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An examination of the problems of Islamization of laws: Issues in contemporary Islamic legal theory

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A Dissertation
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by
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ABSTRACT

AN EXAMINATION OF THE PROBLEMS OF ISLAMIZATION OF LAWS: ISSUES IN CONTEMPORARY ISLAMIC LEGAL THEORY

by: Abdel Azim M. Elsiddig

Doctor of Philosophy

Temple University, 1993

Major Advisor: Dr. Khalid Y. Blankinship

This thesis is confined only to a few issues in contemporary Islamic legal theory in so far as such issues are interrelated and, consequently, affected by traditional Islamic politics and education.

The problem that the study is intended to handle is twofold: first, the misconceptions, misunderstandings and confusions about the sources, concept and definition of Islamic law in western scholarship; and second, whether Muslim law, as existing today, is capable of dealing with contemporary circumstances.

The first basic assumption on which the whole thesis rests is that like any other religious system the Islamic legal system was strongly affected by the sociological and political circumstances of the medieval Muslim society.

Another important assumption is that with the exception of the Qur'ān and sunnah serving as primary sources of Islamic jurisprudence, the whole Islamic legal theory known as usul al-fiqh is open to criticism, review and evaluation. Both

ijma' (consensus) and qiyas (analogy) call for a new look from learned scholars in order for the Islamic legal theory to be reformulated under the existing political and other sociological conditions in many parts of the Muslim world. We are not only concerned about their order and place as sources of Islamic jurisprudence but also with the possibility and likelihood of putting them into practice under the existing circumstances.

The third and final assumption on which a major part of this study rests is that there is a remarkable confusion in Western academic circles as regards the definitions and nature of traditional Islamic sciences. Shariah is sometimes mistaken for fiqh, while Qur'anic rituals are treated as laws. To counter the absence of a clear-cut frontier in the Western readers' minds as to what constitutes law, morality and ethics in Islam, this study stresses the importance of such distinctions and frontiers as they originally existed in traditional Islamic sciences.

The study as a whole is neither a total rejection of the traditional formulations of Islamic law, nor a complete acceptance of the recent attempts to reform the medieval legal structure through borrowing from outside systems and resources.

The whole thesis is that the traditional Islamic legal theory could easily survive to provide appropriate solutions for the contemporary Muslim society provided that a

comprehensive study is made to deal with political as well as social structures of Muslim society, in addition to religious and legal education in those societies.

Since the Muslim world is presumably "one and united", at least in theory, the thesis is not concerned with any particular country or experience, except where it is necessary to illustrate by way of practical example, as in the cases of Turkey, Egypt, Pakistan and Sudan.

Islamization of laws will always remain an issue of politics and education for Muslims where the shariah is not applied. It is not only the majority of Muslims that counts when it comes to the demand and pressure for the application of shariah. What is really significant is the political power and authority which usually goes to the "educated elites". Muslims all over the world will only become of significance through education, which in addition to bringing them to power would also open up their minds for new changes within the traditionally accepted Islamic foundations.

Finally the argument in this thesis is based on the understanding and the interpretation of the basic primary sources of Islamic jurisprudence - Qur'ān and sunnah as an attempt to develop a way out of the status quo through the method of ijtihad.

ACKNOWLEDGEMENTS

The gestation and birth of this work have taken many years, and I am grateful to more people than I can acknowledge in this space. I would like to mention in particular the late Professor Ismail al-Faruqi who encouraged me to choose Temple. I thank Dr. Khalid Y. Blankinship for his geniune academic supervision and personal advice; Dr. John C. Raines for his continuous help and support especially during the early stressful days of the tragic death of the Faruqis; Dr. Peter Rigby who made me aware of some intricacies in the law field; Dr. Gibson Winter for his supervision, teaching and advice; and Dr. Mahmoud Ayoub for sharing his experience and time with us. The faculty, academic and administrative staff of the Department of Religion have been of great help throughout the course of my study at Temple.

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TABLE OF CONTENTS

INTRODUCTION

This work begins with Muslim education, its origin, past and present status to substantiate one of our basic arguments that the current problems of the Muslim ummah is due, in part, to its ignorance not only of the other facts of life but of the very basic principles of Islam as developed and shaped throughout its history. The Muslim educational system as it appears today could hardly produce free thinkers who are able to play a substantially significant role in the modern Muslim society. Alternative remedies are occasionally proposed not by way of cutting off this specific problem from its roots but they were given in hope that they may contribute in the stabilization of a society in decline as first attempt for pushing back toward its center of perfection as shown in the dissertation.

The reality of the nation-state in an interdependent and interactive world calls for consideration of Muslim politics in a separate chapter in order to demonstrate the nature of the problems in this field and the need for practical solutions in our time taking into consideration the "fact" and "style" of the early Muslim state in Madinah.

The focus of this dissertation is in chapter three about Islamic theology, law and morality which explains the nature and concept of Islamic law and its relation to both Islamic theology and morality as demonstrated in the Qur'ān and the sunnah of the Prophet with particular emphasis on some

misconceptions and confusions in Western scholarship in Islamics as an attempt to clarify these misunderstandings about the nature and concept of Islamic law to the best we can.

In chapter four I intend to show the role of human reason in the whole mechanism of Islamic law and the process of deriving the law in its particulars from the general sources. I give special consideration for the treatment of the "Islamic Legal Theory" and its significant influence on Islamic jurisprudence and law as separate though interdependent fields. The study shows that for Islamic law to grow and adapt itself to changing circumstances certain measures are needed for reconsideration of some sources of the law.

Among the new sources, (maslaha, mursala) is given due attention for its importance and relevance to the problem under study. I try to show how maslaha as a concept was used by early Muslim jurists notably Mālik of Madina and his Spaniard follower Shātibī. The study focuses on the need to consider it as a source of law along the lines of the Qur'ān and the sunnah but not necessarily in the way that Mālik did.

Finally, I treat the most important issue of ijtihad as related to the Islamic legal methodology. The historical survey of usul al-figh shows the significant role that the ijtihad played in the development of Islamic law. The present status of both Islamic jurisprudence and law is, due to, apart

from other sociological factors, the common misconception of the "closed gate of ijtihād" which is sadly believed and accepted by Muslim masses and scholars as well. Rather than getting dragged into a futile discussion over the issue of the "closedness of the gate" I, however, choose to treat the problem from its very roots in the science of usul al-fiqh. The whole idea of the closing of the gate of ijtihad appears to me as a natural effect to the decline of the Muslim ummah. The real challenge then for the whole Muslim community is to change the socio-political circumstances that have historically contributed to its present status.

I mainly depend in this research on original early medieval Arabic sources on Islamic sciences particularly usul al-figh. However, reference is also made to many recent Arabic sources in the field.

I frequently refer to secondary English sources by Western and Muslim scholars because of the valuable material available in English on Islamics.

Proper Arabic and Muslim names are given with diacritics, and Arabic terms are underlined and given in parenthesis following their English equivalents. Sometimes transliteration is given where necessary with the diacritical marks of (') and (') for medial Arabic 'ayn and hamza. Dates are normally given for both the Muslim or Christian eras separated by a diagonal line with the Muslim Hijri date appearing first and to the left. Persons are normally

identified with their dates of death shown with the English letter (d.) followed by a dot. References are sometimes abbreviated in the footnotes, and are fully identified in the bibliography.

For Qur'anic texts, I have used Abdullah Yusuf Ali, The Holy Qur'ān, Texts, Translation and Commentary. The Qur'ān is cited in the notes and occasionally in the text itself by chapter and verse.

CHAPTER ONE

ORIGIN AND DEVELOPMENT OF THE MUSLIM EDUCATIONAL SYSTEM

To characterize, in general terms, the Muslim concept of knowledge, and to understand the "orthodox" attitude to philosophy and to the "rational sciences", we must examine the origin, development and nature of the Muslim educational system and its contents.

Every classical Arabic work that deals with Muslim education begins with some discussion of its relation to the Qur'ān and the sunnah of the Prophet. It is therefore essential to take notice of this deep-rooted conception of the origin and character of education in Islamic tradition as reflected in its two basic and fundamental sources: Qur'ān and sunnah.[1]

Our basic point and major theme in this chapter is: though the essence of Muslim education is stated in the divine revelation in the Qur'ān (96:1-5; 30:22, etc.), and is given in greater detail in the traditions of the Prophet Muḥammad, it took Muslims more than two centuries of practice to formulate a detailed exposition of what we may call a "theory". While most of the formulations were necessarily close to the first principles laid down in divine revelation, some of them were designed partly to accommodate lapses from the ideal and, more importantly, to rationalize innovations for the stability of the status quo. It is this dominant

spirit of Muslim education that, in my opinion, finally produced its fruit of taqlid, "blind imitation".

The Qur'ān has frequently used the Arabic term 'ilm and its derivatives in the general comprehensive sense of today's term "knowledge," whether such knowledge is acquired through learning, thinking or experience (Qur'ān 18:65. 21:79, 80). It follows from this that this would be the sense in which this word was used during the Prophet's time. However, an even more direct argument in favor of this broad usage of the term 'ilm rests on the Prophet's own words: "antum alam bi-umur dunyakum" ("you are more knowledgeable about your mundane affairs").[2] It follows from this argument that this would be the sense in which this term was used during the Prophet's time.

However, during the process of evolution through the time of the followers (tabiun), the term fiqh (understanding) started to emerge from meaning a discipline concerned with the exercise of understanding to meaning that part of knowledge acquired by learning the tradition of past generations.[3] The most significant fact that we need to emphasize here is: the new term fiqh is related to 'ilm in the same way that the term sunnah relates to the hadith; hadith being the traditional materials while sunnah is the deductions, on the basis of thought, from these materials. The late Professor Fazlur Rahman strongly argues in favor of this dichotomy when he says,". . . (that) hadith meant the traditional materials

whereas sunnah signifies the deduction of practical norms from these materials by the exercise of understanding, can be illustrated by the following example that Abdal-Raḥmān Ibn Mahdī (d. 198/814) is reported to have said that Ṣufyān al-Thawrī was an authority (imam) on hadith but not on sunnah and that the opposite was true of al-Awzā'ī; Mālik combined in himself both types of expertise and masterly qualities."[4] Since then, according to him, the term 'ilm started to receive a traditionalist rather than a "rational" bias in Islamic discourse. Connected with this narrow understanding of the term 'ilm as tradition, and especially as what the Prophet was reported to have either said, done, or ratified, is the famous Arabic expression talab al-ilm (seeking of knowledge), which, instead of acquiring a general application, was given a definite meaning in the traditionalists' study-circles. It simply meant for them a long and painstaking process of travelling from place to place and region to region, sitting at the feet of great traditionalist authorities and acquiring from them their treasure of "knowledge".

Later on, the application of the term "knowledge" enlarged to include 'ilm al-abdan, which literally means science of human bodies, i.e., medicine. Though this enlargement gives a sign of encouragement and hope for an evolutionary process in the Muslim theory of knowledge, unfortunately medicine and other branches of human and natural sciences never attained the same recognition and prestige

given to the traditional Muslim sciences. This fact remains of great importance to us throughout the whole dissertation.

The term fiqh itself, that was originally taken to signify thought or understanding; later, when the legal system grew came to be applied to law, not so much as a process of understanding legal issues but as a body of legal knowledge, the concrete result of legal thought. Consequently, we started to loose the link and, at the same time, blur the frontier in the original ilm-fiqh pair. Still later, after the fourth/tenth century or thereabouts, the term fiqh ceased altogether to have any reference to understanding or thought which, indeed, was claimed to be "closed and forbidden", and was exclusively reserved for the body of legal knowledge produced by the earlier generations.

It was later in the first and second centuries of Islam (seventh-eighth centuries C.E.) that scattered centers of learning grew up around persons of eminence. These teachers would normally give a student a certificate of permission (ijaza) to decide on religious issues and to teach the same subjects he had studied, which in most cases would be limited exclusively to the sciences of the Qur'ān and the traditions.[5]

According to Fazlur Rahman, organized schools with established curricula were probably first set up by the Shia to impart knowledge and indoctrinate students. When the Seljukids and Ayyubids replaced the Shia states in Iran and

Egypt, large madrasas or colleges organized on Sunni lines were established, and with time they multiplied. With the establishment of the Shī'i Safavid dynasty in Iran [1502-1736 C.E.], there grew up a number of Twelve Shia seats of higher learning, the most prominent of which at present is Qum.[6]

In Sunni Islam, an unquestionable leading position in education is held by al-Azhar of Egypt, founded in 988 C.E. by the Ismaili Fatimids of Egypt. Later, it was turned over to the Sunnis after the Ayyubids took over Egypt in 1171 C.E. What concerns us here is the nature and quality of this education, and the kind of man which it aimed at producing for the service of Islam and society.

The teaching program of al-Azhar, as it has evolved through centuries of growth and reform, has fully adhered to the archetypical system of Islamic studies in the classical Muslim tradition as postulated in a "cut and dried" syllabus.[7] Studies on the Qur'ān and hadith occupy a central place, while those on Islamic Law, 'ilm al-kalam (scholastic theology), grammar, rhetoric, and logic form ancillary, though essential features. The curriculum, as seen in the medieval, post-medieval, and even in the present-day definition of traditional Muslim education, owes it origin and structure to the political, social and intellectual patterns in early Muslim society and continue to form the master criterion of every Muslim individual's thought and practice.[8] Hence it is essential to study and analyze at various levels some of these

political and social factors which have determined the present status of Muslim education.

The academic content, utility and topicality of the syllabus of traditional Muslim education as taught in al-Azhar has been subjected from time to time to a harsh, but positive and objective criticism by many scholars as out-dated and ill-adapted to provide for the training of mind that enables man to understand and make proper decisions, and is inadequate to furnish the necessary stimulant to thought and talent so that one may harness one's resources for useful ends. To the Muslim scholars of today, particularly those who are Western-educated, the "curriculum is overrigid, and totally unrelated to the needs of contemporary society."[9] The generations of intellectuals that al-Azhar produced, with few exceptions, are looked upon as being ill-equipped, uninquisitive and provincial in outlook. Education in the classical curriculum as preserved in these schools has lapsed through the ages into a formalism similar to that of the Catholic institutions before the European Reformation. Studies generally have become an end in themselves and have been deprived of almost all vitality, being fixed and stereo-typed in nature.[10] It was this static and constricted atmosphere of the curriculum and methods that led leaders like Muhammad Abduh (1849-1905) to a series of changes in organization and planning, which began in the year 1896 C.E.

and continued until 1925 C.E., when a special committee for al-Azhar reform was constituted.[11]

The subsequent laws, particularly of 1936 during the term in office of Shaykh Muḥammad Muṣṭafā al-Marāghī remain landmarks in the reform movement of al-Azhar. What these advocates of educational reform strove to achieve was the reintegration of a shattered thought-world, the establishment of lines of communication between the artificially created compartments of knowledge, and the reinforcement of Muslim civilization with the tremendous potentialities of modern thought and knowledge. They visualized a system of education which would produce scholars possessing an intellectual curiosity sufficient to challenge them to seek new answers to new problems.

'Abd al-Muta'āl al-Sa'īdī contended in his book on the history of reform in al-Azhar that the education imparted at al-Azhar could not breed mujtahids who would have the capability and the desire to engage in new thinking on the various aspects of Islam. Khālid M. Khalid in his Min Huna Nabda' said the same in stronger terms and stirred up a vehement response.[12] It is essential to note at this point that both critics stressed the fact that al-Azhar represents the late medieval body of Islamic thought with certain new and minor modifications. It is clear that people who criticize al-Azhar take as their point of departure the existing state of affairs which carries within it the weight of long

centuries of cumulative solidification. It is also important to indicate that al-Azhar in particular concerns us here because it represents not only a long, settled, and solidified tradition, but one of massive and influential status as well.

In the twentieth century, a curriculum of Islamic studies could be reformed to include a number of topics of great value and interest. Indeed, increasing the scope of research and study are necessary prerequisites for comprehensive planning whether on a national or local scale, whether confined to religious questions or involving all phases of life. To comprehensively cover both the humanities and social sciences, the range of studies could be widened to include other relevant and interrelated disciplines such as sociology, philosophy, anthropology, psychology and history. Each of these subjects would carry certain courses of common value to all, and could further be defined chronologically as early, medieval, classical and contemporary.

The rationale behind this is to compare and contrast the old with the new, medieval with modern, so as to include the latter instead of ruling it out as an outright "innovation". In addition to Arabic, Persian, Turkish and Urdu, scholars have pointed out that no proper justice could be done to scholarship in Islamic studies without a knowledge of some European languages, such as English, French, German, Spanish, or Italian, for in each of these media there are studies of immense interest and great value to the student of Islam.[13]

Whatever the theme of study, whether theology, history, literature or law, a specialist in Islamic studies must display the highest standard of scholarly integrity. He must be competent in the use of the primary sources of Islam in Arabic, Persian, Turkish or Urdu. To depend on secondary sources and stereotyped works would eventually circumscribe the area of Islamic scholarship to lamentable boundaries. It is only in the original Arabic sources that we can spot and find the political, sociological and philosophical theories of Islam.

THE ISLAMIC THEORY OF KNOWLEDGE

It is important to notice from the beginning that for Muslims, man has learned to make some sense of the universe and his place in it by applying what we may call a frame of reference which, in Islam, means revelation, which is, strictly speaking, the Qur'ān. I say "Qur'ān" because the hadith itself may not be accepted if it is against the teachings of the Qur'ān.[14] Epistemology, according to Z. Sardar, "governs all aspects of human study, from philosophy and pure science to social science. It is the epistemology of a people that gives unity and coherence to the body of their sciences - a unity which is the result of critical examination of the sciences in the light of their beliefs, convictions and value system. There is no such thing as a non-aligned truth.[15]

For the Muslims, the traditional Western epistemologies of Berkeley, Hume, Russell and others are irrelevant. As a corollary of this, a large part of contemporary epistemology is irrelevant too. This is because of Westerners' subjectivist and materialist assumptions. The basic approach of both the traditional and contemporary Western epistemologies of studying any discipline is in a subjective sense of the term 'I know' or 'I am thinking'.

For early Muslims, all theories of knowledge devoid of an absolute reference frame i.e., the Qur'ān, could only lead to conflict and confusion. There are no objective truths that can be discovered by reason alone. And as philosophical theories cannot be tested by observation either, they need an absolute reference frame in order to be judged. From the viewpoint of Islam this is the only solid approach to knowledge.

Within this framework, the traditional problem of knowledge as regards definition, source and validity did not really exist in the minds of early Muslims. Bernard Lewis stated the case when he observed: "The Medieval Muslim . . . was profoundly convinced of the finality, completeness, and essential self-sufficiency of his civilization."[16]

The cause behind this "profound conviction" is due, according to Fazlur Rahman to the ijtihad of early scholars of Islam. He stated: "There is no doubt that early scholars of Islam and leaders of the community exercised a good deal of

freedom and ingenuity in interpreting the Qur'ān, including the principles of ijtihad (personal reasoning) and qiyas (analogical reasoning) from a certain text of the Qur'an, arguing on its basis to solve a new case or problem that has certain essential resemblances to the former."[17]

There is no doubt whatsoever that to an illiterate environment, and in the face of an oral tradition, the Qur'ān's message was revolutionary. Apart from its purely religious content proclaiming the unity and majesty of God, the message insisted on the value of learning and places men of knowledge in a position second only to angels (2:18). However, a problem arose when later this learning was understood to mean only divine revelation. Contemporary Muslim thinkers are still arguing to reinterpret the Qur'ān in a way that may include other fields besides divine revelation.

Hasan al-Turābī leader of the Islamic movement in the Sudan, says "Because all knowledge is divine and religious, a chemist, an engineer, an economist, or a jurist are all ulama'. So the 'ulama' in this broad sense, whether they are social or natural scientists, public opinion leaders, or philosophers, should enlighten society."[18] In his broad interpretation, Dr. Turabi often refers to these Qur'anic verses: "Read: And thy Lord is the Most Bounteous, Who teacheth by the pen, teacheth man that which he knew not."[19]

I recall well that Dr. Tigani Abdul Gadir and myself used to discuss the possibility of such interpretations being used

one day by Dr. Turabi's political foes as "unorthodox" and heretical. This is exactly what happened between Dr. Turabi and the late Egyptian Muslim brother A. Saqr, when the latter wrote a letter to the Saudi conservative Shaykh Abdul Aziz Ibn Baz warning him against the "dangers" of Dr. Turabi's views on the new Sudanese Muslim generations who, according to Mr. Saqr, are not well-grounded in traditional Islamic knowledge. All that they know, in Mr. Saqr's words, is "teachings of Sufi mystics and Dr. Turabi's heresies." By "heresies", Saqr means personal opinions on Islamic law and some other interpretations, like the above one, which Dr. Turabi stated as a jurist and legal expert in both Western as well as Islamic law.

