

## THE ADAB AL-QADI IN ISLAMIC LAW\*

The word *adab* is fascinating in its rich variety of meaning. It comes from a root which means to be well bred, or to invite people to a repast. As an abstract noun it expands its significance into a discipline of the mind; culture; good qualities; polite accomplishments, good manners and mode of conduct, and finally "rules of discipline to be observed in the exercise of a function" (Lane)<sup>1</sup>. It is significant that the most exact rendering comes from this great master of Arabic lexicography. Originally from *adb* (*wahwa fi'l asl min al-adb bi-sukuni 'd-dāl*, *Radd*, iv, 411, line 14), it was later pronounced with the *fatha* of the *dāl*, and is used in the singular only, as a rule.

In its genitive-construct form, we have *adab al-hurub*, of wars; (Dozy)<sup>2</sup>; — *ash-shā'ir*, of poets (Kazimirski)<sup>3</sup>; — *al-kātib*, of secretaries; and — *al-qādi*, of judges. An exact English rendering is impossible: approximations are "duties" (Hamilton)<sup>4</sup>; "moralities" (Ruxton)<sup>5</sup>, and "moeurs judiciares" (Tyan)<sup>6</sup>. The English term "etiquette" however seems to be preferable as it is used in such expressions as "the etiquette of the Bar", and "the etiquette of the profession". It connotes an obligation or duty, lesser than a legal norm and allied to a moral rule. But it means a way of life, a manner of acting, which is approved by the masters of the law; hence the word "etiquette" is adopted by me.

It will be seen however that the chapters on *qadā'* (*Radd*, *Jawāhīr*)<sup>7</sup>, and *adab al-qādi* (*Alamgiri*<sup>8</sup>, etc.) contain a large number of topics not embraced in the concept of duty or of etiquette, which are allied to what we would term as procedure, process or judicial administration. Rules similar to the *adab* are to be found in all the chapters in the *fiqh*, and especially in those relating to evidence. For all these reasons it is best to leave the word untranslated in its later and final form, *adab*.

\* The General Editor regrets that accented *i*'s and *u*'s are not available at present.

1. Lane, *Lexicon*.
2. Dozy, *Supplément*.
3. Kazimirski, *Dictionnaire Arabe-Française*.
4. *Hedaya* — see footnote 14 *infra*.
5. See footnote 22 *infra*.
6. E. Tyan, *Histoire de l'Organisation Judiciaires en Pays d'Islam*, (Paris, 1938).
7. See footnotes 18 and 20 *infra*.
8. See footnote 19 *infra*.

*Adab* is therefore "the unwritten code of honour which discountenances certain practices in some of the professions.<sup>9</sup> I may add that the discussion is restricted strictly to matters contained in legal works and does not embrace history or criticism of the action of judges. It is clear that not all the conditions necessary for *qadā'* and not all the perfections embodied in the *adab* can possibly coexist in large measure over the centuries. The history of the *cadis*, their character, their strength and weakness, have often been described, but no single work treats the subject exhaustively. The best general account is given by Tyan;<sup>10</sup> but interesting observations will also be found in M. B. Ahmad's *Administration of Justice in Medieval India*.<sup>11</sup> It seems therefore necessary to add that the actual manner of the administration of justice, with all its veniality, corruption, humour, pathos and triumph has mostly been omitted by me. This is a very large subject, and the material is interspersed in books relating to history, the law and related subjects. We are concerned with the specific rules on the subject, laid down by the foremost authorities, which in chronological order are as follows: *Kitāb al-Umm*;<sup>12</sup> *Da'ā'im al-Islām*;<sup>13</sup> *Hidāya*;<sup>14</sup> *Sharā'ī' al-Islām*;<sup>15</sup> *Kanz ad-Daqā'iq*;<sup>16</sup> *Durr al-Mukhtār*;<sup>17</sup> *Radd al-Muhtār*;<sup>18</sup> *Fatāwā 'Alamgiri*;<sup>19</sup> *Jawāhīr al-Kalām*.<sup>20</sup>

