah's al-Wasiyyah, al-Fiqu al-Absat reported by Abu Muti' al-Balkhi, and 'Aqidah Tahawiyyah in which Tahawi (c. 229 – 321/843 – 933) has described the doctrines reported from Abu Hanifah and his students, Abu Yusuf and Mohammad bin Hassan al-Shaibani.

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- 23. Ibn Abi al-'Izz, p. 398.

- 24. Al-Makki, Vol, 2, pp. 83, 84; al-Kardari, Vol, 2, pp. 71, 72. This, too, was not the opinion of Abu Hanifah alone. All the ahl al-sunnah had agreed upon this. Ibn Hajar, al-Isabah, Matban'ah Mustafa Mohammad, Egypt, 1939, Vol. 2. p. 502.
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- 44. Al-Jassas, Vol. 1, p. 80
- 45. Al-Dhahabi, p. 17; al-Makki has also quoted this opinion of Abu Hanifah, Vol. 2, p. 100.
- 46. Al-Mas'udi, Vol. 2, p. 192.
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- 56. Al-Makki, Vol. 2 pp. 72, 173, 178.
- 57. Ibid., Vol 1. p. 215
- 58. Al-Makki, Vol. 2, pp. 173, 174, 182; ibn Khallikan, Vol. 5, p,. 46; al-Yafi'i, vol. 1, p. 310
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- 61. Al-Ash'ari, Vol. 2, p. 125
- 62. Al-Makki, Vol. 2. p. 246.
- 63. Ibid., p. 133.
- 64. Al-Kardari, Vol. 2, p. 108.
- 65. Al-Makki, Vol. 2, p. 54.
- 66. Al-Kardari, Vol. 2, p. 109
- 67. Al-Makki, Vol. 2, p. 136

- 68. People of the present day labour under the wrong impression that International Law is a thing of themodern times and its founder is Grotius of Holland (991 1055/1583 1645). But whoever has seen al–Siyar of Abu Hanifah's student Mohammad bin Hassan al–Shaibani (132 189/749 805) knows that the codification of this law was accomplished by Abu Hanifah 900 years before Grotius, and that if, on the one hand, his discussions hardly leave any aspect of it untouched; on the other, they encompass the finest and most vital issues., This has recently been acknowledged by a group of scholars and a Shaibani Society of International Law has been founded in Germany.
- 69. Al-Makki, vol. 2 p. 41
- 70. Ibid, pp. 157 58; al-Kardary, Vol. 2, pp. 106 07.
- 71. Al-Kardari, Vol. 2, p. 183; Tash Kubrazadah, Miftah al-Sa'adah, Vol. 2, p. 114.
- 72. Ibn 'Abd al-Barr, al-Intiqa, pp. 40 41.
- 73. Abu -Na'aim al-Asbahani, Hilat alpAuliya', al-Matba'at al-Sa'adah, Egypt, 1355/1936, Vol. 6, p. 332; Tash Kubrazadah, op. cit., Vol 2, p. 87.
- 74. Al-Makki, Vol. 2, p. 212
- 75. Ibid, p. 214
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- 77. Ibn Khallikan, Vol. 5, p. 423.
- 78. Al-Makki, vol. 2, p. 232
- 79. Al-Kardari, Vol. 2, p. 126
- 80. Ibn Khallikan, vol 5, p. 424; al-Kardari, vol. 2, p. 126.
- <u>81.</u> Ibn al-Nadim, al-Fihrist, al-Matba'at al-Rahmaniyyah, Egypt, 1348/1929. Ibn Khallikan (Vol. 5, p. 242) writes on the authority of Talhah bin Mohammad that Abu Yusuf was the first man to compile books on all fundamental branches of Law in accordance with the Hanafi creed, and thus spread Abu Hanifah's knowledge to all corners of the world.
- 82. It must be understood that the codification of Islamic law according to the Maliki principles enabling it to serve the needs of a government took place later on the model of Mohammad bin Hassan al–Shaibani's books.
- 83. Al-Makki, Vol. 2, pp. 211 39; ibn Khalikan, Vol. 5, p. 421.
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