The point here is not to defend Dr. Turabi's position, but to simply show that both the understanding and interpretation of Islamic resources have not been at all free of either political conflict, personal envy or both. However, Shaykh Ibn Baz decided to close the case when he was convinced by a letter from Dr. Turabi telling him about the real cause behind the "fight": political dispute and personal disagreement.[20]

THE ISLAMIC EDUCATIONAL REVOLUTION

As we have mentioned earlier, the first word revealed to the Prophet of Islam was "read". Then later the Qur'ān continued to ask the Messenger to discharge his message. In

the discharge of his mission the Prophet Muḥammad provided both commentaries on the Qur'ān and set precedents for the future action of his community. Thus, preaching the new faith was accompanied by two practical measures of special educational significance. Literate preachers were sent out to new communities that embraced Islam and the mosques became the first schools in Islam.

The association of the mosque with education remained one of its characteristics throughout history. In the early days it was the focus of all communal activities. From its pulpits religious edification and state policy were proclaimed. Within its walls justice was dispensed. On its floors sat preachers and teachers surrounded by adults and children seeking learning and instruction.[21]

It is true that the mosque played an active and positive role in the education of every Muslim, but the attachment of education exclusively to the mosque was not without problems. First, education of Muslim women was completely neglected because they were deprived of their rights to have access to the mosques, contrary to the authentic Prophetic tradition reported by Imam Muslim in his Ṣaḥīḥ on the authority of Ibn 'Umar that he heard the Prophet saying: "La tamnau ima Allahi masajid Allahi" (Do not bar the female servants of Allāh from coming to His mosques)".[22]

Since the second century of Islam, and apart from the contribution of early Muslim women, notably the Prophet's

wives in the first century, Muslim society had practically dismissed, and thereby ruled out its females from any significant intellectual contribution. Our failure to name any Muslim woman after the first Islamic century as a mujtahid provides good testimony to that fact. Muslims all over the world ought to feel embarrassed about this unfortunate situation, and they have to realize that the first step toward the solution of every problem is to admit it.

Related to this problem is the exclusion of children from the mosque. Based on a weak tradition falsely attributed to the Prophet, Muslim children were treated equally with people of unsound minds. According to that false tradition which reads "jannibu masajidakum sibyanakum wa majaninakum" ("Keep your young boys and the mad people out of the mosques"),[23] young boys were kept away from the mosques, which were the only educational centers available at the time.

Later on, when the kuttab (children's schools) were established and teachers were hired, the teachers were viewed as foolish and small-minded. Thus it was said "more foolish than a kuttab [elementary school] teacher" and "how could intelligence and wisdom be found in one who rotates between an infant and a woman!".[24] See how women are equated with infants and both are depicted as lacking wisdom and intelligence! This fact will remain of extreme importance when we later try to show that the whole problem of ijtihad is

a natural fruit of extremely disfavorable political and social circumstances.

Second, the mosque as a place of worship is treated as sacred if not holy, though not in the strict sense of the term. This sacrednesss has through time been carried over to it as an educational institute. Consequently, traditional Muslim education has been devoid of any social or recreational activities, such as those which would have otherwise been permitted for a Muslim in his ordinary daily life. This remains the dominant characteristic of any Islamic educational and teaching institute and has been a subject of severe criticism by many.[25] However, this policy of isolation and deprivation has effectively produced generations of graduates who are ignorant of the basic facts of social life. But by the time they realized the need to change this policy, they discovered that the train had already passed.[26]

One of the remarkable exceptions of his time was Shaykh Muhammad Abduh who called, while he was a student at al-Azhar, for the study of all branches of science. He remained a landmark in al-Azhar history. The administration was so hostile to Abduh's proposals that when his candidature for a license or diploma was considered there was a critical moment when approval was in serious doubt. But when he passed that hurdle he was free to show his originality and to indulge his intellectual adventure."[27]

Abduh's ideas and methods earned him the appellation of faylasuf (philosopher), a mark of admiration, by his followers and condemnation by opponents. The two different attitudes to his intellectual adventure and liberal interpretation of religious questions, soon crystallized into two opposing schools of thought. For one of these, his orthodoxy was called into question and he was even accused of unbelief. The tenor of the argument against him was on these lines: "What kind of a shaykh is this who speaks French, travels in European countries, reads European books and teaches the ideas of European philosophers?"[28]

This takes us back again to the question of philosophy in Islam. The first important place of learning created by the central government was Bayt al-Hikmah - founded in 217/832 - under Caliph al-Ma'mūn's orders in Baghdad. It was soon captured by the Mu'tazili rationalists who used the Caliph and the state against their Orthodox rivals concerning the famous philosophical battle over the "creation of the Qur'an". That taught the Orthodox 'ulama' a lesson, and they later moved to organize and control education.

The crucial formative stage in the Muslim higher education began when Saljuk vizier Nizām al-Mulk in 459/1067 founded the first organized official orthodox school, at which the great scholar al-Ghazālī (450-505/1058-1111) served as a teacher. Al-Ghazālī received his elementary education from a mystic and then sat at the feet of famous learned men until he

himself became renowned for his learning. In the Alchemy of Happiness, al-Ghazālī divides knowledge into four categories:

(1) the knowledge of self;

(2) the knowledge of God;

(3) the knowledge of this world; and

(4) the knowledge of the next world.[29]

Based on these categories, the most fateful distinction came to be made in the course of time between the "religious sciences" and the "rational or secular sciences".

Since knowledge is vast, while life is short, one must fix one's priorities. In al-Ghazālī's system, as among Muslims generally, these will naturally be in favor of the religious sciences, upon whose acquisition one's success in the next world depends. It is extremely important to appreciate this psychological attitude and its sociological consequences.

Though the "rational sciences" were not completely discarded, their position remained as one of not contributing to one's spiritual salvation. Al-Ghazālī's attitude and his influence on Islamic epistemology has affected Muslim traditional education for centuries.

In fairness to al-Ghazālī, we must at least say that he was opposed not to science per se, but to philosophy as expounded by the two Muslim philosophers al-Farābī (d. 950 C.E.) and Ibn Sīnā (d. 1037 C.E.). He was vigorously reacting to the highly unorthodox metaphysical views explored by those

philosophers, such as the eternity of the world and the rejection of physical resurrection.

Al-Ghazālī finally denounced these philosophers as gravely heretical. He went on to conclude that "since the philosophy of these men is harmful to faith so must their scientific works also be shunned."[30] Al-Ghazalī also invokes the argument based on his set of priorities against those doctors who want to give priority to medical sciences over religion and mislead the "simpleminded" public by cliches such as badanaka thumma dinaka ("look after your health first and then your faith").[31] Finally al-Ghazālī ruled out philosophy, but rehabilitated the mystic with the theological. He recasts the whole Islamic tradition in a synthesis of dogma, ritual, and ethics at once authoritative and rational.[32] Despite their repeated attempts to reconcile reason with revelation, philosophers had completely failed to make any lasting impression. After al-Ghazālī, they remained a race apart, ignored, admired or declared heretics according to the occasion, as we have seen with the Azhar Shaykh Muhammad Abduh.

The character of Muslim education in aims, content, methods and institutions was thus determined for centuries. It hardly changed till the last hundred years, and then due to the influence of some educators on Islamic education and its interaction with Muslim's social and political life.

ENDNOTES

[1]The best reference for this subject is A. L. Tibawi's Islamic Education: Its Tradition and Modernization Into the Arab National Systems (London: Luzac & Co. Ltd., 1972), p. 231.

[2]Abdul Wahhab Khallaf, Ilm Usul al-Figh (Cairo: Dar al-Qalam, 1978), p. 44.

[3]Fazlur Rahman, Islamic Methodology in History, (Karachi: Central Institute of Islamic Research, 1965), p. 130.

[4]Ibid. p. 146.

[5]Makdisi, 1981:1-34.

[6]Fazlur Rahman, Islam & Modernity: Transformation of an Intellectual Tradition (Chicago: University of Chicago Press, 1982), p. 31.

[7]See Mervyn Hiskett, "Problems of Religious Education in Muslim Communities in Africa," Overseas Education, 32 (3) (October, 1960), pp. 121-123.

[8]In A. M. Mohamed Mackeen, "Islamic Studies as a University Discipline: Syllabus." Islamic Review, 57(6) 36-38 (June, 1969), p. 36.

[9]See H. A. R. Gibb, "Law and Theology in Islam," The Muslim World (July, 1948), p. 191. Quoted in Mackeen, op. cit., p. 37.

[10]Ahmad Shalaby, Mawsuat al-Nuzum wa al-Hadarah al-Islamiyya: al-Mujtama al-Islami, vol. 6 (Cairo, Maktabot al-Nahdah al-Masriyya) p. 252.

[11]Ibid, pp. 252-258.

[12]Fazlur Rahman, Islam & Modernity. Op. cit., p. 100.

[13]See al-Azhar fi ithnay ashra am (Cairo: Azhar Publications, n.d.), pp. 75-90, for the range and content of reform in the planning of studies at al-Azhar.

[14]See A. J. Arberry. History of Sufism (London, 1942), pp. 60-61. Quoted in Mackeen. op. cit., p. 37.

[15]See Z. Sardar. The Future of Muslim Civilization, (London: Croon Helm, 1979), p. 26.

[16]Ibid., p. 32.

[17]Bernard Lewis. Islam in History (London: Alcove Press, 1973), p. 102.

[18]Fazlur Rahman. Islam & Modernity. op. cit., p.18.

[19]Hasan Turabi, 'The Islamic State', in John L. Esposito (ed.), Voices of Resurgent Islam (New York and Oxford, Oxford University Press, 1983), p. 245.

[20]Qur'an; 96:3-5.

[21]based on letters and correspondences dated back to the seventies concerning the three parties involved. (copies of two of these are available in my private collections).

[22]Muslim, 1987:86.

[23]Zarqani, 1983:92.

[24]Tibawi. Op. cit., p. 24.

[25]See Tibawi. Op. cit., p. 36.

[26]For example see A. Shalaby, op. cit., p. 255.

[27]Ibid, p. 253.

[28]Tibawi. Op. cit., p. 70.

[29]Ibid., pp. 70-71.

[30]Abū Ḥamīd al-Ghazālī. The Alchemy of Happiness. (Lahore; Ashrat, 1966), Quoted in Z. Sardar, op. cit., p. 33.

[31]See Fazlur Rahman. Islam & Modernity. op. cit., p. 34.

[32]Ibid, p. 35.

CHAPTER TWO

ISLAMIC POLITY: IDEALISM AND REALITY

Perhaps the least developed, though highly complex and controversial area in Islam is its politics. The main reason for this fact is that politics in Islam is always thought of as an integral part of the whole Islamic system. It was never approached or studied by early Muslim scholars - in theory at least - as separate from religion, though in practice it was.

It is within this context we should understand Professor H. A. R. Gibb's comment that "unlike the men of the West, the medieval Arabs gave little thought to politics".[1]

This important fact is further explained by Erwin I.J. Rosenthal who, when commenting on the original works of two medieval Muslim writers, observed that, "They were . . . . not political philosophers, and politics as a discipline did not interest them. They were exponents of one of the four recognized schools of law, and politics found a place in the fiqh books mainly because of its combined religious and legal aspects as embodied in the Islamic constitutional law, and because the Caliphate, as the frame within which the life of the Umma was lived, was viewed as the successor of Muhammad's religious-social-political community of the faithful."[2]

It is this profoundly complicated nature of politics in Islam, as reflected in its origin in the Qur'an and sunnah, and the practice of the early four "Rightly Guided Caliphs"

and its development through various courses in history, that concern us here.

There is no doubt that the caliphate as an institution is based on the Qur'an. Three verses are relevant for our purposes; the first stresses the caliph's duty to act as a judge as the Prophet David was commanded: "O David! Verily we have established thee a khalifa (vicegerent) in the earth, judge thou truthfully between men . . .".[3] The second emphasizes obedience to those in authority who come next only to the Prophet. "O ye who believe! obey Allah, and obey the messenger and those of you who are in authority."[4] The third reads: "And lo! this is your ummah (community) is one ummah and I am your Lord . . ."[5]

To start with, all the controversy over the question of the Islamic caliphate and the legal, and political differences resulting therefrom, can be reduced to either misunderstanding or deliberate misinterpretation of any of the above three verses, and their role in the history of politics in Islam.

If we decide, for our purposes, to set this controversy aside, and then move to speak on the ruler-ruled relationship in Islam, we can safely say that, in Islam, the ruler-ruled relations are governed by the Islamic social contract. The purpose here is to show to a fair extent the evolution of this contract from the time of the Prophet as the architect of early Muslim ummah, in order to find out the real forces

behind the ever-existing tensions within the so-called "modern" Muslim states.

Our basic premise is that the political theory of Islam starts from the sovereignty of Allah (God), with man as viceroy (2:30). Two outcomes of the theory of divine sovereignty are absolute equality before the law and the limitations of man's power of legislation. These two factors, besides a united Muslim community under the "one" elected caliph, form the "ideal" Islamic state originally founded by the Prophet and continued by the rightly-guided caliphs in al-Madinah.

We must also never lose sight of the significant fact that the Arabic term ummah, as understood from the draft of what has come to be known as the "Statute of Medina," is intended to refer to the small band of the first followers of the Prophet. A second though less significant fact is that the term ummah also denotes originally a religious community, not necessarily of Muslims, since it is also applied to the Jews of Medina who are an ummah in themselves as distinct, according to the "Statute" from both ummat al-Islam (community of believers) and al-nas (others).[6]

The "Statute of Medina" was Islam's first constitution. Its intent was to regulate the economic and social affairs of the city by establishing rules and procedures for conflict resolution, including disputed settlement arising from war.

It was contracted between various communities (Muslims, Jews, others) of al-Madinah under the leadership of the Prophet.[7]

Despite its lucidity and conciseness, the "Statute" stands as a rich source for an endless controversy over its interpretation, implementation and relevance to our day-to-day problems.

While some scholars view it as "secular in nature, and relative to time and location",[8] others hold to the opinion that it is ". . . the model for the constitution of the Islamic empire since . . . faith is the link" and "political unity aimed at becoming a unity of faith."[9] In addition to its contents and inferences, another controversy arises as to the Prophet's capacity at the time he drafted the "Statute". That is, did he conclude it as a Prophet or as an ordinary human leader? We must neither underestimate nor overlook the distinction for its relevance to the original nature of Prophet Muḥammad's mission. In other words, without full appreciation of this apparently simple fact, the whole history of Islam may be reduced to "nonsense".

Based on our own understanding of the "Statute" in the light of the controversy over its religious or secular nature, and the interpretation that consequently follows, we would approach the following challenges that every student of law and politics in Islam shall face. These challenges, according to their importance, are:

(A) Secularism

The "Statute" is significant for any secularist from several points of view. Secularists claim that it covered only temporal matters. It excluded scripture, and is relative only to its time and location. In other words, it is devoid of any binding religious force on contemporary Muslim society. Finally it demonstrates the significance which the Prophet himself attached to material and temporal pursuits. It was relative in time and location because it dealt with current social and economic needs, and problems relevant to the people of Medina at that time. Since the city included traders and Jews, and since this was a time of war and conflict, many of the clauses of the 'Statute' naturally related to the regulation of trade, to the conduct of war and peace settlements through blood-money, and to the Jews.

The detailed attention in the document to the Jews betrays the special status of the "People of the Book" as a tolerated minority in the Medinan State. Further, the "Statute" signifies a great social, economic and political reform in conformity with the Islamic ideal of social justice. It sets a secular model and precedent, giving high priority to the orderly regulation of earthly pursuits. If this model and precedent had been observed in later periods, Islam would have evolved as a religion closer to "Protestant ethics rather than one of military conquest."[10] This is, in brief, the secularist interpretation of the "Statute of Medina".

The Egyptian Azhari Ali Abdul Raziq in his al-Islam wa Usul wa Usul al-hukm provided the secularists with a good, well-documented scholarly argument based on traditional Islamic methodology, and on which they have been counting ever since. While another Azhari has helped by adding fuel in his Min Huna Nabda'; I mean none other than the notable Khālid M. Khālid. However, apart from these two distinguished scholars, secularists in modern times have found no real support in a technically religious way as perceived traditionally.

However, going back much earlier, secularists have also tried to find some traces of religious support in the illustrious medieval scholar Ibn Khaldūn's Mugaddimah, which indicated very clearly that the caliphate was not an article of faith for all Muslims, but rather represented the culmination of Arab asabiyyah (solidarity). With the caliphate's decline, other types of asabiyyah could and did, in fact, arise.

Albert Hourani has stated, in the time of Ibn Khaldūn (1332-1406), "the new 'asabiyyah was Turkish in the eastern Islamic world, Berber in the western. The 'ulama' being mainly of Arab origin, can have no share in the process of government on either flank of the Muslim world."[11] This simply meant to the secularists that the notion of asabiyyah, not faith, continued to be of relevance whenever and wherever any groups, Muslim or non-Muslim, have merged together on a viable ideological platform. It is this elusive quality of

asabiyyah which encouraged Ali Abdul Raziq to defend Ibn Khaldūn and to claim his Muqaddimah as the inspiration for his own thought. Abdul Raziq, like Ibn Khaldūn, attempted to set forth a rational, text-bound salafi (traditionalist) reasoning in promoting his liberal views. It has been suggested that Abdul Raziq advocated the basis for a Muslim, as distinct from an Islamic, state by extrapolating into the modern era Ibn Khaldūn's notion of mulk, the power-based state founded on political expediency (siyasah 'agliyah).[12]

It is Ibn Khaldūn's concept of siyasah agliyyah, as opposed to Ibn Taymiyyah's Siyāsah shariyyah (administration according to and by means of the shariah), that projected him as a forerunner secularist. Hence his Muqaddimah was banned by the traditional ulama of al-Azhar, and his views on asabiyyah were denounced as "a blasphemy for the Muslim conscience and view of the world", asabiyyah being "the epitome of the pagan, aristocratic and tribal spirit."[13]

A less vitriolic view of Ibn Khaldūn was taken by Abdul Raziq's major opponent, Rashid Rida (1865-1935), an exponent of Ibn Taymiyyah (d. 1328). Rida viewed Ibn Khaldūn as having exaggerated the notion of 'asabiyyah. Thus, in Rida's opinion, he was "elevating it to serve as the motivating force of political action, dynastic succession and even prophetic mission."[14]

It becomes clear from the above exploration that Rida represents the traditionalists, who profess the belief that

Prophet Muḥammad provided leadership and guidance to his followers in both spiritual and "mundane" matters. As the ideal ruler of the state of al-Madinah, he created the framework for producing both the good man and the good citizen.[15]

The Prophet's role in the whole structure of authority given in the Qur'an can be put into the following relationships: God-Prophet-Man. While there is no controversy among early Muslims over the Prophet's role as judge and teacher (Qur'ān 4:65; 62:2), disagreements exist among Muslims on the structure of authority based on the God-Man relationship. Is such a structure political? In other words, does one become a good Muslim through the agency of the state? While the traditionalists say "yes", secularists persistently answer "no."

As an attempt to find the Muslim Community a way out from its long-lived dilemma, Professor Z. Sardar approached the problem through this query: What would the visions of alternative Muslim futures be based on? "We," he answered, "think that such visions should try to capture the dynamic of the Medinan state established by the Prophet."[16] He continued to elaborate on the subject through his emphasis that there are two particular aspects of the Medinan state civilization that should be realized. First, the Medina state was built on certain spiritual, moral and cultural values. These, for him, form the immutable value system of Islam. To

emphasize their permanent character, he refers to them as the 'fact' of Medina state. Second, there seems to him an underlying dynamic which gave the Medina State its vigorous character and vibrant energy. This is the expression of Islamic ideal and norms, in their own particular way, by the members of the Medina State. He concludes that while the fact-component remains "unchangeable," the "style-component can, of course, change with time".[17]

This conclusion may help us partially to solve the problem of permanence and change in Islamic politics. But still we need someone to decide as to the dividing line between 'fact' and 'style' in reality and not on paper.

(B) Nationalism

In his Whither Islam?, Professor Gibb, as regards the unity of the Muslim world, raised this question: "Are the bonds of unity strong enough, to maintain the solidarity of Islamic society, to govern the outlook and development of its people, and to mark them off as a distinct cultural group?"[18] Fundamental to his answer is whether in their "conceptions, their organizations, their attitude toward new problems, their internal spiritual and material evolution, the Muslim peoples will show a common tendency, will draw from a common stock, and be guided by the sense of a common task and common goal, or whether the pressure of new ideas and new needs will drive them ever further apart, and succeed finally in shattering the fabric of Islamic society."[19]

The words "common tendency", "common stock", "common sense", and "common goals" remain constantly vital throughout the rest of this chapter. Is there anything in Islam which makes it incompatible with the idea of nationalism and with the institution of the nation-state?[20] Can the present Muslim rulers stand as legitimate successors for the past governors of the early Muslim regions such as Iraq, Syria, Yemen, Bahrain and others?