9. Fuller discussions of *adab* will be found in *Alamgiri*, (Bulaq), iii 306; (Urdu Trans.), 5, 107; *Radd*, iv, 411 and *qadā'* see *Jawāhīr al-Kalām*, vi, 336. The English definition is from the *Shorter Oxford Dictionary*, s.v. "etiquette".
10. E. Tyan, *Histoire de l'Organisation Judiciaires en Pays d'Islam* (Paris, 1938), i, 423 *et seq.*
11. (Aligarh, 1941).
12. *Imām* Md. b. Idris ash-Shāfi'i (died, 204/820), *Kitāb al-Umm*, 7 parts, (Bulaq, 1322 A.H.) (abbreviated, *Umm*).
13. *Cadi* Nu'mān b. Muhammad (died, 363/974), *Da'ā'im al-Islām*, 2 volumes, (Cairo, 1951 and 1961). Volume I has been translated in to Urdu, by Yunus Shakib Mubārakpuri, *Idāra-i Adabiyāt-i Fātimi*, Badri Road, Surat 2, India, (no date, 1964 A.D.) (abbreviated, *Da'ā'im*, II).
14. Burhānuddīn al-Marghināni, (died, 593/1197), *Hidāya*, text, 4 volumes, (Delhi, 1915), (abbreviated, *Hidāya*). English Translation by Charles Hamilton, (London, 1870), (abbreviated, *Hedaya* or Hamilton).
15. Najmuddin al-Hilli known as Muhaqqiq-i Hilli, (died, 677/1277), *Sharā'ī' al-Islām*, Text, (Tehran, 1309 A.H.) (abbreviated, *Sharā'ī'*.) Translation (selections), Baillie. *Digest of Moohummudan Law*, vol. II, London, 1959. (Abbreviated, Baillie, II.)
16. Nasafi (died, 718 A.H.), *Kanz ad-Daqā'iq*, Urdu trans. Navalkishore, (Lucknow, 1913). Arabic text, not available. (Abbreviated, *Kanz*.)
17. Haskafi (died, 1088), *ad-Durr al-Mukhtār*. Text, not available. Urdu translation, *Ghāyat al-Awtār*, 4 volumes, Navalkishore, (Lucknow, 1925). (Abbreviated, *Durr al-Mukhtār* or *Ghāyat*.)
18. Muhammad Amin known as Ibn 'ābidin, *Radd al-Muhtār*, a commentary on the *Durr al-Mukhtār*. Arabic text, 6 vols., (Istanbul, 1324-26 mid-eighteenth century, A.D. Abbreviated, *Radd*.)
19. Shaykh Nizām and others, *Fatāwā 'ālamgiri, al-Fatāwa al-Hindiyya*, 6 vols., (Bulaq, 1310 A.H.) Urdu Trans. Amir 'Ali, 10 volumes, Navalkishore, (Lucknow, 1932). Baillie, *Digest*, vol. I is based upon it. (Second ed., London, 1865). (Abbreviated, Baillie, I.)
20. Muhammad Hasan b. Shaykh Bāqir an-Najafi (died, 1266/1850), *Jawāhīr al-Kalām*, 6 volumes, (Tehran, 1323-26). This is the classical commentary on Munaqqiq-i Hilli's *Sharā'ī'*, and is now considered an independent authority and one of the greatest of *Ithnāshari* texts of law. (Abbreviated, *Jawāhīr*.)

The topics dealt with by me are: (i) Qualifications; (ii) Appointment; (iii) Seat of the Court; (iv) Remuneration; (v) Department; (vi) Corruption; (vii) Arbitration.

The material for the following subjects had been collected by me, but considerations of space and relative value have led me to omit these in present paper:

Power of summoning parties; Judgment; Revision and appeal; Jurisdiction; and Enforcement of other *cadis'* decrees.

## I. QUALIFICATIONS

Muzani in his *Mukhtasar* states that his master Shāfi'i taught the utmost independence of judgment. He forbade his disciples to follow him blindly; for it was always necessary to look into matters of religion for oneself, to exercise earnestly the spirit of inquiry and then arrive at a sound conclusion.<sup>21</sup> This direction may perhaps be given pride of place in any discussion of the qualifications of the *cadi*. Its nobility and its necessity are not open to question; but it was probably the one rule of guidance which was continuously disregarded by *cadis* and *muftis* throughout the centuries in every school of Islamic law.

The *cadi* should be God-fearing; he should be just; he should not follow his passions, nor favour any party, nor fear any person. He must obey God, hope for divine favour and save himself from punishment. The *cadi* must not carry on trade, nor should he take loans; nor be bad-tempered and quarrelsome. People should have no doubt as to his virtue (*'iffa*), sobriety (*salāhiyya*), wisdom and knowledge of law and traditions. He must be strict in the matter of religion, but not be harsh of speech. He should not exercise his powers in anger, or when he is weakened by non-obligatory fasts. He should not perform his judicial functions under the influence of hunger or thirst, nor when he is moved by lust, nor when his mind is distracted by heat or cold.<sup>22</sup>

Legally, he must be eligible to give evidence in a court of law; such a person is called '*adl*. That is, he must be a Muslim and not a heretic, who has reached the age of majority, is of sane mind, is free (*hurr*, as distinguished from a slave) and of irreproachable character.

In all the schools, except the *Hanafi*, the *cadi* should be a man, a woman being ineligible.<sup>23</sup> The *Durr-al-Mukhtār* cites an interesting tradition from *Bukhāri* saying that no tribe shall prosper which has entrusted

21. *Mukhtasar* of Abu Ibrāhim Ismā'il b. Yahyā al-Muzani ash-Shāfi'i on the margins of *Kitāb al-Umm* of Imār. Shāfi'i, Vol. I, at p. 1.

22. *Alamgiri* (Urdu), v, 130; *Minhāj* (English Trans. E.C. Howard London, 1914), 500-1; Hamilton, 334; Ruxton, *Maliki Law*, (London, 1916), 273; Fyzee, *Outlines*, 319 (for authorities). As to satisfaction of sexual desires by a young *cadi*, see Hamilton's *Hedaya*, 338 (bottom).

23. Ruxton, 274, is the general rule. *Hanafi* rule, except in *hadd* and *qisās*, Hamilton, 341 (mid.), *Alamgiri* (Urdu), v, 107 (line 20); *Kanz* (Urdu), 154; *Ghāyat*, iii, 252 (line 27). A woman can also be a *nāzir* of a *waqf*, executor for orphans and of course an '*adl* witness, *Ghāyat*, iii, 253; *Minhāj* (Eng. Trans.), 500.

its affairs to a woman.<sup>24</sup> This is similar to the many derogatory remarks to be found in the Fatimid authority, *Da'ā'im al-Islām*, and Imam Shāfi'i pointedly forbids men being led by a woman in prayer.<sup>25</sup>

Whether the *cadi* need be a learned man or not is another moot question. Shāfi'i is punctilious in saying that only a learned man may be appointed; but the Hedaya says that an ignorant man may also be appointed since he can call in an *'ālim* (man of learning) or a *mufti* (trained jurisconsult) to help him.<sup>26</sup> Abu Hanifa has wisely said that no Judge should be appointed for more than a year, after which the ruler should ask him to go back and acquire learning, lest in the pressure of administering justice, he may forget his law — a salutary provision for a refresher course even in modern times.<sup>27</sup>

An interesting side light on the *cadis* is thrown by the well known tradition in which Ali says that *cadis* are of three kinds: he who deliberately perverts the law and he who errs by ignorance, goes to Hell; while he alone goes to Paradise who acts in accordance with the truth.<sup>28</sup> A classification on similar principles will be found in the *Durr al-Mukhtār*. A *cadi* may be:

- (i) learned and just; or
- (ii) ignorant but just; or
- (iii) learned but unjust; or
- (iv) ignorant and unjust.