Invoking the traditional legal and political theory and relying principally on the Qur'ān and the historical experience, and "modern" practice in the Muslim world, we may find ourselves inclined to say, with little reservation, "No." However, we may be judged as jumping to a conclusion that may not actually be supported by facts.

If we, the Muslims, want to discuss any issue, we will first go to the Qur'ān as our basic legal source. But the Qur'ān, like all other fundamental documents, is no more than a main guideline in this respect, and above all, "it is what the reader makes of it."[21] Ask any two learned Muslim scholars, "Does the Qur'ān support nationalism, socialism or capitalism, democracy or dictatorship, polygamy or monogamy, . . etc?" and the answer depends on what one hopes to find.

In this regard, I can safely argue that apart from the five pillars of Islam, and the six pillars of faith (iman), there is no agreement among Muslim scholars on any other major issue. Their disagreement is not a problem per se. The

problem is that Muslims throughout their political history knew only one way to settle their disagreements. That way has been, with great regret, force.[22] This is the problem.

Relying on the Qur'ān, exponents of nationalism view Islam and nationalism as in natural harmony. According to them the Qur'ān speaks of the reality of divisions of men into sects and nations.[23] However, though accepting nationalism as a fact of life, and the differences of geography, custom, and culture among the Muslim states as a reality that conditions their differing constitutional orders, they, on the other hand stress their point that nationalism should not detract Muslims from the larger sense of fraternity that all believers share.[24]

This qualified nationalism brings us to Fazlur Rahman's distinction between social nationalism and political nationalism. The former involves the "cohesiveness of a group," and the latter involves loyalty to a nation-state. According to him, the Turkish or Egyptian peasant can be a social nationalist, experiencing a sense of common ties of culture, language, and history with other Turks or Egyptians, without losing the sense of belonging to a greater Islamic whole. But when he becomes a political nationalist, his loyalty and identity become secular and clash with the Islamic ideal.[25]

Piscatori saw this distinction as "arbitrary" and not borne out by practice. And he further, rightly, observed that

Fazlur Rahman's thought on nationalism would leave something very much like Mawdudi's "fundamentalist" thought on the subject. Nationalism, in the sense of identification with the nation-state, is predicated on secularism. And "secularism," in Mawdudi's as in any other "fundamentalist" thought, "destroys the possibility of the unity of the Umma".[26]

Piscatori like many other western observers, may not be fully aware of the dilemma being lived and experienced by Muslim intellectuals through their life. In his particular case, Fazlur Rahman was then director of the Central Institute of Islamic Research in Pakistan (1963-1969),[27] a heavily politicized, and prestigious institute. As its director, Fazlur Rahman had to compromise and not swim against the current. He later decided to speak his mind anyway, but was not only dismissed from his post but advised to leave the country as well. Fazlur Rahman was by no means an exception. His problem is suffered by almost any intellectual who assumes a position under the focus of Muslim public opinion formed by the Muslim masses.

It is not advisable at all for any self-respecting Muslim intellectual to position himself between the ruling classes and the traditional religious leaders. This is simply because, in Professor Gibb's words, "The ruling classes feared for their power and the advantages which it gave them . . . the prestige of authority; the religious leaders feared for the safety of the Faith. The danger was manifest to both, and

it might have been expected that it would inspire them to join together in common action in defense of their heritage."[28]

The only way available for the Muslim intellectual is to compromise, and the "deeper the cleavage between the demand of the ideal law and the political reality, the more extensive and dangerous this compromise became."[29]

Fazlur Rahman's observation brings us to Muslim nationalism in its relation to pan-Islamism. Smith observed that on its positive side, Muslim nationalism has two expressions: first, to give added intensity to any social grouping of Muslims, strikingly operative in producing Pakistan; secondly, to reach out in aspiration towards a social grouping of all Muslims. The former strengthens every Muslim nation. The latter is pan-Islamism.[30]

This sense of nationalism received an endorsement from Rashid Rida in a fatwa (religious opinion) that Indonesian Muslims solicited on the question of Islam's compatibility with nationalism. Rida opined, "The contemporary notion of patriotism expresses the unity of the people of different religions in their homeland, and their cooperation in defending the homeland they share. They cooperate to preserve its independence, to win it back if it was lost, and to develop it. . . . The type of patriotism that should adorn Muslim youth is that to be a good example for the people of his homeland, no matter what their religions affiliation,

cooperating with them in every legitimate action for independence."[31]

It is important to mention at this point that Rida was very much concerned about Ataturk's intention to abolish the caliphate and about the pre-eminence of the secular nationalists in Egypt. He thought that both of these developments were symptomatic of an Islamic malaise and at the same time intractable realities. Reform was indeed needed, but he recognized that this could not be accomplished while Muslims were under colonial domination. He acted under extremely exceptional circumstances of necessity and expediency. Rida was later incorrectly viewed to be in full agreement, at least on this point, with Ahmad Lutfi al-Sayyid who was, like Rida, a student of Muhammad Abduh. Lutfi al-Sayyid contrived to mobilize his countrymen when he told them that the only alternative to the traditional principle of Dar al-Islam (the land of Islam) is to replace it with the doctrine that is in accord with the aspirations of every eastern nation with a defined homeland (watan). That doctrine, according to him is wataniyyah (patriotism).[32]

It is valid to stress at this point the fact that the unity of the Muslim world became a unity of sentiment. This sentiment often finds expression in many ways and on different levels. For example, in the 1956 constitution of Pakistan we read, among its "Directive Principles of State Policy," clause 24 that clearly states, "The state shall endeavor to

strengthen the bonds of unity among Muslim countries". As a practical step toward the implementation of this clause the government of Pakistan established the International Assembly of Muslim Youth,[33] and has held a series of international conferences on Islamic law and economics.

It is worth noting that the ideal of an integrated Muslim brotherhood, comprehending all the faithful in a united social grouping, has from the early days of Islam been a compelling but an unrealized dream. It was deep in the religious consciousness of every Muslim. But it was the first major Islamic ideal to be, in fact, shattered by history.

The Muslim religious consciousness has not yet recovered from the shocking rift opened at the Battle of the Camel (36 A.H./656 C.E.), and subsequent history did not remedy but rather elaborated and ramified this historic disunity. However, the ideal has remained and has retained its warm attractiveness until today, though the Muslim community has in fact been fragmented through most of its history.

The real problem for Muslim scholars of nationalism is not merely that it may conflict with Islam, but how the Islamic ideas of the ummah and caliphate could go hand-in-hand with certain western concepts that nationalism generates, such as democracy, constitutionality and the nation-state.

It is safe to conclude this chapter by saying that while patriotism as a sentiment may not conflict with Islam, in

tangible reality it may. It thereby adds one more instance of the divergence between theory and practice in Muslim life.

As a result of their failure to fill the gap between theory and practice, some Muslims attempt to solace themselves through an alleged saying of the Prophet, "Difference of opinion among my community is a sign of God's mercy." But the illustrious Spaniard Ibn Hazm refuted this when he correctly concluded: "By all measures al-Ikhtilaf (disagreement) is wrath; not mercy."[34] The famous Shāfi'ī jurist al-Subkī also said, "Mercy runs counter to it".[35] This strongly refutes the claims of other jurists who argue that disagreement is as natural as a tree of many branches or a garment of many threads.[36]

However, instead of being honest with themselves like Ibn Hazm and al-Subkī, whom we have just quoted, those jurists chose to justify themselves through their attempt to put "a good face on the entrenched differences that arose in disparate parts of the Islamic empire and crystallized into the four orthodox schools of law."[37] The emergence of the schools of jurisprudence in Islamic history raises certain questions that have not been convincingly answered. Why were there schools of jurisprudence in a system that was basically individualistic? What is the nature of the relationship between such schools and Islamic politics and theology? What are the points on which the schools agree and what are the points of their disagreements?

ENDNOTES

[1]H.A.R. Gibb, "Toward Arab Unity," in Foreign Affairs (October, 1945), p. 123.

[2]Erwin I.J. Rosenthal, Political Thought, op.cit., p. 31.

[3]Qur'an 38:26.

[4]Ibid. 4:59.

[5]Ibid. 23:52.

[6]Rosenthal, op.cit., p. 25.

[7]Ozay Mehmet. Islamic Identity and Development: Studies of the Islamic Periphery (London, Routledge, 1990), p. 53.

[8]Ibid, p. 54.

[9]Rosenthal, op.cit., p. 25.

[10]Mehmet, op.cit., p. 54.

[11]A. Hourani, op.cit., p. 24.

[12]E.I.J. Rosenthal, Islami in the Modern National State, (Cambridge: Cambridge University Press, 1965), p. 85.

[13]H. Simon. Ibn Khaldun's Science of Human Culture. trans. F. Baali (Lahore: Muhammad Ashraf, 1978), p. 141.

[14]H. Enayat, Modern Islamic Political Thought (London: Macmillan, 1982), p. 70.

[15]Ishtiaq Ahmed, The Concept of an Islamic State: An Analysis of the Ideological Controversy in Pakistan (New York: St. Martin's Press, 1987), p. 45.

[16]Sarder, op.cit., p. 117.

[17]Ibid., p. 118.

[18]H.A.R. Gibb, Whither Islam?: Survey of Modern Movements in the Muslim World (London: Victor Gollancz Ltd., 1932), p. 316.

[19]Ibid., p. 317.

[20]James P. Piscatori, Islam in a World of Nation-State (Cambridge: Cambridge University Press, 1986), p. vii

[21]Ibid., p. 3.

[22]In accord with many Quranic verses (49:9, 4:35, 2:137), and the practice of the prophet and his early companions, the fourth caliph Ali Ibn Abu Talib agreed to negotiate for a peaceful settlement with his political foe Muawiyah, but he achieved that end only at the cost of his life.

[23]Qur'ān 49:13.

[24]Abd al-Rahman al-Azzam, al-Risālah al-Khalīdah (Beirut, Dar al-Shuruq, 1969), pp. 274-275, 283, 288.

[25]Fazlur Rahman, Islam (Chicago: Chicago University Press, 1979), pp. 227-228.

[26]Ibid., p. 228.

[27]Piscatori, op., cit., p. 110.

[28]Gibb, op., cit., p. 34.

[29]E.I.J. Rosenthal, Political Thought, op.cit., p. 51.

[30]Smith, 1957:81.

[31]Piscatori, op. cit., p. 79.

[32]Lufti al-Sayyid, 1946:68-69.

[33]Smith, op. cit., p. 83.

[34]Quoted in Taha Jabir's Adab al-Ikhtilaf fi al-Islam. (al-Dawhah: Matbuat al-Ummah, 1405 H.), p. 33.

[35]Ibid., p. 32.

[36]N.J. Coulson, A History of Islamic Law (Edinburgh: Edinburgh University Press, 1964), p. 86.

[37]Piscatori, op., cit., pp. 5-6.

CHAPTER THREE

ISLAMIC THEOLOGY, LAW AND MORALITY

In this chapter I will try to show that many confusions, misunderstandings and misinterpretations of basic Islamic principles occurred because Islam has always been studied and observed in the West by analogy to Christianity. Consequently, the Muslim world is seen as analogous to the Christian West, depending on the approach of each researcher and the various conditions and circumstances surrounding his study and research.

It is true that there are major similarities between Islam and Christianity, as both share a religious tradition of monotheism, prophetic mission and a revelation preserved in scripture. However, an appreciation of such similarities and many others should not lead us to overlook the real differences which exist between them or attempt to describe Islam by false analogies.

B. Lewis has correctly observed that "Muhammad is not the Muslim Christ, the Qur'an is not the Muslim Bible, the mosque is not the Muslim Church. Friday is not the Muslim sabbath, the ulama are not the Muslim clergy, and Sunnism is not the Muslim orthodoxy".[1] We may add that the founders of the four schools of Islamic Jurisprudence are not the "Fathers of the Church" as the late Professor Gibb wrongly tried to interpret.[2]

Connected to the above false analogies is another big confusion that stems, in my opinion, from the general misunderstanding of the sources, concept, and nature, as well as the definition, of Islamic law.

The purpose of this chapter is to examine the importance of the Qur'an as a primary source of law in the Muslim community, Islamic law as a combination of the divine word of God and juristic work, and the way this is connected to both Islamic theology and morality.

Taking into consideration the sensitivity and complexity of the problem, I would prefer to start by underlining the relevant basic Qur'anic legal principles, as well as the areas actually covered by the law, and by treating the question about whether Islamic law, in its existing form, is stable or changeable.

QURANIC LEGISLATION

For Muslims the Qur'an is the Word of God revealed to the Prophet Muhammad through the Holy Spirit Gabriel. The purpose of the Book is to guard the previous revelations and restore the eternal truth of God, to guide humanity to the straight path and quicken the soul of man, to awaken the human conscience and enlighten human kind.[3]

However, the Qur'an is also a book of principles and not of details. Its purpose is to state and advocate the intellectual and moral basis of the Islamic way of life.

Therefore, it is the life of the Prophet that provides Muslims with a practical interpretation and model of the Qur'anic principles.

Perhaps the most basic characteristic of the Book is its moderating or harmonizing the difference between the divine and the human, the spiritual and the material, and the individual and the collective. In this regard, the Qur'an pays close attention to the fundamental facts of life and needs of all human beings (28:77), and deals with them in such a way as to help them realize the noble objectives of their being. For this approach of moderation the Qur'an refers to the Muslims as the Middle Nation.[4] Along with this "middleness" they are called "the best of peoples evolved for mankind" (as long as they continue) "enjoining what is right, forbidding what is wrong and believing in God."[5]

The wisdom of the Qur'an calls for truth in thought, piety in action, for unity in purpose and good intention. It declares, "This is a Book which We have revealed unto you, in order that you might lead mankind out of the depths of darkness into light."[6] The Qur'an was crucial to the development of Muslim society, not only because of its artistic and intellectual preeminence, but first and foremost because of its social, moral and political role in the drama of Islamic history. However, it would be a great mistake to read or understand the Qur'an as a merely treatise on sociology, ethics, morals or politics. For the faithful

Muslims, in order to correctly understand the Qur'an as a text, it must be read as it has been intended by God: for His guidance of humanity (2:2).

It is also essential to mention at this point that the Qur'an is no more a book of law than it is a book of theology. But it does contain a number of specific commands and prohibitions that became, for legally minded people of later times, the elements of a legal system. These commands and prohibitions became the basis of the highly elaborated Islamic law or shariah, and are often referred to as "the laws of the Qur'an." "But," as correctly stated by N. J. Coulson, "the Qur'an and sunnah taken together in no sense constitute a comprehensive code of law. The legal material they contain is a collection of piecemeal rulings on particular issues scattered over a wide variety of different topics; far from representing a substantial corpus juris, it hardly comprises the bare skeleton of a legal system."[7]

Even so, it would be a grave mistake to overlook the influence of the Qur'an in the creation of one of the most legally-cohesive communities in history. It is basically because of the restrictions that the Qur'an imposes on humans prohibiting them from legislating on some major issues that Islamic theology is connected to its law. One of the these basic issues that the Qur'an deals with is the question of halal and haram (lawful and unlawful), where both Islamic theology and law overlap.

When the revelation came to the Prophet Muhammad, the errors, confusions, and deviations with respect to the issue of halal and haram were very widespread. One of the basic accomplishments of the Qur'an was to establish certain legal principles and measures for handling this vital issue, and the principles on which decisions about what is halal and what is haram were to be based. According to the Qur'an, it was a basic principle that to make lawful and to prohibit is the right of Allah alone. Moreover, Muslims see the Qur'an as exposing the error of those who make lawful what should have been prohibited. "Lost are those who kill their children in folly, without knowledge, and who prohibited what Allah has provided them, forging (lies) against Allah. They have indeed gone astray and are without guidance."[8]

According to the Qur'an, the pre-Islamic Arabs experienced great confusion regarding the criteria for making lawful or prohibiting things and actions. They permitted the drinking of alcohol, the taking of usury at abnormally high rates, the torturing of women, and killing of daughters, together with many other attitudes which caused confusion in their religion (6:140). It seemed strange to Muslims that these same people who used to kill their children had prohibited to themselves the eating of certain agricultural produce and meat of specific animals. Stranger still was that they considered such prohibitions as part of their religion, attributing them to Allah's command. In rejecting their false

claim, Allah says: "And they say, 'these cattles and crops are sacred; none shall eat of them except those whom we wish . . .' He will assurely punish them for what they had forged."[9]

Thus, the new Qur'anic system rebutted certain existing false claims, provided better alternatives, and established new rules for the development of a balanced and perfect society (2:143). Thus, the basic principle (asl) related to the settlement of the question of authority, is that of "the permissibility of things." This principle is second in importance only to the one relating to the question of lawful and the prohibited. Together they are considered the corner-stone of Qur'anic legislation. Dr. Yusuf al-Qaradawi in his book al Halal wa'l-Haram fi'l Islam (The Lawful and the Prohibited in Islam) writes: "The basic asl or principle established by Islam is those things which Allah has created, and benefits derived from them are essentially for man's use, and hence are permissible. Nothing is haram except what is prohibited by a sound and explicit nass from the Law giver."[10]

This basic principle was based on the Qur'anic verse which says, "It is He who created all that is in the earth for you."[11] Jurists may argue that Allah would not create these things, give man control over them, and count them as God's favors without giving man as His servant the ability and permission to utilize them. While, according to the Qur'an,

God has created everything on earth for man's use and benefit, on the other hand He has forbidden certain things as haram for specific purposes. However, there are only a small number of sound and explicit texts concerning prohibitions; while whatever is not mentioned in a nass as being lawful or prohibited falls under the general principle of the permissibility of things and within the domain of Allah's favor.

In this regard the Prophet was reported to have said, "What Allah has made lawful in His Book is halal and what He has forbidden is haram and that concerning which He is silent is allowed as His favor. So accept from Allah His favor, for Allah is not forgetful of anything".[12] Also Salman al-Farisi, the Prophet's Companion, reported that when the Messenger of Allah was asked about animal fat, cheese and fur, he replied, "The halal is that which Allah has made lawful in His Book, and the haram is that which he has forbidden, and that about which He is silent, he has permitted as a favor to you."[13] Based on his understanding of those traditions, Imam al-Shafi'i, who has been considered "the father of Muslim jurisprudence," in his Risalah argued that "whatever decision the Prophet passed, or any legal opinion he developed, came out of his understanding of the Qur'an."[14]

In the above mentioned hadith reported by Salman al-Farisi, the Prophet, instead of giving a specific answer to the question at issue, referred to the general criterion for

determining the halal and the haram. That criterion is that it is sufficient for Muslims to know what Allah has made haram; all else that is not specifically mentioned is permissible and lawful.

On another occasion the Prophet was reported to have affirmed the above mentioned basic rule in a lengthy hadith. Referring to the same principle but using different terms he said: "Allah has prescribed certain obligations for you, so do not neglect them; He has defined certain limits, so do not transgress them; He has prohibited certain things, so do not do them; and He has kept silent about other things out of mercy for you and not because of forgetfulness, so do not ask questions concerning them"[15]

This basic principle of natural permissibility is not limited to things and objects but also includes all human actions and conduct related to acts of worship (ibadat), though for this category the law seems to be very strict, as the Prophet was reported to have said in a sound hadith, "Any innovation in our religion is rejected."[16]

According to the above hadith anyone who invents or originates a form of worship on his own has gone astray, for only to the Law-Giver that authority belongs to originate the acts of worship through which human beings may seek His nearness and forgiveness. As for other daily matters, people presumably are left alone to do whatever may be convenient and proper for them. Interestingly, in this regard, the Prophet

may not be the right person to consult if the matter in question is exclusively worldly, as the Messenger himself had put it to his companions that they were "more knowledgeable as regards their worldly affairs."[17]

It is on the basis on the aforementioned hadith that Ahmad Ibn Hanbal and other jurists who based their judgements on a hadith maintained that "In relation to acts of worship, the principle is tawqif", that is to say, nothing can be legislated in this regard except that which Allah has legislated. According to this jurist, to do otherwise is to run the risk of being included in those referred to in the verse (ayat), "Do they have partners who have prescribed for them in religion matters for which Allah has given no permission?"[18] As far as day-to-day affairs are concerned, however, the principle is freedom because nothing can be restricted in this regard except what Allah has prohibited. Any other act to the contrary will bring the doer under the verse, "Say, do you see what Allah has sent down to you for sustenance? Yet you have made some part of it halal and some part haram."[19]

On the basis of this principle one can say that buying, selling, leasing, renting and other such matters are necessary activities for people. If the Qur'an says something concerning these matters, it is in order to teach good behaviour and prevent injustice that might result from such transactions. Accordingly, it has prohibited things which

might lead to hostility and enmity; it made obligatory that which is essential, disapproved that which is frivolous, and approved that which is beneficial. All this has been done with due consideration for the kinds of activities involved and their magnitudes and properties.