It is not difficult to decide which of them will be consigned to the fires of Hell and which will enter the gates of Paradise.<sup>29</sup>

## II. APPOINTMENT

The King appointing a *cadi* need not be a Muslim,<sup>30</sup> and similarly a non-Muslim conqueror of a Muslim King is entitled to appoint *cadis*. The appointment of a *cadi* is an obligatory duty on the authority concerned; and the *cadi* should possess a commanding personality, knowledge and patience in Court; but it is not necessary that he be a *mujtahid* because to few is given the power of *ijtihād*.<sup>31</sup> If a man possesses the qualifications he must of necessity accept the *qadā'*; and yet one who is constrained

24. *Ghāyat*, iii, 253 (line 1).

25. *Umm*, i, 145; *Da'ā'im*, i (New Edition, 1963/1383), 152.

26. Hamilton, 334-5; *Radd*, iv, 424. But if a *cadi* is quite unfit, he himself should not enter upon the office, *ibid.*, 427.

27. *Alamgiri* (text, Bulaq), iii, 317 (lines 15-18).

28. *Da'ā'im* ii, para. 1888; *Radd*, iv, 427 (line 13).

29. *Ghāyat*, iii, 268.

30. *Alamgiri* (Urdu), v, 108.

31. *Umm*, vi, 204 (line 6).

to accept office is like an animal slaughtered without a knife, that is by a blunt instrument, so painful is his death.<sup>32</sup>

The moral difficulties of accepting office from a tyrannical Sultan are well described by 'Abd al-Hayy in his Introduction to the *Hidāya*. He says that Yazid b. Hubayra, Amir of the 'Irāqayn, wanted to appoint *Imām* Abu Hanifa a *cadi* at Kufa in the time of Marwān b. Muhammad, the last of the Umayyads, but the *Imām* refused. So he had the *Imām* beaten ten strokes a day for ten days, 100 strokes in all. Still the *Imām* persisted in refusing and Yazid thereupon let him go. Later the Caliph Mansur brought him from Kufa to Baghdad to appoint him Chief Justice (*qādi al-quḍāt*), but Abu Hanifa refused, and the Caliph swore that he would appoint him. Then there was a discussion between them and the *Imām* was imprisoned. It is related that the *Imām* said, "I am not suitable for the office (*lā asluku l'l-qadā'*)."<sup>33</sup> Whereupon the Caliph got incensed and said: "Thou art a liar." And the *Imām* said: "How is it lawful to appoint a liar as a Judge?" It is also said that the Caliph forcibly appointed Abu Hanifa a Judge, and he worked for two days, was ill the next six days, and then he died.<sup>33</sup>

The two ways of obtaining the office wrongfully are shown in the following: "In the *Yanābi'* it is related that one should neither ask for (*talab*) nor try to obtain it (*su'āl*). *Talab* means asking the Caliph to appoint himself; and *su'āl* is implied when the aspirant says to several persons that if the King were to appoint him, he would accept the office. It is therefore always better to avoid accepting this onerous position.<sup>34</sup>

*Imām* Shāfi'i favoured the view that the *cadi* is empowered to consult a learned man for understanding the law; from this doctrine there arose institution of *muftis*, so well known in India. The person consulted must be learned in the Koran, traditions and competent in assessing opinions, he should be intelligent enough to make correct deductions and not fall into error and pervert the truth. Thus the function can only be performed by one who is a master of the Arabic language. The consultant should possess a combination all these qualities, so that he is perfect in his faith, not desiring anything but the truth.<sup>35</sup>

In certain circumstances the *cadi* can be removed; for instance, (1) blindness, (2) deafness, (3) loss of reason, and (4) apostasy are reasons for disqualification.<sup>36</sup>

Similarly, the *cadi* is entitled to resign, but the resignation is not effective until the King's order is received, or at least till the King knows of the *cadi's* intention.<sup>37</sup>

32. *Alamgiri* (Urdu), v, 111 (line 12); Hamilton, 335 A.; *Hidāya*, iii, 117 (lines 2-3).

33. *Hidāya*, iv, End, Introduction, 7.

34. *Alamgiri* (Urdu), v, 112.

35. *Umm*, vi, 207.

36. *Alamgiri* (Urdu), v, 120.

37. *Loc. cit.*

### III. SEAT OF THE COURT

The best place according to the *Fatāwā 'Alamgiri* for holding the Court is a cathedral mosque; but it is also permissible to sit in one's house.<sup>38</sup> *Imām Shāfi'* says that the *cadi* should sit and exercise his powers at a place accessible to the public; it should be in the middle of the town; there should be no barrier, nor should people be terrified by the pomp and glory of the state officials. Thus the convenience of the litigating public is the prime consideration.<sup>39</sup> A little known Fatimid illustration is enlightening. The Fatimid Caliph Mansur had ordered the jurist Nu'mān to sit as *cadi* within the threshold of his own palace. But his successor Mu'izz, finding that it was an inaccessible place for the poor and the sick and the women, who were frightened to come within the precincts of the palace, ordered a new building to be built, where Nu'mān was finally accommodated.<sup>40</sup>

### IV. REMUNERATION

A *cadi* cannot take recompense (*ajr*) for his work; for he is performing a moral and spiritual function, but he is entitled to living expenses or maintenance.<sup>41</sup> It is therefore best if the *cadi* is in easy circumstances, in which case no question of salary arises. But if the *cadi* is poor, he should be given a salary from the Bayt *al-māl*, the Public Treasury.<sup>42</sup> In any case the *cadi* must be well provided with the necessities of life, so that he does not fall a prey to corruption, nor his mind tormented by anxiety.

The judge cannot even accept presents, but the *Radd* mentions special exceptions to this rule: (1) the Sultan; (2) the *Bāshā* (Minister of Justice); (3) relations within the prohibited degrees, and (4) persons who as friends are accustomed to send presents out of love and affection.<sup>45</sup> Now there is a clear distinction between a present (*hadiyya*) and a bribe (*rushwa*). In a present no conditions are made, but in a bribe help is a necessary condition.<sup>44</sup> A very interesting set of illustrations of bribery and venal invitations will be found in the *Fatāwā 'Alamgiri*.<sup>45</sup> The *hadiyya* must be returned to the owner, if it is improper; and in some cases, to the Public Treasury.<sup>46</sup>

38. *Loc. cit. et seq.*

39. *Umm*, vi, 201; *Sharā'ī'* (Tehran), 299 (line 1); Hamilton, 337 A.

40. Asaf A. A. Fyzee, "Qādi an-Nu'mān, the Fatimid Jurist and Author", J.R.A.S. for 1934, 10.

41. *Da'ā'im*, ii, Para. 1911; *Ghāyat* (Urdu), iii, 216.

42. *Alamgiri*, citing *Qādi Khān*, (Urdu), v, 132.

43. *Radd*, iv, 432.

44. *Alamgiri* (Urdu), v, 132.

45. *Ibid.*, v, 134-5; for an interesting story see *Radd*, iv, 431.

46. *Ghāyat*, iii, 219.