Consequently, people are free to buy, sell and lease as they wish, just as they are free to eat and drink as long as it is not haram according to the Book or the Sunnah. However, if some of these things are disapproved but not strictly prohibited in the Qur'an (2:219), Muslims are left free in this regard, since the Qur'an has not gone to the extent of prohibiting them, and thus the original principle of permissibility remains unless Muslim individuals decide to appeal to their own conscience for a prohibition. In accordance with this rule, Ibn Taymiyyah, his student Ibn al-Qayyim (d. 751/1350), and the late Hanbali jurists in general, hold that business contracts and the conditions and terms laid down in them are essentially permissible so long as such contracts contain no provision which would be haram according to the Qur'anic text.[20]

This principle is seen as further supported by a "sound hadith" reported by the Prophet's Companion Jabir Ibn Abdullah, "We used to practice azl (withdrawal) during the period when the Qur'an was being revealed." If the practice were to have been prohibited, the Qur'an would have prohibited it. That is, the Companions understood and maintained that if

the Qur'an was silent about something, it was permissible and people were free to practice it. According to this understanding, a basic principle has been established that no worship can be legislated except by the command of Allah, and no practice can be prohibited except by His prohibition.

Another fundamental principle for Muslims is that the Qur'an has restricted the authority to legislate on halal and haram matters, taking it out of the hands of human beings, regardless of their religious or worldly position, and reserving it for God alone. No one, of whatever position, rank, or status, has a right to prohibit something permissible for His servants. The Muslims were cautioned not to behave like the other people of the Book, who were seen as having put the legislative power into the hands of their rabbis and priests. Adi bin Hatim, who had been a Christian before accepting Islam, heard the Prophet reciting the Qur'anic verse:

"They have taken their rabbis and priests as lords besides Allah and the Messiah, the son of Mary, although they were commanded to worship no one except God,"[21]

Adi then argued, "O Messenger of Allah, but they did not worship them." The Prophet replied, "Yes, but they prohibited to the people what was halal and they permitted to them what was haram and the people obeyed them. This is indeed their worship for them."[22]

Muslim jurists have no legislative authority at all while their Christian peers claim that Jesus, before ascending to heaven, vested in his apostles the authority to declare things as bound or loosed as reported in Matthew 18:18, "Verily I said unto you, whatsoever ye shall bind on earth shall be bound in heaven; and whatsoever ye shall loose on earth shall be loosed in heaven". In Islam the jurists' task does not go beyond explaining what Allah has decreed to be halal and haram. However, the apostles's power might be interpreted as limited only to those individuals.

This point is clearly understood by N. J. Coulson, who stated that "In their philosophy of law the legal sovreignty of God was all-embracing. To allow humans to formulate a legal rule - whether by recognition of a customary law or by juristic speculation on a new problem - was tantamount to heresy. In the language of Islamic theology it was to set up a competitor with Allah and to contradict the fundamental doctrine of the omniscience and omnipotence of the Creator."[23] Thus the early jurists in spite of the scholarship and availability of ijtihad (independent reasoning) shied away from pronouncing judgements concerning matters of halal and haram, passing the problem from one to another out of fear of committing the error of declaring halal what is actually haram and vice-versa. In his book, al-Umm, Imam al-Shafi'i narrated that Abu Yusuf, a companion of Abu Hanifah and chief judge, said, "I know that our knowledgeable

teachers avoided saying, 'This is halal and that is haram,' apart from what they found clearly stated without requiring an interpretation found in the Book of Allah. We have been told that al-Rabi bin Khaytham said "Beware that none of you says, 'Allah has made this lawful or unlawful,' or else that 'Allah has permitted or prohibited', when Allah may then say to you, 'You lie! I did not prohibit it nor disapprove of it.'" Some companions of Ibrahim al-Nakha'i have told of his instructions to his students to say in their legal/religious judgements (fatwas), "It is disapproved' or, 'There is no harm in it,' rather than, 'It is haram' or 'It is halal,' as haram and halal are terms of much greater significance and importance."[24]

This opinion was further supported by Ibn Taymiyyah, who was reported on many occasions as saying that the jurists of the early days of Islam did not term anything haram unless it was definitely known to be so. The Companions of the Prophet did not give up the drinking of alcohol after the revelation of the Qur'anic verse, "They ask Thee about wine and gambling, Say: In them is a great sin and some benefits,"(2:219) since this verse did not definitely prohibit drinking prior to the revelation of the verses in Surar al-Ma'idah.[25] The conduct of the companions based on their understanding of the above verse should provide a good lesson to contemporary Muslim jurists who may freely invoke the word haram without having a proof, or even a semblance of a proof.

QUR'ANIC MORAL LAWS AND THE BELIEF IN GOD

According to the Qur'an, a right action is that which conforms to its rule. Since many of these rules are the rules of common morality, it follows that actions which conform to common moral rules are also right in view of the Qur'an and those which do not conform are wrong.

It is important to stress the point that no action is rewardable if God's lordship is not admitted. Hence, there are two conditions which must be satisfied if an action is to be a right and rewardable action. First, it must conform to moral rules. And second, the rules themselves must be taken and obeyed as God's command. The second stipulation, therefore, makes belief in God a necessary condition of righteous moral conduct.

Now, since actions are right if and only if both the conditions are satisfied, it follows that an action will be wrong if both the conditions are not satisfied, or if even one of the conditions is not fulfilled. We have therefore, three kinds of wrong actions:

(1) Actions which neither conform to moral rules nor are accompanied by a belief in God.(6:140)

(2) Actions which do not conform to moral rules, but are accompanied by a belief in God.(49:12)

(3) Actions which conform to moral rules but are not accompanied by a belief in God.(14:18)

The first two kinds of actions are wrong in the judgement of both the Qur'an and the common morality. The third kind is wrong only in the view of the Qur'an. But although they are not regarded to be right, they differ from the other two kinds of wrong actions in two important respects, -- namely, in the way they are referred to in the Qur'an and in the treatment which is accorded to their doers in the hereafter.

The Qur'an refers to the first two kinds of actions as sayyiat, khatiat, atham (bad deeds) etc. But it refrains from using these adjectives for the third kind of actions, namely those which conform to moral rules although they are not accompanied by a belief in God. On the other hand, it also avoids calling them hasanat or salihat (good deeds), adjectives which the Qur'an uses only for actions which satisfy both of the conditions. The Qur'an refers to them simply as amal (actions) without any qualifications of either kind. Let us consider the following two Qur'anic verses:

A similitude of those who disbelieve in their Lord, their actions are as ashes which the wind bloweth hard upon a stormy day. They have no control of aught that they have earned. That is the extreme failure.(26)

Who so denieth the faith, his actions are in vain and he will be among the losers in the Hereafter.(27)

It is obvious that the actions of the unbelievers referred to in these verses are good actions which in the eyes of the doers merit divine reward, since nobody expects

to be rewarded for his evil deeds. But they do not merit divine reward according to the Qur'an, because they are not accompanied by a belief in God. Nor do they deserve to be called perfectly right (hasan).

MOTIVE UNDERLYING AN ACTION

The Qur'an often emphasizes the importance of a good motive to please God as an essential condition of a good action (salih).[28] This does not imply, however, the exclusion of other motives. All motives are fully compatible with the motive of God's pleasure, provided they are good and provided also that the agent ultimately seeks God's pleasure by pursuing those motives.

Motives do not affect the wrongness or rightness of actions, which are solely determined by the conformity of actions to moral rules. There are right actions which are performed with bad motives and wrong actions which are performed with good motives. Conformity to rules, however, is viewed in the Qur'an in a way somewhat different from the view shared by some modern deontologists. That is, conformity to rules does not exclude the consideration of the consequences of an action in its final evaluation. It appears that from the Qur'anic perspective the evaluation of an action depends upon the nature of the action and its consequences.

The Qur'anic rules are incumbent in varying hierarchical degrees. Pleasing one's own parents is more incumbent than

pleasing one's own friends. But obedience to God is more incumbent than obedience to parents. To save life is a higher duty than to speak the truth, and so on.[29]

Consequences are taken into consideration not only when one has to decide between a right and a wrong action, but also when one has to choose the lesser of the two wrong actions in a situation of necessity. As was indicated above, there are two principles to guide the choice in complex situations, namely, the nature of actions and their consequences. It is only on this twin basis of the nature and consequences of actions that the division of human acts by the Muslim jurists into five categories of mubah (permissible), mustahabb (commendable), fard (obligatory), makruh (undesireable) and haram (forbidden) can be explained and made intelligible.

Epistemologically speaking, the moral rules of the Qur'an are mostly known by common sense, independently of any prophetic revelation. Speaking the truth, keeping promises, and showing gratitude are a few instances in point.

There are other rules which are known through revelation, either wholly or in part; our human faculties are claimed to be insufficient in varying degrees in apprehending them. Prohibitions of some relations in marriage, and the injunction on certain commercial transactions are examples of such rules. Later thinkers of Islam who intend to reduce all our knowledge of the Qur'anic moral rules to one type or the other would therefore seem to be mistaken.

THE CONCEPT OF LAW

The argument that the Islamic concept of law is absolute and authoritarian and hence immutable, has been advanced from two points of view. The first point deals with regard to the source of Islamic law as the will of God, which is absolute and unchangeable.[30] The second point of view springs from the definition of Islamic law. Here it is demonstrated that Islamic law cannot be identified as law in the proper sense; rather, it is an ethical or moral system of rules. The first view, thus, treats the problem of the concept of law in terms of the distinction between reason and revelation; while the second view deals with it in terms of the distinction between law and morality.

The arguments in regard to the first view take into consideration two subject matters: (i) law and theology, and (ii) law and epistemology.

J. Schacht has strongly argued in his article, "Theology and Law in Islam," that "there has always been a close connection between Islamic law and theology; and certain isolated instances of separatist trends are only accidental." He has demonstrated this connection by citing the fact that "the schools of law and their founders showed their interest both in law and theology."[31] The connection between law and theology must not be understood in the sense that law was theological so as to be a counterpart of "divine law" or "canon law" as in Christian teachings. "Islam," as Schacht

put it, "is a religion of action rather than of belief."[32] Hence a "theology" in Christian sense could not be conceived of in Islam. The argument asserting the theological foundations of the concept of Islamic law is advanced simply to stress that the source of law is divine will, and not human reason.

C. H. Toy has put forth this idea in a different manner by comparing the Greek and the Semitic concepts of law. He found that Semites conceived law as absolute, revealed by God; whereas the Greeks worked out the idea of natural law. The absolute law of the Semites, according to Toy, is external, imposed on man from without, by God, while the Greek conception is of inward law which is part of man's nature.[33]

The first evidence advanced by the advocates of the immutability view concerns the divinity of the sources of Islamic law. It is argued that Islamic law has its basis in divine revelation through the Prophet; it is embedded in the Qur'an and hadith. Being divine, or divinely inspired, these sources are believed to be sacred, final, external and hence immutable. It is in this sense that scholars such as N. J. Coulson,[34] H. A. R. Gibb,[35] and M. Khadduri have understood Islamic law as divine law.[36]

S. G. V. Fitzgerald and others have disagreed with the view of the above scholars. They argue that the strictly legal materials in these "revealed" sources are limited and negligible. Furthermore, this material is more concerned with

religious and moral teachings than with matters strictly pertinent to law. The whole body of Islamic law, therefore, cannot be called revealed and sacred when the amount of legal material existing in the revealed sources is very little.[37]

The second argument advanced by the advocates of the immutability view takes the question of the sources of law in a more abstract sense. It contends that Islamic law has its source in the will of God. Gibb has expressed this view as follows:

"The conception of law in Islam is thus authoritarian to the last degree. The Law which is the constitution of the Community, cannot be other than the Will of God, revealed through the Prophet.' This is a Semitic form of the principle that 'The will of the sovereign is law', since God is the sole Head of the Community, and therefore sole Legislator."[38]

The concept of the will of God has theological implications which render it entirely absolute and immutable. The reason for this situation Gibb found in the nature of the development of Muslim theology. Gibb argues that because of its radical stress on monotheism, Islamic theology refused to admit any limitations whatsoever upon the power and the will of God.

The arguments in respect to epistemology of Islamic law have referred to two respects of the problem: a) the possibility and method of knowing the law, and b) the role of human reason.

Gibb argues that Islamic law is thought of, not as a product of human intelligence and adaptation to social needs and ideals, but rather of divine inspiration which is unquestionably immutable. According to Gibb, the Qur'an and hadith are not the basis of Islamic legal speculation but only its sources. The real foundation of the law is to be sought in the attitude of mind which determined the methods of utilizing these sources. The ultimate reason of such a mental attitude is the metaphysical, an a priori conviction of the imperfection of human reason and its inability to apprehend by its own sole powers the real nature of the good, or indeed of reality whatsoever.[39]

As a corollary of this concept of the epistemology of law, no primary role is allowed to independent human reason in lawmaking. Schacht, however, has pointed out that as a consequence of such an epistemological attitude, a number of "irrational elements have survived in the Islamic law".[40]

However, for Muslims the principle in Islamic legal theory that implies the employment of reason in knowing and interpreting law is maslahah which always remains open because of another principle i.e., ijtihad, maslahah has been classified by some scholars as a rational principle. This classification has clearly been disputed by other scholars like J. Schacht.

Gibb, however, maintains the position that Islamic law was an ethical system in contradistinction to a legal system.

Yet it was not a rational or philosophical system, as it sought its basis in revelation. The main points in his argument that distinguish Islamic law as an ethical system from a legal system are the following:

(a) the classifications and categories of actions in Islamic law are moral, not juridical. The five categories of obligatory, recommended, indifferent, reprehensible and forbidden which cover all human actions, are moral and ethical. "For many derelictions the penalties are religious, not civil, and sometimes no penalties are laid down at all."[41]

(b) Islamic Law speaks of duties not of rights. In other words, there is much more emphasis on what one ought to do rather than upon what is one entitled to claim as a right. The term huqug, even though it means "rights" in a sense, nonetheless does not contradict the point. In Islamic law, huqug are divided into those belonging to God and those belonging to men (6:141; 17:26; 30:38). Subsequently, the latter are subordinated to the former. And this fact renders them religious and ethical duties rather than rights in the strictest meaning.

(c) Penalties and sanctions in Islamic law are religious and moral, not civil and legal. The term used for penalty, even in matters belonging to penal law, is hudud Allah (the limits of God), which stresses the fact that a certain offense

has been committed against God and that it is God's right to impose penalty.[42]

As an attempt to explain and aid an understanding of how theology, law and morality interrelate in Islam, the original sources and nature of Islamic law, and the place of human reason in Islamic legal theory, I have developed a model which describes and classifies various elements of the Islamic legal mechanism.

Our purpose here is to examine main areas and concepts in order to clear up misunderstandings and confusions about basic Islamic terms such as Islam, iman, usul, sharia, figh and taqwa. This attempt will also way help increase our understanding of the legal process in Islam and its relation to Islamic theology, as we have mentioned in Chapter Two of this dissertation.

A very basic model is made up of a circle (Figure 1) which in a very simple way represents Islam as a complete pattern of life. Inner circles 2, 3, 4, 5 and 6 respectively represent iman (faith), usul (roots), shariah (law), figh (jurisprudence) and makarim al-akhlaq (morality) as shown in Figures 2, 3, 4, 5 and 6.

While this model is relatively simple, it does imply some of the complexities of the legal process. We should always bear in mind the point we have already made, that the connection between law and theology in Islam must not be understood in the sense that law was theological and a

counterpart of "divine law" or "canon law" as in Christian teachings. "Islam", as Schacht put it, "is a religion of action rather than of belief." However, an action not based on a solid belief would not count, as we have seen earlier in this chapter.

The model specifies that every aspect of a Muslim's life is seen and hence evaluated from within Circle 1, Figure 1, (Islam). In other words, whatever a Muslim may think, say or do must fall within that circle, which for our purpose represents the Islamic boundary.

The above observation is based on the Qur'anic verse 49:14, which sets a frontier between Islam and Iman as it is indicated by Circle 2 (Figure 2).

"The desert Arabs say "We believe." Say, "Ye have no faith; but ye (only) say, 'We have submitted our wills to Allah,' for not yet has faith entered your hearts."

In his commentary on the Qur'an, Yusuf Ali mentioned that, "The desert Arabs were somewhat shaky in their faith. Their hearts and minds were petty, and they sought of petty things, while Islam requires the complete submission of one's being to Allah." He continued, "This is what you ought to prove if your faith has any meaning, but ye only say it with your tongues."[43]

From the above quotation it becomes clear that iman requires, besides submission, a sincere action.

"Cnly those are Believers who have believed in Allah and His Messenger, and have never since doubted, but have striven with their belongings and their persons in the Cause of Allah: Such are the sincere ones."[44]

Iman, according to the verse, is not at all a wish or desire. It means, in truth and reality, Islam in action.

About the early desert Arabs, much as for many Muslims today, Yusuf Ali continues, "You say (or perhaps even think) that you are Muslims, but where are the fruits of your faith? Allah knows the innermost motives and secrets of your hearts, and you cannot deceive Him by attaching a certain label to yourselves'. Alas!" he said, "that answer to the desert Arabs is true of so many others in our own times."[45]

So it must be clear by now when we say Islam, we specifically mean the outer circle that encompases all the other circles.

Both Islam (Circle 1) and iman (Circle 2) remain an issue of theology, and they are mainly concerned with aqidah and ibadat (the God-man relationship). At this point we can say that iman is, according to the verse, a step forward toward perfection (Figure 2) through action, so that a mu'min (faithful) is a believer in Islam whose belief pervades all his actions while the perfection he is seeking, for our study, means that of a religious society in a state governed by divine law, ethics and morality.

Rosenthal observed that, "By giving the highest good a religious content by relating it to the God of revelation in the form of law, they [Muslim philosophers] transformed the merely metaphysical concept of [Aristotle] into a religious value." (46) While Rosenthal's observation remains valid and correct as to the religious content that the Muslims added to the "highest good," he was confused as regards its relation to the God of revelation in the "form of law" (emphasis added), because, as we will see later, not every religious content is necessarily in a form of law. It is to clear up this type of confusion that our model is developed.

In their quest for "perfection," a Muslim individual or community will always remain faithful to their basic sources. That is, the Qur'an and sunnah, identified as usul in Figure 3. As we have already observed in our introduction to this dissertation, while both the Qur'an and sunnah form the basic sources of usul al-fiqh, there are two other major sources, namely, consensus (ijma) and analogy (qiyas). These together form the four main sources. The Qur'an, sunnah, ijma and qiyas are taken together in this order and in sequence according to their importance since the time of al-Shafi'i (d. 204/820).

Professor John L. Esposito in his article on "The Sources of Islamic Law" decided to reverse this unanimously accepted order and sequence by placing analogical deduction (qiyas) ahead of consensus (ijma). Had this been the correct order,

there would have been no issue to raise among contemporary Muslim thinkers since everyone in his own way has shown his concern about qiyas having priority over ijma' (see Fazlur Rahman's Islamic Methodology in History). In other words, the whole problem would have been solved had Esposito's order been correct. Unfortunately, it is not. Qiyas is in fact, another term for ijtihad. Had this been given precedence over ijma there wouldn't have been any problem in Islamic legal methodology.

Now we are in Circle 3 (Figure 3) of our model. In order to avoid confusion it should be pointed out that the term usul is employed in a strict sense to mean usul al-fiqh (sources/principles of Muslim jurisprudence). Specifically, it refers to the Qur'an as the Absolute Frame of Reference, and sunnah as its By-laws of Interpretation, ijma' of the mujtahids, and qiyas (It may, for our purposes, include other sources like istihsan, istishab, maslaha, urf . . etc.) This, in brief, provides the general frame of reference for every Islamic movement in its move toward "perfection". Thus, Circle 3 represents a level of general social cooperation and movement that distinguishes it from Circle 2. Every movement in the Muslim world could be judged from the standpoints of Circles 1, 2 and 3 and the questions asked about them could generally have the following format: where do they fall? (Circle 1), what are their actions? (Circle 2), and what are their sources? (Circle 3).

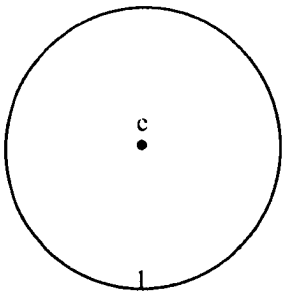

Figure 1 (Islam)

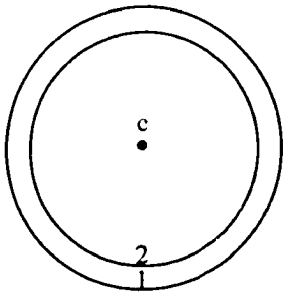

Figure 2 (Iman)

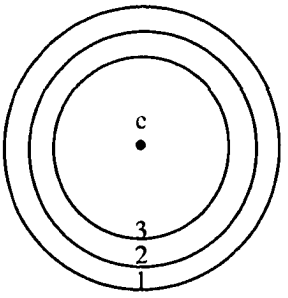

Figure 3 (Usul)

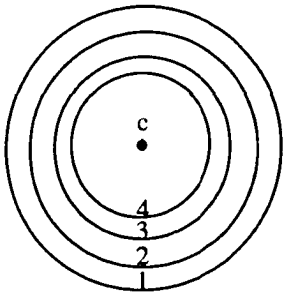

Figure 4 (Fiqh)

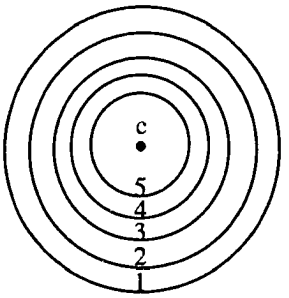

Figure 5 (Sharia)

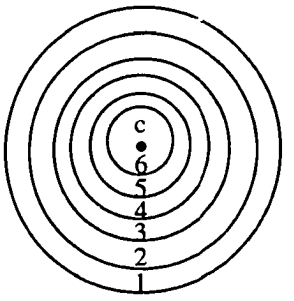

Figure 6 (Taqwa)

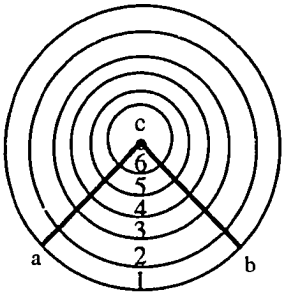

Figure 7 (Perfect Muslim State)

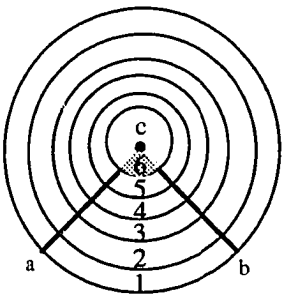

Figure 8 (Decline)

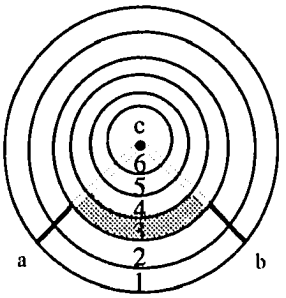

Figure 9 (Ijtihad)

For its success or failure, the answers to the above three questions are essential, urgent and prompt. In other words, no delay may be excused in this respect under any circumstance. Furthemore the vitality and significance of any issue depends in the first place on its placement in the model.

Circle 4 (Figure 4) refers to the jurisprudence. The question fiqh can be called law is a source of ambiguity to Western scholars. The problem comes from the fact that the English term "law" has no equivalent in Islamic legal terminology, as the word "law" in the Western world has a special sense which is not conveyed by the Islamic terms. So it becomes obvious at this point that we have a linguistic problem whenever we try to compare Islamic fiqh to western law.

Because of this problem some western scholars fail to see the sharp difference between what comes under the heading of ibadat (rituals) and that which is classified as mu'amalat (transactions) in Islam. The theocratic and religious nature and details of the ibadat have always been exaggerated in comparison to the general civil guidelines for the mu'amalat. The former were often stressed to the point of ignoring the role of human reason in carrying out the divine will, as we have seen in Professor Gibb's remarks on Islamic law as a product of divine inspiration. The theocratic origin of Islamic law as emphasized by Gibb should not prevent us from

appreciating the actual nature of the Islamic legal system as developed by early Muslim jurists and sanctioned by the government authorities throughout most of Muslim history.

The point I want to make here is that fiqh becomes law only when it has been sanctioned by governors and administrators. Thus Circle 5 in our model (Figure 5) is concerned about shariah as it is enforceable in Islamic courts of law, in contrast to fatwa (juristic opinion) which has no legal force.

When they write on the concept of law, western scholars always identify Islamic law with shariah, but when they come to the arguments about its ethical and moral nature they confusingly refer either to aqidah (theology), fiqh (jurisprudence), or fatawa (opinions). This is very obvious in Professor Gibb's previous observation about the classification and categories of actions in Islamic law as moral, not juridical. Gibb had in mind the five categories of wajib (obligatory), mandub (recommended), mubah (indifferent), makruh (reprehensible) and haram (forbidden) which are to cover all human actions. These, according to him, are "moral and ethical".[47]

The absence of a clear-cut frontier between what constitutes law, fiqh and morality has confused Professor Gibb, and as a result he reached this very misleading conclusion.

However, in a sharp contrast to Gibb's conclusion, P. Joseph Schacht made it clear that the ethical nature of the categories of action does not mean that there did not exist any legal subject matter in Islamic law. As a matter of fact, Schacht was correct in his observation that "the legal subject-matter can be distinguished from the other subjects." But it seems that he was also sadly confused when he took these five moral categories to indicate that even legal subject-matter is classified as an ethical and religious duty.[48] This is not to deny that in Islam obedience to the law is indeed an ethical, moral, and religious, as well as a legal, duty.

This observation brings us to the place of fiqh (jurisprudence) in Islamic legal methodology, and its relation to sharia. Fiqh is a science that deduces legal opinions (fatawa) from the sources (usul). Accordingly, shariah is only known through fiqh, otherwise shariah itself will remain abstract. To put it differently, shariah consists of the corpus of law as set out by the jurists (fuqaha) who, as of the fourth Islamic century, are categorized according to their affiliation with the four recognized Sunni schools of jurisprudence. The question whether everything contained in the Qur'an and sunnah is law takes us to fiqh. That is where the law is spelled out. So we can safely conclude at this point that fiqh constitutes the theoretical part of the law, or in the legal jargon, an original draft for the law. In

brief, the works in fiqh become law only when they are sanctioned by a government authority, or else they will stay as fatwas.

The Arabic term fatwa simply means an opinion of a jurist on a point of law or legal problem based on his own independent reasoning (ijtihad) or someone else's. A fatwa may deal with a weighty point of law, but may also deal with social issues, such as the legality or otherwise of abortion and birth control; or with ritual matters, e.g., the permissibilty of using electric shock before the slaughter of cattle; or political issues like the legitimacy of a ruler.

Since these fatwas are answers to the actual questions arising out of new social conditions, they provide a real test for the extent a legal change is needed in every part of the Muslim community. However, if not sanctioned by a law enforcing agency, these fatwas stay as binding only at the ideal or ethical level (Circle 6). Therefore, in absence of a truly God-conscious ruler and ideal Muslim consciousness, such fatwas would be devoid of any meaningful significance in the practical life of society. Non-adherence to the ideal means departure from the goal at the center of the diagrams and will, according to our model, put more pressure on the shariah as a safety net, which will presumably hold up the falling apart of society. This helps us understand why every Islamic resurgence is viewed as an expression of

disappointment which some Muslims feel about the divergence of the real from what they perceive as ideal.

For example, during my stay in Saudi Arabia, I noticed a strong discontent and disappointment about many issues, notably smoking, which, according to the unanimous fatwa of the Saudi jurists, is haram (not permitted). However, the Saudi government decided to leave it to the conscience of each individual Muslim by not intervening to sanction the fatwa through its legal enforcement agencies. The net result is an increasing number of smokers, to the disappointment of Saudi scholars and their "God-conscious" followers.

Fatawa serve the law process most efficiently at times of increasing social changes due to vast urbanization and development as has been recently experienced in the Arab Gulf states.

In case Muslim jurists fail to provide adequately convincing fatawa, and their governments work hard to screen such fatawa for the adoption of the best and most efficient from among them, the law would eventually cease to operate effectively. Consequently, people would seek other sources, such as individual fatawa, as a last resort for some, or else seek solutions from outside the Islamic circle, as in the case of western laws.

This is obviously clear in the introduction of certain external and material features of western political life for the purpose of restoring strength and prosperity to the Muslim

state. This was the aim which was pursued by the Turkish statesmen between 1839 and 1878, and on its military and economic side by Muhammad 'Ali and his grandson Ismail.[49] Gibb observed that, in their reforming attempts, "They resented the assumption commonly made by European students that the ultimate cause of the decline of the East was an unprogressive religion".[50] This apparent unprogressiveness was in fact due, in part, to the lack of competent jurists who were needed to inject new blood into the otherwise dead body. On the other hand, although they did not directly attack Islam and professed to defend it, the ideal which the reformers set before their eyes did not embody a revolution in doctrine, morals, and social institutions but in the introduction of alien and external elements which yielded, in Gibb's own words, "a disastrous failure."

Indeed, government also plays a vital role in causing any program of reformation to fail. This fact was counted by Gibb as the first reason for the failure of the reform program in the Ottoman Empire and Egypt by 1878. In his opinion, "The first reason for this failure was that the reformers were never given a fair chance".[51] In fact, the reformation did not succeed mainly because it was carried from outside the outer circle (Figure 1), contrary to the teachings of the Quran (5:44, 45, 47) which supposedly govern every Muslim's activity. Ijtihad must be carried out from within Circle 1 otherwise it would not be Islamic.

ISLAMIC MORALITY AND ETHICS (TAQWA)

The failure to hold Islamic ethics in their basically original nature as it was the case in that "ideal" state of Medina has eventually led to a disastrous rupture in the fabric of the Islamic legal system. When any Muslim ruler repeatedly in his public statements promise his people to carry justice according to the Medinan standard by quoting the famous prophetic tradition "had Fatimah the daughter of Muhammad stolen something, Muhammad would have cut off her hand" but at the same time fails to apply it, he will significantly contribute to the existing departure from the ideal. Recent experiences show that the Muslim masses were asked to obey the law while their leaders were freely left to their own conscience.[52] This simply means, in absence of a God-conscientious leader, the people would be ruled by a tyrannical and despotic dictator who would be manipulating Islam rather than mobilizing it. When ethics remain outside the law circle (Figure 6), rulers will eventually be over and above the law and whatever service they may pretend to help Islam and their communities through would be no more than a lip service. The only remedy for this disastrous deterioration in Muslim governments is through certain and effective constitutional guarantees based on the Islamic concept of mutual consultation (shura).

The failure and success of every experience of Islamic government should be judged from the standpoint of whether or

not its leaders have remained sincere to the solution of this historic problem of law and governmental institutions.

Fazlur Rahman was very much concerned about this issue when he proposed that "in building any genuine and viable Islamic set of laws and institutions, there has to be a twofold movement: First one must move from the concrete case treatments of the Qur'an - taking the necessary and social conditions of that time into account - to the general principles upon which the entire teaching converges. Second, from this general level there must be a movement back to specific legislation, taking into account the necessary and relevant social conditions now obtaining."[53]

For the codification of ethics and morality, Fazlur Rahman drew heavily on the famous Muslim Spaniard Maliki legal theorist al-Shatibi (d. 790/1388) who, according to Fazlur Rahman, opined that the eternal validity belongs only to "the general principles (usul kulliya) and not to the particulars of the Qur'an.[54] Thus, the issue becomes one of distinction between the general principles and the particulars. The problem about this kind of proposal is in its seemingly offensive nature to the minds of today's Muslims who, in Fazlur Rahman's own words, "have been for centuries habituated to think of the laws of the Qur'an in a discrete, atomistic, and totally unintegrated manner".[55] This statement shows a major contribution to the identification process of the main causes of the Muslim intellectual decline.

Another significant observation in this respect was made by Z. Sardar who attributed the decline of the whole Muslim civilization to the failure of Muslim society to develop the proper understanding the early Muslims had of the underlying dynamics of Islam. According to Sardar, "when creativity and imagination gave way to rigid formalism and rituals, unity and mutual consultation to internal conflict and power struggle, Muslim had progressively declined."[56]

Both Sardar and Fazlur Rahman agree with Muhammad Iqbal who also attributed the decline of the Muslim society to its failure to readjust to the fundamental material changes in human life.[57] The three of them concluded that it is taqlid which is considered the main cause for the decline. Unfortunately this conclusion was widely shared by many Muslim and Western scholars of Islamics who mistakenly think that the roots of the problem go back to the fourth Islamic century (the tenth Christian century) when Sunni Muslim jurists claimed that there was no further need for exercising independent reasoning (ijtihad) to formulate new rules of law. This is what is known today as "closing the gate of ijtihad" to the effect that all future activity with regard to Islamic jurisprudence or law would have to be confined to the explanation, interpretation and application of the precedents set by the recognized four schools of Islamic jurisprudence (Hanafi, Maliki, Shafi'i and Hanbali).

In fact the departure from the "ideal" began at the death of the Prophet (11/632), whose death as head of the Medinan state left behind him a rebellion of the desert Arabs who saw themselves bound only to the person of Muhammad the Prophet as long as he was living among them. Abu Bakr was not a successor of the Prophet according to their understanding of the Arabian rules of succession. That is, he was neither the Prophet's blood brother nor his son. However, Abu Bakr successfully fought for the reuniting of the community. He temporarily pacified the rebels and established the Muslim Caliphate. The forced internal unification lasted well during the time of Abu Bakr (d. 13/634), and his successor Omar (d. 23/643). The assassination of Caliph Uthman (d. 35/655) shocked the Muslim consciousness, caused a series of dissatisfaction and finally culminated itself into the Battle of the Camel (37/657) which set a landmark into the decline of the Muslim community.

The internal conflict and power struggles followed by a rigid formation of legal methodology have finally resulted into taqlid as a natural produce of the increasingly deteriorating conditions. Therefore, taqlid is rather an effect than it is a cause of the decline. More importantly, the concept of taqlid itself was invoked as a means to block the decline by sticking hard to the rules and principles of the four schools of Islamic jurisprudence.

ENDNOTES

[1]Bernard Lewis, ed. & trans. Islam: From the Prophet Muhammad to the Capture of Constaninople, vol. I (New York: Oxford University Press, 1987) p. XV.

[2]H.A.R. Gibb, Whither Islam?: A Survey of Modern Movements in the Muslim World. (London, Victor Gollanez Ltd., 1932), p. 68,

[3]Al-Qur'an 5:48.

[4]Ibid, 2:143.

[5]Ibid, 3:110.

[6]Ibid, 14:2.

[7]N.J. Coulson, Conflicts and Tensions in Islamic Jurisprudence (Chicago:Chicago University Press, 1969), p.4.

[8]Al-Qur'an 6:140.

[9]Ibid, 6:138.

[10]Yusuf Al-Qaradawi, The Lawful and the Prohibited in Islam, translated by Kamal El-Hebawy and others (Indianapolis:American Trust Publication, n.d.), p.14.

[11]Al-Qur'an 2:229.

[12]This hadith was reported by al-Hakim and classified as sahih (authentic).

[13]Reported by al-Tirmidhi and Ibn Majah.

[14]Al-Shafi'i, al-Risalah (Beirut: Dar al-'Ilm lil-Malayin, n.d.), p.224.

[15]Reported by al-Daraqutni and classified as hasan (good) by al-Nawawi.

[16]Agreed upon by Bukhari and Muslim.

[17]Khallaf, op. cit., p.44.

[18]Qur'an 42:21.

[19]Qur'an 10:59.

[20]Ibn Taymiyyah, al-Qawaid al-Nuraniyyah al-Fiqhiyah (Riyadh: al-Dar al-Saudiyyah lil-Nashr, 1972), p.114.

[21]Qur'an 9:31.

[22]Reported and classified as hasan by al-Tirmidhi and others.

[23]Coulson, op.cit., p.5.

[24]al-Shafi'i, al-Umm, vol. 7 (Cairo: al-Dar al-Misriyyah lil-Ta'lif wa'l-Tarjamah, 1966), p.117.

[25]Qur'an 5:90-91.

[26]Qur'an 14:18.

[27]Qur'an 5:5.

[28]Qur'an 2:265.

[29]Qur'an 21:63; 17:23.

[30]Qur'an 10:64.

[31]Schacht, J., "Theology and Law in Islam," in Theology and Law in Islam, edited by G.E. Von Grunembaum (Weisbaden, 1971), p. 4.

[32]Ibid. p. 10.

[33]Toy's attribution of natural law to Indo-European people and of external absolute law to Semites has been supported by Hajime Nakamura in an article "The Indian and Buddhist Concept of Law" in Religious Pluralism and World Community, edited by E.J. Jurji (Leiden: E.J. Brill, 1969), pp.131-174.

[34]Coulson, History Already cited ch. 2, n. 36, op. cit., pp. 1-2.

[35]H.A.R. Gibb, "Constitutional Organization," in Law in the Middle East, vol.1, edited by M. Khadduri and H.J. Liebesny (Washington, 1965), p. 4. Also in Gibb and H. Bowen, Islamic Society and the West, vol.2, part 2 (Toronto: Oxfort University Press, 1957), p. 114.

[36]Khadduri, M., "From Religion to National Law," in Modernization of the Arab World, edited by J.H. Thompson and R.D. Reischauer (Princeton: Nostrand, 1966), p. 38.

[37]S.G. Vesey Fitzgerald, "Nature and Sources of the Shari'a", in Law and the Middle East, vol. 1, (Washington, 1955), p. 87.

[38]H.A.R. Gibb, Mohammedanism (New York: Oxford University Press, 1972), pp. 67-8.

[39]Ibid., pp. 60-2.

[40]Schacht, J., Introduction to Islamic Law (Oxford, 1966), p. 202-203.

[41]Gibb, op. cit., p.118.

[42]Ibid., p. 176.

[43]Ali, 1410 H.:1593.

[44]Qur'an 49:50.

[45]Ali, 1410 H.:1594.

[46]Rosenthal, 1958:13.

[47]Gibb, 1957:118.

[48]Schacht, Introduction, op. cit., p. 201.

[49]Gibb, 1932:45.

[50]Gibb, 1932:45.

[51]Gibb, 1932:45.

[52]See A. A. An-Naim's Toward an Islamic Reformation, (Syracuse University Press, 1990) p. 25, and I. M. Zein's unpublished Ph.D. thesis, "Religion Legality, and the State: 1983 Sudanese Penal Code", Temple University, 1989.

[53]Fazlur Rahman, Islam and Modernity: Transformation of an Intellectual Tradition (The University of Chicago Press, 1982) p. 20.

[54]Fazlur Rahman, Islam and Modernity, p. 21.

[55]Ibid., p. 20.

[56]Ziauddin Sardar The Future of Muslim Civilization (London: Croom Helm, 1979) p. 43.

[57]Iqbal, Allama Muhammad Reconstruction of Religious Thought in Islam (Lahor: Ashraf, 1971) p. 147.

CHAPTER FOUR

ISLAMIC LEGAL THEORY

Whenever I use the term "Islamic legal theory," I mean what is known in Arabic as usul al-fiqh as distinct from the term fiqh. For the purpose of avoiding any confusion, usul al-fiqh is thus simply understood as the formal science in which Muslim jurists have dealt with legal theories, the principles of legal texts, methods of reasoning and of deduction of rules and other such related matters.

As we have already seen in the previous chapter of this dissertation, Islam means total submission and surrender to Allah. It is therefore to the Muslim the will of God, and that will alone, which determines the ultimate values and purposes of human life. The fundamental issue of the nature of law is answered for Muslims in terms of the Islamic faith itself. That is, law is the divinely ordained system of God's commands as interpreted by the Prophet. To deny this principle would be, as correctly stated by Coulson, "to renounce the religious faith of Islam."[1]

But while law in Islam is taken as God-given, it is man who must apply the law. "God proposes; man disposes." And between the original divine proposition and the eventual human disposition is interposed an extensive field of intellectual activity and decision.[2] When a Muslim court decides, for example, to grant a wife's petition for divorce on the ground that she has suffered harm as a result of her husband's bad

treatment, the decree of divorce is the human disposition which stems from the divine proposition contained in the Qur'an that wives should be treated with consideration.[3] The point we are stressing here is that between the Qur'anic text and the court's decree lies a long series of questions. What establishes the authenticity of the Qur'anic text? What are the types and nature of the rules contained therein in terms of generality and particularization? What about its verses? Are they all absolute (qati) or are a few (if any) probable (zanni)? What is the precise significance, in terms of social behavior and conduct, of the norms which are contained therein? By what authority is that significance determined and expressed in the form of legal rules which a court of law must observe, and legal remedies which it may provide? These and related questions are the task of usul al-fiqh[4]. However, some confusions arise as to the nature and task of the science of usul al-fiqh and to its relation as to both fiqh and shariah.