As regards invitations, a general invitation, such as to marriage feasts or death ceremonies, may be accepted; but special or private invitations should be refused. Some authorities however permit the invitations of close relatives to be accepted. In all these discussions, a modern reader will find a great deal of casuistry under the cover of general principles. This is to be expected; for, lawyers all over the world are well known for their capacity to make the worse appear the better reason, and their Islamic brethren are no exceptions to the general rule.<sup>47</sup>

An embarrassing situation may sometimes arise in the matter of invitations. What is the proper course for a *cadi* who finds that a litigant in the name of friendship seeks his hospitality? The case of Ali is a precedent. It is related that a guest came to him and stayed with him, according to Arab custom. Later Ali came to know that he was a party to a suit which was to be decided by him. And Ali acting under the guidance of the Prophet asked him to leave immediately; for, the Prophet had specifically forbidden *cadis* to extend hospitality to intending litigants.<sup>48</sup>

## V. DEPORTMENT

The *shari'a* emphasizes that the *cadi* should decide cases with an equable mind. *Imām Shāfi'i* for instance, following the Prophet's *dictum*, lays down that the judge should not give judgment in anger or under the stress of emotion. From this it follows that whenever a *cadi* suffers from a mental upset which impairs his reasoning powers and fair judgment, he should abstain from passing orders. Similarly, somnolence is a serious drawback, and the *cadi* should not decide cases when sleep overcomes him.<sup>49</sup>

For the like reasons a *cadi* interested in trade and increasing his wealth is unfit for judicial duty; for, these desires will occupy his mind even more than anger or lust.<sup>50</sup> Ali wrote to *Rifā'a*, *cadi* of *Ahwāz*: "Know O *Rifā'a*, that this office is a trust (*amāna*) ; so he who is fraudulent in it, the curse of God be upon him till the Day of Resurrection, and he who is corrupt in his actions, the Prophet will have nothing to do with him (that is, disown him) both in this and the next world."<sup>51</sup>

The *cadi* should show equal regard to all parties; except where the defendant is the *Khalifa*. He should rise from his seat, and make the *Khalifa* and his opponent sit together, while he himself should sit on a higher seat. The consideration to be shown to the ruler is based upon the consideration the Prophet used to show to elderly persons.<sup>52</sup> The *cadi* should be formal and not familiar in his conversation;

47. *Ibid.*, iii, 213-15.

48. *Da'ā'im*, ii, Para. 1905; *Ghāyat*, iii, 221; *Jawāhir*, vi, 361 (lines 31-33). Tyan, i, 426.

49. *Umm*, vi, 201 (lines 9-10); *Da'ā'im* ii, para. 1906.

50. *Umm*, *loc. cit.* (l. 15).

51. *Da'ā'im*, ii, para. 1889.

52. *Radd*, iv, 433.

he should be courteous without being oily and cringing.<sup>53</sup> The *cadi* should not put words into the mouth of a witness, nor should he suggest answers. Leading questions are forbidden. Nor should the judge speak to one of the witnesses in a language not understood by the other. And once the *cadi* has decided a case, not even the King can ask him to go over the case again.<sup>54</sup>

A *cadi* should not frighten one of the parties, or encourage the other; he should hear both parties with patience before deciding the case.<sup>55</sup>

## VI. BRIBERY AND CORRUPTION

The subject of bribery (*rushwa*) is an interesting one, but it is best to restrict ourselves to the positive rules of law. The *Da'ā'im* has a report from *Imām* Ja'far as-Sādiq who said:

“Acquiring what you have not earned is *rushwa* in deciding a case (*hukm*).” And they said: “And if the Judge decides rightly? The *Imām* said: “Even so; while, deciding wrongly constitutes *kufir* (disbelief)”<sup>56</sup> No presents can be accepted as a consideration for deciding a case, one way or the other.<sup>57</sup> Omar once asked Abu Hurayra to return certain gifts to the Public Treasury.<sup>58</sup> The taking of any return or *douceur* even for deciding rightly is declared to be *harām* by the *Sharā'i' al-Islām*.<sup>59</sup> And if a *cadi* obtains the office by bribery, his appointment itself is not valid.<sup>60</sup>

In order not to complicate the treatment of the subject, it is proposed to omit the rules relating to the powers of the *cadi* to summon parties and witnesses, judgment, revision, and jurisdiction, and proceed to arbitration.