In his observation about the relation of usul al-fiqh to both law (shariah) and jurisprudence (fiqh), the late Professor N.J. Coulson wrote:

"The comprehensive system of personal and public behavior which constitutes the Islamic religion is known as the sharia. The goal of Muslim jurisprudence was to reach an understanding (fiqh) of the shariah. Its primary task, therefore, was to formulate the principles or sources (usul) from which such an

understanding might be achieved. Consequently, Muslim legal theory is known as usul al-fiqh, or the sources of understanding."[5]

Our observation about Professor Coulson's statement is that while he has correctly determined the goal of fiqh (Muslim jurisprudence), he is wrong as to its task. In fact, the "formulation of the principles or sources" is the primary task of the science of usul al-fiqh as we have already seen, for through it Muslim jurists deal with legal theories, the principles of legal texts, methods of reasoning and of deduction of rules, in short, with methodology. So the usul al-fiqh as we understand it is not concerned with jurisprudence directly. Rather, that is the main task of the fiqh.[6]

For the purpose of our study concerning the relatedness and influence of fiqh, shariah and usul, Coulson nevertheless remains more helpful than Schacht with regard to his opinion on this particular issue, that "the theory of usul al-fiqh is of little direct importance for the positive doctrines of the schools of law"[7]. On this point, Schacht is still better to us than Chafique Chehata who sees no relation whatsoever between the seemingly independent but, in fact, closely related sciences. Chehata incorrectly maintains that "usul al-fiqh was born independently of fiqh and developed without influencing the science of law or being influenced by it".[8] Chehata's misconception of the nature and relatedness of the

above three Islamic sciences usul al-fiqh, fiqh and shariah is due, in part, to his failure to see the comprehensive nature of the usul (Qur'an, sunnah, ijma, qiyas) and the role that they have really played in shaping the historical evolution of Islamic thought. With very few exceptions, this essential point has always been overlooked by contemporary Muslim scholars.

From among the few scholars who see the connection between the two sciences was Fazlur Rahman who wrote in his Islamic Methodology in History, "These articles [which form the book] were written under a conceived plan to show (a) the historical evolution of the application of the four basic principles of Islamic thinking - which supply the framework for all Islamic thought - viz., the Qur'an, the Sunnah, Ijtihad, Ijma', and (b) their actual working on the Islamic development itself"(9). For Fazlur Rahman, these four principles, which form the primary sources of Islamic jurisprudence are important not just because of their relation to fiqh but as the foundations of all Islamic thought. Still more important is the way "these principles may be combined and applied."

In his analysis, Fazlur Rahman relies on the early Spaniard Maliki jurist al-Shatibi, who clearly explained the relationship between usul al-fiqh and the shariah when he stated that "usul al-fiqh has the same relationship to sharia in the same way that usul al-din (the principles of religion;

kalam) is related to din". In other words, the function of the Muslim legal theorists (usulis) is to act as a bridge which connects the Muslim jurists with the sources (usul).

Upon establishing the role of the usulis in connecting the jurists with the roots of the law, al-Shatibi turned to the Qur'an as the basic source. As for any other Muslim jurist, the Qur'an, for him, is the word of God. However, his major contribution lies in his differentiation between general principles (usul kulliyah) and particulars (usul fariyyah). Drawing heavily on the Qur'anic verse in which God says, "Today I have completed your religion ..." (Qur'an, 5:3), he concluded that God had revealed all that we needed, sometimes in the Qur'an and sometimes in the sunnah. As to the question of change in the days of the Prophet, al-Shatibi maintained that the fundamental principles revealed in Makkah were permanent, and could never be changed or repealed, because they were necessary and essential matters. Abrogation (naskh) occured only in particular details, not in universals.[10] In other words, the finality and immutability of Islamic law in the days of the Prophet meant, for him, the non-changeability of fundamentals of the shariah only. Legal change is, however, possible in the particulars. By the fundamentals he meant the universal principles which were revealed in Makkah, which included, among other things, belief in Allah, the Prophet and the hereafter. These were followed by general rules such as those about prayer, alms, etc. Along with this

were revealed general ethical rules about justice, virtue, patience. However, when the Prophet moved to al-Madinah the territory of Islam had expanded. From then on, the general principles revealed in Makkah were complemented with additional particular rulings pertaining to contracts, prohibition of intoxicants, prescription of penal punishments, and much more. Also rules of worship, such as the fast and the pilgrimage, continued to come at al-Madinah.

It is al-Shatibi's distinction between the "universal" and "particular" that helped later Muslim jurists to distinguish the religious Qur'anic injunctions on rituals (ibadat) from the temporal injunctions pertaining to mundane human relations (mu'amalat). It is in the light of this distinction al-Shatibi's conclusion that "God revealed all that is needed" should be understood. Thus, totality and completion in reference to ibadat means that the entirety of rulings concerning ibadat have been revealed and that nothing else by way of ibadat is further needed. That is, no Muslim jurist may come up with a rule for increasing the daily prayers from five to, say, fifty. The totality in reference to mu'amalat means that the totality of basic principles have been revealed, the particular of which will, however, always require the involvement of human reason through ijtihad. It is in this perspective that al-Shatibi views the shariah as essentially associated with revelation, and still is able to argue in favor of the continuity and need of ijtihad by the

jurists who shall pursue the "task of applying these rules and prescriptions in further details. They search the basis of these rules in order to apply them to particular cases."[11]

One of the most perplexing problems for al-Shatibi was the diversity of opinion among scholars on the specifics of various particulars (furu) (we have slightly touched upon this matter in Chapter Two). The use of the principle of honoring conflicting opinions (mura'at al-khilaf) made the problem even more complex for him. This principle was originally developed to honor differences of opinion within the Maliki schools by treating them all as equally valid. Because of this attitude, diversity of opinions was proudly preserved from the earliest days of Maliki fiqh in Spain. Al-Shatibi felt that the principle left the body of the law without spirit, and the jurists fell into a kind of formalism that would render the law devoid of any practicality unless the real nature of the legal theory was investigated.[12] This formalism has been long before felt by the Shafi'i jurist and philosopher al-Ghazali (d. 505/1111) in Baghdad. In his Ihya, al-Ghazali strongly stated that, "The people have changed the original meanings of the words jurisprudence (fiqh), knowledge ilm, oneness (tawhid), preaching (tadhkir) and wisdom (hikmat). Fiqh has now the meaning of the ... mystery of the minutest details of jurisprudence and excessive debates on them. The man who gives attention to such a science is called now faqih

or jurist"[13]. However, Shatibi's works were dedicated to the investigation of the causes of such formalism.

Formalism showed itself in a number of situations where new practices apparently came into conflict with the teachings of Islamic law. Perplexed, the people asked the jurists to resolve the resultant problems. The jurists in their religious opinions (fatawa) made an attempt to reconcile the new practices with the existing Islamic system, or else they rejected them. Shatibi's contribution is significant for our study because he went far beyond the mere application of existing law to investigate Islamic legal theory itself with regard to the following matters:

(a) What subject matter in Islamic law was affected by social changes and to what extent?

(b) How did the Islamic legal theory respond to social changes?, and

(c) What methods could a Muslim jurist use to adopt or reject these changes?

Generally speaking, discussions of theological issues are not one of the subjects treated in books of fiqh, yet theology was a common subject in Shatibi's fatawa. It may be argued that since Islamic law is applicable to the Muslims in the first place, the question of who is a Muslim, even though, of a theological nature, is very relevant to fiqh.

One of the best examples for the connection of theology and fiqh appears in al-Shatibi's opinon on the wax industry.

Muslim artisans used to make wax candles resembling hands in prayers for their Christian customers. This resemblance apparently violated the teachings of Islam that strictly forbid any representation of the human figure in sculpture or paintings, since such arts would resemble God's act of creation. Shatibi dismissed the objection and declared this industry lawful. Quoting earlier Maliki jurists, Shatibi argued that what is really forbidden is the representation of the complete figure; a figure without its head in particular had been previously permitted in Maliki fiqh[14]. This clear case of intimate connection between theology and fiqh also indicates a new type of challenge that the Andalusian society faced.

On other occasions pertaining to taxes, Shatibi departed from the traditional Maliki views. In view of the deteriorating financial conditions, the sultan (ruler) levied additional taxes. One of these new sources of revenue was an unprecedented form of tax levied on the building of walls in or around Granada (Shatibi's town). The senior official jurist (mufti), Ibn Lubb, declared such taxes unlawful, "because they were not provided for in the shariah"[15]. Shatibi disagreed with the Mufti. He viewed taxation from the point of view of public welfare (maslahah), a concept which we will study in detail later. His idea was, and he quoted al-Ghazali (who is a Shafi'i) in his support, that the safeguarding of public interests (masalih) was essentially the

responsibility of the community. This, in my opinion, is a very essential take-off point for the Muslims' understanding of community development. In situations where Muslims could no longer carry out this responsibility, the community may transfer it to the public treasury and contribute from their wealth for this purpose. With this objective in view, the public treasury is in constant need of such contributions. In circumstances similar to those existing in Shatibi's time, the levying of new taxes was viewed by him as in accord with law and order.[16]

Shatibi extended this criterion even to zakah (the third of the five pillars of Islam). According to al-Mud-awwana al-kubra, zakah on merchandise for sale could be levied only after the merchandise was sold and after one year had passed therefrom. It was only to be levied then on the price earned from the merchandise[17]. Accordingly, artisans did not pay any zakah on their products, because, first, only a few of these products would be sold immediately and the rest would remain as potential money not yet taxable. Second, the condition of allowing one year to pass would be hard to meet if the investment in these products was an on-going process. Shatibi viewed this practice in the light of the changing economic conditions, which gave these artisans ample opportunity for production and yet allowed them to avoid zakah. Shatibi, therefore, opined that the products of the artisans should be taxed, as they were potentially sold

merchandise.[18] Thus, al-Shatibi once more sides with the government. This indeed does seem proto-modern.

A rather conspicuous impact of the changing economic conditions was in the field of contracts and obligations. The demand for raw materials in foreign markets generated extensive trade activities within Spain. On the other hand, these trade demands were confronted with the rising number of the population and the scarcity of resources within al-Andalus. It was quite understandable that such a situation necessitated the freedom of contracts to meet social demands.

In practice a number of new and relatively complex forms of contracts emerged which did not always meet the stipulations of Islamic law. Actually, in the classical Islamic legal theory there were no clear-cut specific forms of contracts. Both the Qur'an and sunnah insisted on avoiding usury (riba) and excessive risk (gharar) (Qur'an, 2:275-8; 3:130; 4:29; 4:161), and thereby put some restrictions on a number of commercial transactions. Despite such restrictions, some scholars of Islamic law showed much flexibility in adapting the law to the changing conditions and circumstances. We are concerned with two controversial concepts which, in our opinion, significantly contributed to the flexibility of Islamic law and its adaptation to the changing circumstances of time and place. The first one is custom ('urf), and the second is public interest (maslaha).

URF AS A SOURCE OF LAW

'Urf is one of the most controversial topics among Muslim scholars and jurists. It has, from the earliest phase in the history of Islamic law, stimulated lengthy discussions as to whether or not it may be considered one of the sources of Islamic law. The early debate ended in favor of the recognition of 'urf as a source of law[19]. As the views of the schools of jurisprudence were recorded, the debate was renewed, centering this time on the possibility of applying an 'urf of the kind not mentioned in the recognized manuals, that is, the urf of an area not known to the early jurists.

The importance of urf was clearly demonstrated in the Prophetic tradition, in the practice of his companions, and in the interpretations of the founders of the four schools of jurisprudence. We shall soon see to what extent it is true to say that one of the reasons which divorced Islamic law from actual practice was its non-recognition of various peoples' 'urf. For in reality, Islam was not a legislative revolution directed against all that was established and practiced by the pre-Islamic Arabs. In fact, the Prophet confirmed a number of rulings which were exclusively based on pre-Islamic Arabian customary law. Examples of such rulings may be found in almost every area of the legal field.[20]

In family law, for example, the Prophet's wife 'A'ishah clearly indicated that the Prophet approved one of several forms of marriage contract which were known to the Arabs

before Islam; other systems were disapproved of and consequently became illegal[21]. In this particular case, no one can claim that Islam invented its own original form of contracts, since the existing one was already in practice before the advent of Islam.

In penal law as well, the whole system of retaliation (qisas) and blood-money (diyah) was adopted from the pre-Islamic Arabian society[22]. Certain modifications were indeed stipulated in the Qur'an and in the sunnah of the Prophet, but the main idea and basic principles had already been followed a long time before the coming of Islam[23]. The main change under Islamic law was the incorporation of the principle of equality into the framework of the laws of retaliation. In consequence, either only one life may be taken for another, namely the life of the killer himelf, or an amount of compensation is to be paid to the victim's family which must be invariable and not dependent on a tribe's standing or the victim's station within his own tribe (Qur'an 2:178-179, 194; 4:92; 5:45).

Also, in conducting the affairs of the Muslim community, the Prophet did not depart from the Arabs' practice of consultation (shura). The Qur'anic injunction on this particular matter is to the point: "and consult them" (Qur'an 3:159). This teaching if further expanded by a hadith in which it was reported that "no one was more keen in practicing consultation with his men than the Prophet."[24] This is yet

another instance of the Prophet following a pre-Islamic Arabian tradition.

Manuals of fiqh contain countless discussions on contracts approved by Islamic law. Some of these contracts fall within the scope of the customary law of trade prevailing in pre-Islamic Arabia and subsequently received the approval of the Prophet. The main object of such approval was to protect the parties involved and to guarantee that every contract was given the consent of the parties to it and would not lead to unlawful gain.[25] It is possible that the customary laws approved by the Prophet were intended to provide solutions sought to satisfy the interests of the community. It is by the criterion of public interest (we will return to this later) that all customary rules are to be measured.[26]

Action in the public or communal interest which has led to the establishment of 'urf as a valid source of law may be a necessity (darurah) or a need (hajah). From an usuli point of view, there is a difference of degree between darurah and hajah as to the effect of each on the application of the law. In civil law, however, a hajah is considered tantamount to a darurah, and the practice of a habitual activity is evidence of the community need for it.[27]

During the time of Umar I (13-23/634-644) the Islamic conquests won vast areas of territory. Muslims from Arabia came into contact with existing customary laws in such areas.

So the Companions, based on their understanding of the Qur'an and sunnah, had to measure what they encountered there by the yardstick of maslahah "public interest". It is this flexible attitude toward the existing customs that led Western scholars like J. Schacht and B. Lewis to emphasize Islam's "inheritance of the ancient civilizations of the Middle East".[28]

While this observation holds true as regards the accomodation of existing customs in conquered areas, it by no means extends to cover areas of theology, which remained intact as clearly shown in our model. Some Muslim scholars insist that the Islamic legal system is complete in both principles and details and, therefore, there is no need for any adoption from, or borrowing of foreign systems. On the other hand, some Western scholars try to imply that the Islamic legal system is exclusively inherited from the ancient Middle Eastern systems. These popular allegations, though they obviously contain a certain element of truth, nevertheless mislead and disclose only half the truth. Islam may be deemed complete only in the areas of theology and ethics. In areas of fiqh, law, and sources such as urf and maslahah it should either remain open and accomadative or else it will fossilize and die.

In practice, the Companions did not close the doors on the adoption of foreign systems as long as the latter did not contradict an express rule of the Qur'an or sunnah. Thus, for example, in matters relating to public holidays and religious

festivals, they observed Islamic occasions and refrained from celebrating those conflicting with their Islamic way of life. In addition to such celebrations, violation of both Qur'anic and Prophetic teachings, such prohibited actions generally fall under "intermingling" or imitation (tashabbuh), which is not a matter of fiqh or law but of theology, since it affects the very behaviour and way of life of the whole Muslim community (circle 1).

The founders of the four schools of jurisprudence, also facing types of problems which did not confront the Companions, made further use of customs existing before Islam. Thus, Abu Hanifa held that if natural crop damage takes place, the affected farmers should not pay their kharaj (taxes) and, in justified cases, they should be entitled to financial aid to meet the loss suffered.[29] Women of noble birth were exempted in the Maliki fiqh from breast-feeding their children on the grounds that this would be contrary to the custom of their social class. This is obviously a limitation to the Qur'anic verse which commands, "mothers shall give suck to their offspring for two whole years" (2:233). Yet custom was enough in Malik's view to limit the application of this verse to mothers whose custom allows it.[30]

The Hanafi jurist and judge Muhammad b. al-Hasan upon becoming a judge in the time of Harun al-Rashid (170-193/786-809) used to call on members of various trades and professions to ask them about their custom before issuing

a fatwa (verdict) dealing with a professional practice.[31] The reason for this is the hardship liable to be inflicted when a fatwa is issued regardless of the practice to which people are accustomed.[32]

As a result of this recognition of custom, all jurists agree that when custom changes, views based on that custom should also change. In his Usul al-fiqh, Abdu'l-Wahhab Khallaf attributed the changes in the new Egyptian Shafi'i school (madhhab) from the old Iraqi one to 'urf.[33] The best illustration of the place of 'urf in Islamic legal theory is given by the Maliki jurist al-Qarafi who strongly pronounced, "Whenever 'urf changes, a jurist should follow the change. It is stupidity and ignorance to follow the fiqh manuals without regard to the custom of the people".[34] In his Ihkam, however, he carried his observation further in order to declare that "even a muqallid (follower of one of the four schools) should act according to this principle".[35]

Again I would like to stress that the only custom which is not recognized in Islam is that which contradicts an explicit Qur'anic verse or a Prophetic teaching. The reasoning is obvious; no system would recognize a practice which runs counter to its fundamental principles.

The role of custom is also important in the interpretation, understanding and application of the rules (ahkam) embodied in the Qur'an and sunnah as basic sources of Islamic law. Many rules in the Qur'an and sunnah are open to

various interpretations and the only accepted method of applying such rules is with reference to the 'urf of the place where, and the time when, it is to be applied. Thus, it is the change in time and place which makes the difference, not the law itself or its procedures.[36] For example, the Qur'anic command that every Muslim should support his family (65:7) does not precisely specify what portion of a person's income is to go to his dependents; this is to be decided according to the 'urf. Even those jurists who actually fixed a specific portion did so in view of the custom prevailing in their day. No one can honestly claim to prove otherwise from either the Qur'an or sunnah. The terms used in the Qur'an and sunnah but not clearly defined therein are to be understood in their context as determined by the Arab usage at the time of the Prophet. Accordingly, Imam Shatibi in his Muwafaqat has observed that "those who want to understand the teaching of the Qur'an and the sunnah should start by learning the customary meaning of the words as understood by the Arabs during the Prophet's time; otherwise they will run into trouble".[37] 'Urf might be used as circumstantial evidence in cases of dispute. So when a wife and a husband claim the ownership of the furniture in their house, in absence of any evidence to support either one, the case should be settled according to urf. Thus, if what is usually brought to the house is, according to custom, considered the wife's exclusive right, the husband would definitely lose.[38]

It was on this basis the Muslim jurists formulated the Islamic legal principle, "Custom ranks as a stipulation".[39]

It is the recognition of urf among other sources of law that made the earliest scholars more realistic than idealistic. Coulson got the point and rightly recorded, "The earliest scholars in the law schools also were often men of a practical outlook," referring to the Malik's early doctrine of 'amal ahl al-Madina (the legal practice of medinese society) upon which rests Malik's work al- Muwatta. Coulson elucidated this important observation when he has astoundingly stated, "But with the jurisprudential debate which began toward the end of the eighth century and eventually produced the theory of the sources of law, came the notion of the shariah as the comprehensive and preordained system of God's command, a system of law having an existence independent of society, not growing out of society but imposed upon society from above. And the discovery of this pure law, it was felt, was a task best undertaken in isolation from practice. Muslim jurisprudence then became essentially an introspective science, concerned with the elaboration of the pure sharia law in abstracto and content to leave the mundane matter of the enforcement of the doctrine it expounded to the officials of the state. This idealism of the medieval jurists, who adopted the role of spiritual advisors to the conscience of Islam rather than practical administration of its affairs, created a decided rift between legal doctrine and legal

practice and a clear division between the role of the jurist and the role of the judge.[40]

We must say here that the "idealism" for which Islamic law has been, and still is being criticized, was unprecedently figured out by Professor Coulson as "the idealism of the medieval jurists", but not of Islam. Muslim jurists, however, should immediately direct their attention, and they must honestly study this highly important observation if they are serious about fixing the "rift between legal doctrine and legal practice".

It is time to give serious consideration also to the principle of maslahah as it is related to urf. The success or failure of the Islamic legal system eventually depends on the recognition of these two essential sources. The Egyptian scholar M. El-Awa has remarkably insisted in his writings on such recognition saying, "In its recognition of the custom based on the public or the people's interest, the Islamic legal system has been able to meet the needs and solve the problems of communities completely alien to the homeland of the Islamic religion and its legal system. Today, as in the past, one can be sure that the Islamic legal system, being as flexible as it is, will be able to repeat the same success, whenever an opportunity for its application is offered."[41] Of course, there are other factors to be considered in addition to Dr. El-Awa's above observation.

CONDITIONS OF 'URF

It should be noted here that 'urf or custom should conform to basic conditions in order to be recognized as a source of law in Islam. First, it should be commonly practiced by the community, or a community, the former being a phenomenon common to all sections of Muslim society, and the latter common to a particular group or profession, or in a particular group or profession, or in a particular area. Secondly, to be considered 'urf, a practice should be current at the time of the contingency to which it relates and on which it is to be consulted. Former 'urf is not admissible nor is 'urf which postdates the contingency. Thirdly, 'urf should not contradict an explicit provision of the two basic sources of law (Qur'an and sunnah). Consequently, alcohol consumption, adultery, usury and other similarly prohibited wrongs cannot be justified on grounds of 'urf since such offenses constitute a direct threat to the existence of the whole Muslim society. Fourthly, in cases of disputes, 'urf is to be considered only where there is not an explicit stipulation between the parties involved. If an explicit stipulation exists, that stipulation should be adopted and 'urf should have no effect.[42]

It must be noted that the operational field of 'urf is man-to-man transactions. It has nothing to do with rituals, faith, or moralities and ethics specifically designed to distinguish Islam as a way of life. From an Islamic

perspective, these areas are entirely reserved to the direct commands of God and His Prophet. It is the duty of every Muslim in this respect to "obey Allah and His Messenger".[43]

The importance of this remark appears whenever questions arise concerning the status of Islamic law when it has been confronted by the demands of social change. We have already mentioned that the distinguished level of the works of some of the fourteenth century jurists was due, in part, to their ability to handle the challenges brought against the tradition due to social changes at that time. It is essential to mention here that Shatibi, as a distinguished legal philosopher and jurist of that period, demonstrated great skills in drawing clear-cut lines between the permanent and changeable in Islamic law. In Dr. Masud's words, "The subject matters in which Shatibi rejected adaptation to social change most often were ritual and worship, family and trust. In contracts and obligations, he accepted and rejected cases almost equally, although he accepted adaptability more often than he rejected it."[44] It is clear that Shatibi, when rejecting adaptability to social change, especially in cases of contracts and obligation had in mind the explicit injunctions on unjust enrichment (riba) and risk (gharar).

In conclusion, the usual methods in the traditional Islamic jurisprudence generally have proven to be insufficient to meet new changes. Shatibi, like a few other fourteenth-century jurists, turned to the general principle in

usul al-figh. An obvious result of their efforts was that more attention was given to the subject for investigating the foundations, objectives and purposes of Islamic law. Lengthy discussions among jurists of various ranks extended to cover, in addition to ordinary figh issues, crucial subjects of usul like analogy (qiyas), disagreement (ikhtilaf) and urf. This indicates the jurists' interest in Islamic legal theory when it became clear to them that the older legal concepts had failed to answer the problems raised by the social changes. Because of his awareness of this failure, and the lasting impact it had on his mind, Shatibi, like others before him, resorted to maslahah "public interest" as a source of law. We should not forget that a change in method and substance of figh had already taken place. Such a change would logically call for a theorectical justification of the adaptation of law to social changes. We may point out here that the underlying theme in Shatibi's works is the question of morality and philosophy of law. With the exception of rituals ('ibadat), in almost all the cases he gives more weight to human interest and public good than to the strict adherence to law. This theological approach to legal obligations led him to investigate the goals and objectives of Islamic law.[45]

It is this quest for an efficient Islamic legal system that has inspired the contemporary Sudanese legal jurist Hasan al-Turabi to contribute to the subject through his tajdid usul al-figh al-Islami "Reformulatin of the Islamic Legal Theory".

ENDNOTES

[1]N.J. Coulson, Conflicts and Tensions in Islamic Jurisprudence (Chicago: Chicago University Press, 1969), p. I.

[2]Ibid, p. 2.

[3]Al-Qur'an 4:19.

[4]Abdul Wahhab Khallaf, Usul al-fiqh (Kuwait, Dar al-Qalam, 1978) p. 44.

[5]Coulson, op. cit., p. 3.

[6]Khallaf, op. cit., pp. 12, 13.

[7]Muhammad Khalid Masud, Islamic Legal Philosophy: A Study of Abu Ishaq al-Shatibi's Life and Thought. (Islamabad: Islamic Research Institute, 1984) p. 193.

[8]Ibid, p. 193.

[9]Fazlur Rahman, Islamic Methodology in History (Karachi, Central Institute of Islamic Research, 1965) p. ix.

[10]Ibn Ishaq al-Shatibi, al-Muwafaqat, ed. by Muhammad Muhiy al-Din Abdul Hamid (Cairo, Matba Muhammad Ali, 1969) vol. 1, p. 236.

[11]Ibid, vol. 4, p. 233.

[12]Masud, op. cit., p. 102.

[13]Abu Hamid al-Ghazali, Ihya Ulum Ud-Din, ed. and translated by Al-haj Muwalana Fazul Karim, Book I, vol. I, (Lahore, Kazi Publication, n.d.), p. 49.

[14]Al-Wansharisi, al-Miyar al-Mughrib on fatawa ulama ifriqiya wal-andalus wa'l maaghrib (Fas, 1314-15 A.H.) vol. 6, p. 87.

[15]Masud, op. cit., p. 127.

[16]Al-Wansharisi, op. cit., vol. II, pp. 101-107.

[17]Malik Ibn Anas Al-Mudawwanatu al-Kubra, vol. I (Baghdad: Muthanna, 1970) p. 268.

[18]Masud, op. cit., p. 128.

[19]Khallaf, op. cit., p. 89-91.

[20]Mohamed El-Awa, The Place of Custom (Urf) In Islamic Legal Theory. In Islamic Quarterly, vol. XVII (3), (1973), p. 177.

[21]Al-Shawkani. Nayl al-Awtar, vol. 5. (Cairo, Maktabat al-Qahirah), p. 178.

[22]Al-Awa, op. cit., p. 177.

[23]See M. Al-Awa's unpublished Ph.D. Thesis, "The Theory of Punishment in Islamic Law", (London, 1972), pp. 146-9.

[24]This is clearly stated in al-Jassas' Ahkam al-Quran (Istanbul, n.d.), II, p. 40.

[25]See also M. Shalabi's al-Fiqh al-Islami (Alexandria, 1960), p. 451.

[26]Shalabi, op. cit., p. 71.

[27]Al-Awa, op. cit., p. 179.

[28]Lewis, op. cit., xv.

[29]Shalabi, op. cit., p. 78.

[30]See al-Qurtibi's al-Tami Li Ahkam al-Quran, vol. 3, (Beirut, Dar al-Kitab al-Arabi, n.d.), p. 161.

[31]Shalabi, op. cit., p. 80.

[32]See this in al-Sarakhsi's Mabsut, vol. 16, (Cairo, n.d.), p. 62.

[33]Khallaf, op. cit., p. 90.

[34]See Shihab al-Din al-Qarafi's Alfuruq, vol. I, (Cairo: Dar Ihya al-Kutub al-Arabiyya, 1346 A.H.), p. 176.

[35]Al-Awa, op. cit., p. 180.

[36]Khallaf, op. cit., p. 91.

[37]Shatibi, op. cit., p. 151.

[38]Shalabi, op. cit., p. 92-94.

[39]Khallaf, op. cit., p. 90.

[40]Coulson, op. cit., p. 60.

[41]Al-Awa, op. cit., p. 181.

[42]Shalabi, op. cit., pp. 235-9.

[43]al-Qur'an 3:32.

[44]Masud, op. cit., p. 137.

[45]Ibid, p. 140.

CHAPTER FIVE

MASLAHAH AS A SOURCE OF LAW

Generally speaking, the Arabic term maslahah means interest. From an usuli point of view, it is a principle through which juridical rulings can be legitimized in the absence of any direct or explicit provision about the prohibition or permissibility of such rulings. Hence these matters fall under the concept of maslahah musalah, which is considered as one of the sources of Islamic Law[1].

Etymologically speaking, the word maslahah is an infinite noun of the root s-l-h. The verb saluha is used to indicate when a thing or man becomes good, uncorrupted, right, just, virtuous, honest, or alternatively to indicate the state of possessing these virtues. When used with the preposition li it gives the meaning of suitability. Maslahah in its relational sense means a cause, a means, an occasion, or a goal which is good. It is also said of a thing, an affair or a piece of business which is conducive to good or that is for good. Its plural form is masalih. Mafsadah is its exact antonym. In Arabic usage, it is said: nazara fi masalih al-nas, which means: "He considered the things that were for the good of the people." The sentence fi'l amr maslahah is used to mean: "in the affair there is that which is good or cause of good"[2].

The term maslahah does not appear in the Qur'an, though there are in it various derivatives of the root s-l-h. The

Qur'an, however, uses some verbs such as zalama (he transgressed/did wrong) (5:39) and fasada (he corrupted) (2:220; 26:125; 27:142) as opposite terms to saluha. Salih, the active participle of saluha, occurs thirty-six times in the Qur'an[3]. It is clear that its use in the Qur'an and throughout the early period of Islam was essentially related to the meanings of good or utility:

"They believe in Allah and the Last Day; they enjoin what is right, and forbid what is wrong; and they hasten (in emulation) in (all) good works: they are in the ranks of the righteous (Salihin)."[4]

There seems to be a confusion in equating the use of maslahah as a general term with its technical use as a source of law. It is claimed that maslahah as a principle of legal reasoning came to be used at an early period in the development of Islamic jurisprudence. The use of this principle is attributed to the Companions of the Prophet, and it is associated with Malik b. Anas, among the founders of the schools of jurisprudence.[5]

It appears from the examples given by the late usulis that the early use of maslahah may have been understood in a sense similar to that of human reason (ra'y) as opposed to revelation.[6] Accordingly, the whole problem would be solved through the Ashari Mutazali debate over the authority to determine "good" and "bad" for Muslims. The argument that "good" is "lawful" and that "lawful" must be good lays the

foundation for maslahah to emerge later as a source of law. Rudi Paret has observed that "the word maslaha as a technical term is not used by Malik or Shafii." Hence this concept, according to him, must have developed in the "post-Shafii period."[7]

Paret's observation does not remove the possibility that other terms similar to maslahah were used by pre-Shafii jurists to the same effect. As we have already noted, Islamic jurisprudence did not start with a clear-cut, defined legal terminology. It is the absence of such precise definitions that resulted in many controversies over the sources of Islamic law.[8] When Shafi'i later defined the method of reasoning in terms of sources, and insisted that the reasoning be linked with the revealed texts (Qur'an and sunnah) through qiyas, the concept of maslahah was seen, especially by Shafi'i jurists, in terms of revealed sources.

It appears that the word maslahah had come into use as a legal technical term by the time of the Shafi'i jurist al-Juwayni (d. 433/ 1042). From al-Juwayni's work al-Burhan, it seems that by his time the validity of reasoning on the basis of maslahah (as a technical term) had become a problem complicated enough to bring forth three controversial juristic opinions. Some Shafi'is, and a number of mutakallimun, are claimed to have maintained a position that the acceptable maslahah is only that which has a legal textual basis (asl). Thus, the so called maslahah mursalah (not based on any text)

and any other maslahah contradicting or not supported by any textual evidence (dalil) are not valid. The second opinion was held by a majority of Hanafis, who opined that maslahah, even if it is not founded on a specific basis, could still be used, provided that it was similar to those masalih which were unanimously upheld or textually established. It deserves mentioning here that the Hanifis used ijma as a basis and source equivalent to texts as used by the Shafiis in the first opinion. The third opinion is attributed to the Malikis, who, based on their understanding of the concept of amal ahl al-Madinah (local customs of the people of Madinah) as recognized and used by their teacher Malik, held that a maslahah must be considered regardless of whether it is similar to an acceptable one or whether it corresponds with a text or not.

It will be significant to consider at this point the real cause behind the above three different juristic opinions on the concept of maslahah. We must always bear in mind the fact that such differences are mainly attributable to the problem of allowing the method of reasoning on the exclusive basis of maslahah in absence of any relevant textual support. This Maliki-Shafii contrast explains the reason why the concept of maslahah, which originally was not necessarily conceived of and confined within the framework of sources, came to be seen by later Shafii jurists in reference to sources (Qur'an, sunnah and ijma). This tendency has complicated the task of later Muslim jurists, who must not only discuss maslahah in

terms of need and effectiveness, but should also consider its reference to sources. If we have to accept the attribution of unrestricted maslahah to the Maliki jurists as shown above, then we could easily understand that their liberal position toward maslahah simply goes hand-in-hand with the legal methodology of the founder of the Maliki school, who demonstrated an unprecedented tolerance toward the established custom and the interests of his Madinan community, in contrast to the Shafiis who would only accept the maslahah if it conformed to revealed sources of ijma.

Moreover, Juwayni analysed maslahah as an extratextual basis of reasoning in the context of analogy through effective cause ('illah). First is the category where its significance (ma'na) is rationally understandable and where it is related to a certain essential necessity (darurah) which is inevitable. The second category concerns what is known as general needs (al-hajat al-'ammah) but below the level of darurah. Third is the category which belongs to neither of the above, but rather concerns something seen as noble and worthy (makramah). The last category concerns those usul pertaining to purely ritual actions whose significance is not obvious, and are not required as darurah or hajah, nor are they seen as makramah.[9] If a jurist looks into any case involving maslahah, he must give precedence to the darurat over hajat which shall, in turn, have priority over makramat.

The Mutazli usuli Abu'l Husayn al-Basri (d. 478/1085) used the terms maslahah and masalih both in a general sense and as technical terms. To him masalih are good things, and maslahah means goodness. Basri studied maslahah in reference to reasoning (istidlal) and cause ('illah). He argued against his opponents who maintained that masalih cannot be known through reasoning at all. At one point he defined al-masalih al-shariyyah as those acts which we are obliged to do by the shariah such as rituals (ibadat). Related to these acts are the means of achieving the shari commands. These means are also connected with masalih. These means are dalil, amarah, sabab, 'illah and shart. The illustrations he gave for these technical terms are as follows: the validity of consensus, analogy, measurability for usury (riba), and the conditions in contracts of sale. All of these means are connected with maslahah.[10]

For Basri, the connection of sign (amarah) and effective cause ('illah) is essential for determination of maslahah. He carried his argument further to say that, "When a correct sign (amarah) indicates by way of also (dalalah) a quality (wasf) being the effective cause ('illah) for a rule (hukm), we decide that the latter is the basis of maslahah. This indicates that there is a basis for maslahah whenever an 'illah is present".[11] For Basri, then, maslahah is an end for which illah and other related terms are means. Basri, however, does not elaborate what these masalih are and what

the connection is between al-masalih al-shariyyah and al-masalih al-wadiyyah (related to mundane matters), which he omitted from his work.

Ghazali discussed in his al-Mustasfa the problem of maslaha in a detailed fashion. His definition of the concept is as follows:

"In its original meaning (asl), maslahah is an expression for seeking something useful (manfa'ah) or removing something harmful (madarrah). But this is not what we mean, because seeking utility and removing harm are the purposes (maqasid) at which the creation aims and the goodness (salah) of creation exists in realizing their goals (maqasid). What we mean by maslahah is the preservation of the objective (maqsud) of the law (shar') which consists of five things: preservation of religion (din), life (nafs), intellect (aql), offspring (nasl) and property (mal). What assures the preservation of these five fundamentals (usul) is maslahah and whatever fails to preserve them is corruption (mafsada)."[12]

Naslahah, defined by Ghazalim falls into the following three categories. First is the type of maslahah which has positive textual evidence in favor of its consideration. Second is the one which is dismissed and ruled out by negative textual evidence. The third is that type about which the text is silent, i.e., there is neither textual evidence in favor of it, nor in contradiction to it. It is this type which

contemporary Muslim scholars refer to as al-maslahah al-mursalah.[13]

As a Shafi'i jurist, Ghazali views the first category as a valid one which can be the basis for qiyas (analogy).[14] The second is categorically forbidden. It is the third that needs further consideration for our purpose of study from an usuli perspective.

The element of maslahah in the third category is examined from the viewpoint of its significance or strength (quwwah). From this standpoint there are three grades of maslahah: darurat, hajat, and tahsinat. The preservation of the above-mentioned five fundamentals is covered under darurat, which is considered the strongest type of maslaha. "Necessity makes prohibited things permissible." The second grade consists of those masalih which are not absolute necessities (darurat) but are necessary for realization of masalih in general. The third type exists only as a refinement of things or luxury.[15]

With this classification in his mind, Ghazali further stipulated that al-maslahah al-mursalah i.e., that which is not supported by any text, will be accepted only if it satisfies three conditions: darurah, qatiyyah, and kulliyyah. It becomes daruri when it consists of preserving at least one of the five fundamentals (religion, life, intellect, offspring, property). It is qati'i if it is definitely known to lead to the consequences in mind. It will

be kulli if it takes into account the whole of the community, not a part of it.[16]

Following the teachings of his Imam, al-Shafii, al-Ghazali with a strongly rejected any maslahah not supported by a specific textual evidence. If it is supported by the text, the reasoning is then called qiyas, otherwise, it is called istislah, which is similar to istihsan that the Shafi'is categorically deny.[17]

Ghazali counts istislah, along with istihsan, among the methods of reasoning which do not have the same validity that qiyas has. He calls such methods usul mawhumah, where a jurist relies on his conjecture, imagination or discretion rather than tradition.[18]

The above classification of maslahah has a particular place in Ghazali's structure of usul al-fiqh. A brief analysis of this structure will show the place that Ghazali gave to the concept of maslahah. He treated maslahah as an annex to the four proofs (arbaa adillah) i.e. Qur'an, sunnah, ijma and intellect ('aql). He further argued that maslahah is not considered one of the four proofs or evidences. Also it is not discussed in the part dealing with methods of interpretation and analogy, although its connection is implied.[19]

In the part on rules (hukm), Ghazali discusses the essential meaning (haqiqah) of a hukm and its four components, while maslahah is mentioned occasionally. The four components

of a hukm, according to Ghazali are the following: (1) sovereign/judge/legislator (hakim); (2) judgment/rule (hukm); (3) the subject of the rule (mahkum alayhi, mukallaf); (4) the object of the rule, the act of a mukallaf (mahkum fihi).

In the part on the command (hukm), Ghazali discusses the essential meaning of hukm and its question of whether the goodness or badness of acts, both human and divine, is known objectively or through divine guidance. His description of good (hasan) corresponds to his definition of maslahah according to its original meaning. Sometimes he even uses the term masalih to mean hasan.[20] The significance of this impression will be discussed in more detail later, but, in general, how a Muslim jurist handles any issue depends largely on his perception and the definition he gives to that issue. In the absence of a precise definition, endless controversies would likely arise, and they would not easily open up for settlement.

In the part on methods of reasoning, Ghazali referred to maslahah as reasoned through qiyas. He explains that qiyas has four components: (1) asl, the root upon which analogy is based; (2) far', the branch for which analogy is sought; (3) illah, the effective cause for the hukm; (4) hukm, the judgment or rule to which the analogy leads. Ghazali further emphasizes that qiyas in usul must be distinguished from qiyas in philosophy. The evidence through which the 'illah is sought is textual (naqliyyah), meaning the Qur'an, sunnah and

ijma. The 'illah is either explicit (sarih) or implicit. It may also be known from the sequence and order of the command, i.e. cause (sabab) and priority (tartib) according to categorization as necessities, needs, or luxury. The fourth manner of finding the 'illah is inference (istinbat). The only alid methods of istinbat are two: (1) observation and classification; method of exclusion (al-sabr wa'l-taqsim), and (2) affinity (munasabah)[21]. It is in reference to munasabah that maslahah as a main element of affinity with shar is frequently discussed. It is for the jurist to show that there is a real (as opposed to an illusionary) affinity between the issue under study as maslahah and a recognized source. In case a conspicuous affinity has not been firmly established, then the case will be seen as having nothing to do with maslahah at all. It will then be classified as falling under istihsan which is not acceptable to the Shafii jurists. Thus, the textualist doctrine of the Shafii school is upheld.

Ghazali defines the suitable (munasib) as "that which, like masalih, becomes regulated as soon as it is connected with the rule (hukm)."[22] For him, munasabah and maslahah are not identical. Although he analyzes munasib also in terms of effectiveness and validity in the same way as he does with maslahah, yet the details vary. Among the various classification of munasib, one is of special significance for us, as it demonstrates the relationship of munasib to

maslahah, as well as the difference between istihsan and istislah as viewed by Ghazali. Munasib is divided into four categories, the first being the munasib which is suitable to and is supported by specific textual evidence. Second is that munasib which is neither suitable to nor supported by textual evidence. Third is that munasib which is not suitable but is supported by textual evidence. Fourth is that munasib which is suitable but not supported by textual evidence.[23]

Ghazali pointed out that in the above classification the first category is acceptable to all jurists. The second category falls under istihsan, which clearly means to the Shafiis, including Ghazali, promulgating laws and issuing commands according to one's own desire and discretion, which al-Ghazali would accept only if supported by a text or if there exists an apparent affinity in the situation, which is not permissible or possible in the second category. It is clear from this classification that maslahah is the basic consideration for deciding the suitability or munasabah of something which istihsan lacks. In other words, it is used as a way out of the dilemma facing Shafi'i jurists like Ghazali, who reject istihsan. Their belief in opposition to the Hanafis or ahl al-ray is that the munasabah of maslahah further depends on its suitability or conformity to the text in general. Otherwise, it will fall, according to their definition, into the category of istihsan, which they strongly deny as a source of law.