## VII. ARBITRATION

The law always extols the role of the person who composes the

53. *Ghāyat*, iii, 221.

54. *Ibid.*, iii, 222.

55. *Da'ā'im*, ii, paras. 1892, 1894. Considerations of space and complexity do not permit me to deal with the question how far *qiyās* and *ra'y* can be resorted to by the judge, and how far *ijtihād* or *taqlid* is permissible. This is obviously a difficult and complicated question, related to the times and social condition of the officers, and much has already been written on it. For an elementary treatment see Fyze, *Outlines of Muhammadan Law*, (3rd ed., 1964), 31 *et seq.* *Radd*, iii, 453 *et seq.* discusses the question how far a *cadi* can decide according to the principles of another school. The normal rule is mentioned by Ruxton in his *Maliki Law* that the *cadi* should always decide in accordance with the rules followed in his own school 274. The *Da'ā'im* forbids *ijtihād*, *qiyas*, or *ra'y*, *Da'ā'im*, ii, paras. 1899 1900, 1902.

56. *Da'ā'im*, ii, para. 1890.

57. Hamilton, 337 B; *Alamgiri* (Urdu) v, 112.

58. *Radd*, iv, 431 (lines 1-3).

59. *Sharā'i'* (Tehran), 301 (line 12); Tyan, i, 429-31.

60. *Radd*, iv, 422.



difference between men, and the classical statement of the rule is to be found in the Fatimid authority, *Da'ā'im al-Islām*. In the Testament of Ali, it is said:

The composing of differences between men is better than all fasts and prayers.<sup>61</sup>

Arbitration in so far as it precludes action before a *cadi* is a meritorious act. The *Hedaya* lays down that where two persons agree upon an arbitrator (*hakam*) and agree to his giving the award, the arbitrator possesses the same powers as a *cadi*.<sup>62</sup>

The *Fatāwā 'Alamgiri* defines arbitration and arbitrators clearly and distinguishes between the award of an arbitrator and the decree of a judge. Arbitration is the act whereby two parties agree to a third party to resolve their differences. This procedure is called *tahkim*, and the arbitrator assumes the power of a *hākīm*. The *hākīm* must be an *'adl*, that is he must possess the qualities necessary for being a competent witness. The award of an arbitrator has the same force as the decree of a judge.<sup>63</sup>

A woman is eligible to be an arbitrator,<sup>64</sup> and there may be joint arbitrator.<sup>65</sup> The *cadi* cannot give any directions to an arbitrator; but the award, having the force of a judicial decree, the *cadi* is bound to execute it. The *Ithnāshari* authority, *Sharā'ī' al-Islām*, lays down the same rule.<sup>66</sup>

The *Durr al-Mukhtār* is particularly full and precise regarding the rules governing arbitration.<sup>67</sup> It says that Abu Shurayh once related a tradition from the Prophet praising arbitration. Arbitration is possible between two human beings (their rights are called *huquq al-'ibād*), but not in the Rights of God (*huquq al-Allāh*).<sup>68</sup> In particular, arbitration is to be recommended in the following matters:

- (1) property,
- (2) divorce,
- (3) emancipation of slaves,
- (4) marriage, and
- (5) guarantee,

61. *Da'ā'im*, ii, para. 1297, at p. 347, line 16.

62. Hamilton, 343 B.

63. *Alamgiri* (Urdu), v. 204-5.

64. *Ibid.*, 206.

65. *Ibid.*, 207 (lines 7-8).

66. *Sharā'ī'* (Tehran), 297 (line 10).

67. *Ghāyat*, iii, iv, 246 *et. seq.*

68. Radd, iv, 482; *Alamgiri* (Urdu) v, 204 *et. seq.*

but not in the following:

- (i) *zinā* (fornication, adultery),
- (ii) theft, and
- (iii) libel.

The arbitrator cannot benefit himself or his close relatives by his award, this is the rule also for *cadis*. And the arbitrator cannot delegate his duty to another person.<sup>69</sup>

It will be observed that the chapters on *qadā'* and *adab al-qādi* contain a large number of subjects, and do not pertain only to the duties or the etiquette of the *cadis*. Similarly the opinion commonly held that the *adab al-qādi* comprises rules analogous to those of equity in English law seems to be without foundation. In awarding interest to a widow on her unpaid dower debt. Lord Parker of Waddington says in *Hamira Bibi v. Zubaida Bibi*:<sup>70</sup>

When a widow is allowed to take possession of her husband's estate in order to satisfy her dower debt with the income thereof, it is either on the basis of some understanding as to the conditions on which she should hold the property, or on no understanding. If there is an agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower, she must abide by its terms. But where there is no such understanding, and a claim is made as in the present case, the question arises whether, on equitable considerations, she should not be allowed some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband. Their Lordships think that she is so entitled, and obviously compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest. *This appears to be consistent with the chapter on "The Duties (Adab) of the Kazi" in the principal works on Mussulman law, which clearly shows that the rules of equity and equitable considerations commonly recognized in the Courts of Chancery in England are not foreign to the Mussulman system but are in fact often referred to and invoked in the adjudication of cases.*

This case was an appeal from a Full Bench decision of the Allahabad High Court,<sup>71</sup> The leading judgment is that of Karamat Husain J. who in a well-considered opinion allowed interest on the dower debt at 6 per cent *per annum* on equitable considerations, despite the clear injunctions of the Koran against the giving or taking of interest. He does so on the ground of "justice, equity and good conscience" and does not mention the *adab al-qādi*. But Lord Parker of Waddington introduces the *adab al-qādi* to fortify his decision. The decision to award interest in such circumstances is indubitably right in Indian law and social conditions; but the *obiter* that the *adab al-qādi* contain rules analogous to equity as understood in the Courts of Chancery is without foundation.

69. Hamilton, 344A.

70. *Hamira Bibi v. Zubaida Bibi* (1916) 43 Indian Appeals 294 at pp. 301-302 (my italics).

71. *Hamira Bibi v. Zubaida Bibi* (1910) 33 Allahabad 182.

In England the Courts of Chancery set out to mitigate the evils of a strict adherence to the rules propounded by the Courts of Common Law. The rules of equity as understood in English law, thus, constitute a superstructure on the existing common law. Gradually, in the course of centuries, they became a separate and distinct system known as equity. The *adab al-qādi* in the Islamic system, on the other hand, are rules of etiquette or good behaviour, together with numerous accretions relating to the qualification of judges, the appointment of *cadis*, their judgments, revision and appeal, transfer of cases from one *cadi* to another and many related questions. There is no rule in the Islamic system that a clear rule of law (*nass*) can be varied by the *adab*. This remark therefore of the noble and learned Lord must, with respect, be deemed to be an *obiter* and cannot import wholesale the rules of Equity in matters relating to dower (*mahr*), let alone the other points of Muhammadan Law as received in India.

The rules of Equity are however well known to Indian law as whole, and are imported into its fabric by the expression "justice, equity and good conscience" used in several acts and judgments.<sup>72†</sup>

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72. J. D. M. Derrett, in *Changing Law in Developing Countries*, (edited by J. N. D. Anderson, London, 1963), on "Justice, Equity and Good Conscience", at p. 114; and Fyzee, *Outlines of Muhammadan Law*, (3rd ed., 1964), at pp. 21, 55, 84, 388.

† It is regretted that few Arabic texts are available to me in Bombay, and in particular, I have not been able to use **Khassāf**, *Adab al-qadi*. It is gratifying to learn however that Dr. Farhat J. Ziadeh (Princeton) is working on an edition of this classical text, and it is certain that he will make valuable contributions to the study of the subject, of which this is but a preliminary survey.

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