From Ghazali's testament of maslahah, we can generally infer that his inclination for theologization of figh and for qiyas, as a method of reasoning, has led him to examine the concept of maslahah with reservations. These reservations would sense only if we read them within the context of the Shafi'i school of jurisprudence to which Ghazali pays strong allegiance and commitment.

From the point of view of theology, he rejected the conception of maslahah in terms of human utility. Furthermore, he subjected it to scrutiny on the basis of revealed texts. He made the method of reasoning by maslahah subordinate to qiyas. However, as an usuli he did not reject maslahah altogether, as he did istihsan, but the theological qualification he provided for the acceptance of maslahah would not allow it to remain an independent principle of reasoning and also limited its scope in practice.

It is of great significance to stress at this point that while the Shafiis view the concept of maslahah as an issue of theology, other madhhabs see it as a source of law independent of the Qur'an and sunnah. This fact explains the strong controversy between the Malikis and Hanafis on the one hand and, in particular, the Shafiis over any issue involving maslahah or istihsan.

Ghazali's work has strongly influenced a number of jurists. His al-Mustasfa, with Basri's book al-Mu'tamad, remained a major source of influence for later works on usul,

until Razi (d. 608/1209) later completed his monumental work al-Mahsul.[24]

In his al-Mahsul, Razi combined the two works of Basri (d. 435/1044) and Ghazali (d. 505/1111) to formulate a number of concepts[25]. Razi's Mahsul then became a source of considerable influence for later usul works, including even Maliki and Hanafi usul which had opposed the Shafi'i influence. It must be mentioned at this point that the Malikis Qarafi (d. 684/1285) and Ibn al-Hajib (d. 646/1249), with whom the Maliki al-Shatibi was generally in opposition, were largely under the influence of al-Razi.[26]

Razi's Mahsul is structured more on the pattern of Basri's al-Mu'tamad than on Ghazali's al-Mustasfa. The references to maslahah are made in the introduction where the question of goodness (al-husn) of acts is discussed. In the chapter on qiyas, the question of munasabah as a manner of finding the cause ('illah) is dealt with. And in the last chapter al-masalih al-mursalah are discussed as one of the ways of knowing the commands of the shariah in addition to qiyas.

Razi does not define maslahah. But it seems that in his thinking munasib and maslahah are quite closely associated with each other. He gives two definitions of munasib. First, munasib is defined as that which would lead man to what is agreeable (yuwafiq) to him both in acquisition (tahsil) and preservation (ibqa). He explains that tahsil means to seek

utility (manfa'a), and manfa'a is pleasure (ladhdha). Ladhdha is to achieve what is suited (mulaim). Ibqa is explained similarly as removing harm (madarra), which is pain (alam) or its means. Both ladhdha and alam are evident and cannot be defined. Thus munasib in its final analysis is related to ladhdha in the positive sense and to alam in the negative sense.[27] A second definition, however, was given as that which is suited (fil 'adah) to the actions of the wise([28].

Razi then clarifies that the first definition is accepted by those who attribute wisdom (hikam) and utility (masalih) as causes or motives of God's commands. The second definition is employed by those who do not accept the above causality. This takes us back to theology and Razi's own view on the problem of causality and God's commands. The question is always dealt with in the course of discussion whether the goodness or badness of things is determined to be rationally, or established by shar'. The point in question is, however, whether good and bad can be defined in reference to praise or blame as the Mu'tazilah have argued. Razi, after detailed analysis, concludes that good and bad can be established only through shar'.[29] The question then is whether what is praised in God's commands corresponds to the rational good or not? If, however, it is corresponds, can this correspondence be understood as cause or motive?

Razi answers this question in detail in his discussion of munasabah as a manner of 'illah. He argues that to prove that

munasabah can be 'illah there are three premises to be established: first, that God issued the commands for the masalih of the people; second, that the case in question is of maslahah, and, third, that it can be shown that the probable reason for God's issuing this particular command is this particular maslahah.[30]

Razi's first premise is that shariah commands are issued because of masalih. He further explains this premise in opposition to the Mu'tazila rationalists that the (Sunni) jurists do not regard maslahah as personal motive (gharad). They, according to him, rather view it in terms of significance (ma'na) or rationale (hikmah). The difference between these two positions appears as follows. Whereas the Mu'tazilah believe that God takes it upon Himself to consider mankind's interests (Qur'an, 6:54), other jurists than Mutazilis stress that He is under no obligation to do so. God, according to the latter, has done so out of grace.

Razi stresses that no motive or cause can be attributed to God's acts or commands; yet he admits that God's commands are for the maslahah of the people. And this maslahah or munasabah can be considered 'illah for that command. The paradox in this position is resolved by two explanations. First, these masalih are coincidental with God's acts, only accidentally, not in terms of cause and effect. Secondly, it has happened this way not as a necessary correlation between maslahah and command, because God is not obliged to act this

way. Rather, God has acted as He has as a matter of grace, so that a sign may be established to make His commands known.

It is obvious that Razi offered these explanations in view of the possible objections against his concept of ta'lil af'al Allah (rationalization/justification of God's acts), which contradicts his theological position that God is under no obligation to consider maslahah. From an usuli perspective, Razi could maintain that munasabah or maslahah were evidences for illah. And he could theologically insist that God's commands had no motives. It is with this reservation that Razi apparently accepted the first definition of munasib. This appears to be the reason why he divides munasib into two categories: true (haqiqi) and apparent (igna'i). Haqiqi is that munasib which consists of either a maslaha in this world or one in the hereafter. Igna'i only appears to be a munasib.

Like Ghazali, Razi also divides maslaha into daruri, haji and tahsini. He divides munasib according to effect (ta'thir) and textual evidence (shahadat al-shar') and compatibility (mula'ama). With the exception of certain differences on details, he is generally in agreement with Ghazali.

It is clear now that the attempt to theologize the concept of maslahah by Ghazali was completed by Razi. Ghazali's thesis was that a conception of maslahah, in reference to human utility along with and independent of God's determination, is not theologically possible.

Razi gave this general objection of al-Ghazali's a vehement theological support. He made it clear that even to attribute the consideration of maslahah, in terms of human utility to God's commands, is to attribute causality to his acts, and that was theologically unacceptable. This position later led to what is known in Islamic theology as determinism (jabr) which, in short, means that God's commands demand obedience in their own right not because of maslahah. If there existed the element of maslahah in the law, it was to be explained either by the grace of God, or coincidently (Qur'an, 2:219, 5:90-91). This is the position held by Razi and other Sunni Muslim theologians who preceded him. Such positions render the question of moral and legal responsibility meaningless. And, in addition, have negative implications on the problem of religious duty (taklif) as well as for qiyas as a source of law, for the latter entirely depends on the cause (illah) and purpose of the divine command. If, however, good and evil are to be knowable only through the revelation, and, at same time, we deny that divine commandments in the Quran have any purpose, how could we imagine any growth in Muslim religious thought in general and in the Islamic legal thought in particular?!

Maslahah, which was originally a general method of decision for jurists, came to be limited by the opponents of the concept on a theological basis. The main elaborator of Ash'arite doctrine, al-Baqillani (tenth century C.E.), even

recommended that rejection of causality (talil) should be "officially" required from Muslims[31]. And it is in the unqualified support of the Sufi theologian al-Ghazali that Ash'arism found its way to dominate as the creed of the vast majority of Sunni Islam.[32]

Furthermore, the legal argument developed by theologians against maslahah as source of law (asl) were built on two bases. First, maslahah was defined in terms of divine commands. Second, maslahah was methodologically subjected to qiyas so as to link it with a definite textual source.

However, exponents of maslahah argued that in order to decide that something is maslahah, even to say that God's commands are based on maslahah, some criterion outside these commands has inevitably to be accepted. This was precisely what theological determinists denied. Second, to employ qiyas as a method of deducing new rules from the original textual source, one must seek the cause ('illah) which was absolutely denied on a theological basis by the determinist theologian.

The implications of the theologians' position became more obvious in, first, their insistence that further extension of rules must be in units. Every new deduction must have a specific link with the texts. It denied the extension of law as a whole. "This theology (kalam)" observed Fazlur Rahman, "which took shape during the tenth, eleventh, and twelfth centuries C.E., came to claim for itself the exalted function of being the "defender of the bases of Islamic law".[33] Then

secondly, they denied that they had to take social needs into consideration, because they insisted upon deducing laws from specific rulings of shariah not even from the general intent of the law. This was precisely what was opposed by Fazlur Rahman when he wrote:

"In building any genuine and viable Islamic set of law and institutions, there has to be a twofold movement: First one must move from the concrete case treatment of the Qur'an, taking the necessary and relevant social conditions of that time into account, to the general principles upon which the entire teaching converges. Second, from this general level, there must be a movement back to specific legislation, taking into account the necessary and relevant social conditions now obtaining."[34]

Major usuli works on maslahah during the period of Razi and Shatibi are viewed by some contemporary scholars, like Fazlur Rahman and Abdul Wahhab Khallaf, as representing the following trends.

The first trend includes those whose conception of maslahah is either dominantly similar to that of Razi or who have simply juxtaposed Ghazali's and Razi's definitions of munasib and maslahah. Among Maliki jurists, Shihab al-Din al-Qarafi (d. 684/1285) stays closer to Razi. Though he accepted it in principle as "used by the Prophet's Companions (sahaba) regardless of any textual bases",[35] he nevertheless raised serious doubts as to whether maslahah could ever be

defined and justified in clear terms.[36] Jamal al-Din al-Isnawi (d. 771/1370) and Taj al-Din al-Subki (d. 771/1369) combine Ghazali and Razi.

The second trend refers to those jurists who reject al-maslahah al-mursalah (no test for or against) as a valid basis of reasoning.[37] Into this category fall the Shafi'i jurist Sayf al-Din al-Amidi (d. 631/1234)(38), and the Maliki jurist Ibn al-Hajib(39). In their arguments against al-maslahah al-mursalah both follow Ghazali rather than Razi. To them a maslahah is acceptable only if it is textually supported.

The third trend is represented by the Sufi-inclined Shafi'i jurist Izzaf Din Ibn 'Abd al-Salam (d. 660/1263). In his usage, there is a remarkable inclination towards Sufistic interpretation as clearly shown in the terms he used in his treatment of the concept of maslahah.

To Ibn 'Abd al-Salam maslahah means pleasure or joy (ladhdhah) and happiness (farh) and the means leading to them[40]. Masalih, for him, are divided into two categories, masalih of this world and masalih of the second life. The former can be ascertained by reason, while the latter can only be known through naql (tradition/revelation). In view of the people's knowledge, however, masalih differ according to the level of the approach of the people. The lowest level of masalih is that which is common to all men. Higher than this is the level on which the wise/bright (adhkiya) people conceive of the masalih. The highest level is peculiar to the

Sufi mystics (awliya Allah) alone. The awliya and the chosen (asfiya) prefer the masalih of the next life to those of this world. The reason is that "the awliya are anxious to know God's commands and laws in their reality (fi al-haqiqah), hence their investigation and reasoning (ijtihad) is the most complete one"[42].

Ibn Abd al-Salam's major contribution appears in his perception as rights and in the dichotomy he sets between the rights of God and the rights of men. The rights of God are three classes. First is gnostis (ma'arif) and mystic rank or stations (ahwal). Second are rights which combine rights of God with those of men such as charity (zakat). Third are those which combine rights of God and of His Prophet, and of the people in general. The rights of men are also of three categories; rights of self (nafs), rights of men among themselves (inter se), and rights of animals toward men[43].

The above references which dominate his qawaid al-ahkam indicate that Ibn 'Abd al-Salam's legal thinking was strongly influenced by Sufi mysticism. Though he did not expressly reject self-rights (huguq al-nafs), he treated maslahah aiming at the realization of such rights as lower in rank than the one aimed at ma'arif and ahwal[44].

Ibn Abd al-Salam's works represent the stage where the Sufi conception of masalih found its way to the principle that the backbone of Sufism is the rejection of the pleasure of the lower self or flesh (huzuz al-nafs) as a means of controlling

the nafs for the attainment of the higher state. Huzuz had apparent connection with masalih as rights, and more particularly with the question of legal allowance (rukhsa) in case of hardship. The Sufi stress on asceticism (zuhd) required abandoning of huzuz. The best example of this encroachment of Sufi theology on fiqh and usul al-fiqh may be found in Qushayri's will to his novices where he warned them against following such allowances, because he believed that "when a faqir (Sufi mystic) falls down from the level of haqiqa to that of rukhsah of the shariah, he dissolves his covenant with God and violates the mutual bond between him and Allah".[45]

The denial of huzuz appears even stronger closer to the period of Shatibi. Abu'l-Hasan al-Shadhili (d. 656/1258) used to define tawhid in terms of abandoning the huzuz al-nafs[46]. He further put it as a curse from Allah when servant of God ('abd) is caught indulging in the huzuz which would, according to Shadhili, eventually isolate him from true servitude (ubudiyya)[47].

The famous Shadhili mystic Ibn Abbad al-Rundi (d. 792/1390), who was in correspondence with Shatibi on matters relating to tasawwuf and fiqh, strongly emphasized the denial of huzuz. In his comment on the wisdom (hikam) of Ibn 'Ata Allah, Ibn 'Abbad stressed that "the human self (nafs) always seeks huzuz and runs away from duties (huqug); hence when anyone is confused about two choices, he must always seek

whatever is harder for the self (nafs)"[48]. Elsewhere, he pushed this point to its extreme. "The coming of temptations through wants and needs (fagat)," he stipulated, "is a happy occasion for the disciples" because a true Sufi, according to him, should find pleasure in renouncing his huzuz. In his opinion, situations of neediness provide a disciple with purity of heart which is not achievable through fasting (sawm) or prayers (salat)[49].

Dr. Masud in his Islamic Legal Philosophy observed the serious implications of the Sufi view of obligation to God. The Sufis, according to him, did not only deny human interest as a basis of consideration but they also insisted on abandoning human interests to purify the performance of any religious obligation as "complete obedience to God".[50].

The problem becomes more complicated when these implications were not even recognized by the jurists. In his try for a practical solution, Ibn Abdal-Salam accepted the Sufi view. But in his attempt at synthesis between the two he was led either to deny the masalih of this world altogether, or to accept the two on separate grounds.

The real influence of Sufism on Islamic legal thought can not be fully apprehended unless we admit the fact that was correctly stated by the late Pakistani Muslim philosopher Muhammad Iqbal, who rightly observed, "In the later Middle Ages the more original and creative minds moved from orthodox Islam into Sufism"[51].

In the first chapter of his "Islam and Modernity: Transformation of an Intellectual Tradition", Fazlur Rahman raised doubts about a sort of affinity of spirit developed between Ash'arism and certain more extreme forms of Sufism (like the very widespread Sufism of the thirteenth-century Ibn 'Arabi), which affirmed that there was one and only one existence in reality, namely God, and regarded all else as illusion, shadow, or appearance. He confirmed and further corroborated Iqbal's statement quoted above describing a state which, in his opinion, is to be attributed to the fact that "In the face of the barrenness of 'official' Islam - law and theology - most creative minds in the Muslim world gravitated into the Sufi fold"[52].

The question, as correctly raised by Fazlur Rahman, is, "Does this Sufism, with its pantheistic matrix, bear any relationship either to the theology or the social message of the Qur'an or, indeed, to the conduct of the Prophet himself and that of the early generations of Muslims?"[53] The answer, without hesitation, is "No". The Qur'an's social message as understood by the Prophet, and then implemented by him in the state of al-Madinah has never ignored by any means the affairs of this "good" life as extreme Sufi mystics allege. (Qur'an, 2:29, 7:32, 28:77, 62:10 etc).

In his comment on the negative effects of Sufism on the Muslim masses, Fazlur Rahman writes, "The massive injurious effects of its uncontrolled expressions on the body of the

community can never be overestimated. How does one square, for example, the insistent Qur'anic call for establishing an ethically just and viable social order on earth with the vagrant intoxicants of the various popular Sufi practices? Is the ill-balanced dancing of the glass-eating dervish the proper stuff for satisfying Qur'anic requirements? To crown all, since Islamic law was reduced practically to a lifeless shell in the late medieval centuries, the sufi adepts often took the greatest pleasure in ridiculing it and advocating rebellion against it. For the lawyers only 'worshipped a pile of dry books', whereas Sufi initiates worshipped the true God!"[54]

In the light of the above, we can safely say that the current crisis of the Islamic legal thought is the product of specific adverse historical circumstances such as Sufism. The central challenge that remains for Muslim scholars is how to liberate themselves and, in turn, the Muslim masses from the effects of such circumstances. The basic two questions, facing every Muslim, are: (a) What exactly are these adverse historical circumstances? and (b) How did they come about?

The Hanbali jurist and theologian Ibn Taymiyya (728/1328) tried to find a solution in taking a middle way between the two extremes of total rejection and total acceptance of masalih. He considered al-maslahah similar to the method ra'y, juristic preference (istihsan), mystic inspiration (kashf) and mystic taste (dhawq), of whose origin and validity

he was skeptical, and hence he rejected them. On the other hand, he refuted the moral implications of the denial of maslahah to the commands of God.

Ibn Taymiyya counts al-maslahah al-mursalah as one of the ways of determining the commands of God, along with the other sources of law. He defines al-maslahah al-mursalah as follows: "It is a decision when a mujtahid considers that a particular act seeks a utility which is preferable, and there is nothing in the law (shar) that opposes this consideration"[55]. Thus, he admits maslahah as a legal consideration and, by implication, a possible source of law. This shows that he acknowledged no "closing of the gate of ijtihad," even though he is adjudged to have been a very conservative Muslim thinker.

Ibn Taymiyyah admits that the shari'ah is not opposed to maslahah, but when human reason finds a maslahah, this simply means for him one of two things. Either there definitely is a text which the observer does not know, or else one is not dealing with maslahah at all. It is obvious that Ibn Taymiyyah's argument is based on the assumption that all the possible masalih are already given in the text which in fact, some contemporary Muslim writers on Usul have rejected. Ibn Taymiyyah's philosophy of maslahah is somewhere between that of the Mu'tazilah and the Jabriyyah. The Mu'tazilah argued that God is obliged to command only what is good for man; they stressed God's justice. They conceived of God's actions as

analogous to man's actions. They assumed that whatever is morally obligatory for man must be obligatory for God, a stand that Ibn Taymiyyah would, of course, not accept. He also rejected the Jabriyyah position that God's commands are not based on maslahah. He questioned the validity of their assumption that the existence of maslahah would constitute a limitation upon God's acts. He stated that in reference to God there are two kinds of wills (iradah): the legal and the religious will (al-iradah al-shar'iyyah al-diniyyah) and the potentive creative will (al-iradah al-qadriyyahal-kawniyyah). When God commands, He means, for him, the first kind of will. However, this differentiation exists only in theory. Although it was accepted by Ibn Taymiyyah's close friends and students who defended him against his rivals.

Notable among Ibn Taymiyyah's students was his prison-mate Ibn al-Qayyim who expounds in his I'lam al-muwaqqi'in the principles of Hanbali figh as derived from its five sources: (1) texts, (2) the legal opinions (fatawa) of the Companions of the Prophet, (3) selection from the opinion of the Companions, (4) a report of a Prophetic tradition or saying which lacks a link in the chain going back to the Prophet (al-hadith al-mursal), and (5) analogical reasoning where necessary (qiyas lil-darurah). It is in reference only to the first three sources that the consideration of maslahah is expounded. Ibn al-Qayyim's basic stand in this regard was that it is valid to attribute 'illa to God's commands.

Because the Qur'an and sunnah themselves are full of examples where rationale and reasons are given to explain the commands of God and His Prophet[56]. Ibn al-Qayyim's strong conviction in maslahah finally finds its way in a chapter where he explains how "fatawa may change according to the change in time and place," and the shari'ah is based on masalih. He observes:

"This chapter is of significant use. Due to the ignorance of and misconceptions about issues included herein, grave errors have been committed in and against the shari'ah law. Consequently, hardship and severity have been brought forth....The foundations of the shari'ah are laid on points of wisdom (hikam) and the masalih of God's worshipers, in their world of living (ma'ash) and the world of return (ma'ad). The shari'ah is all justice, kindness, masalih and hikam. Hence any case which departs from justice to injustice . . . from maslahah to corruption (mafsadah) . . . is not of the shari'ah even though it has been invoked there by way of allegorical interpretation (ta'wil).[57] This shows clearly that how Ibn al-Qayyim attributed most if not all the problems in the application of the shariah law to the ignorance and unawareness of Muslim scholars and jurists of the significance of the masalih.

Ibn al-Qayyim's emphasis on masalih and its significance was greatly exceeded by Najm al-Din al-Tufi (d. 716/1316), who, due to his clear, unorthodox views was not considered to

fit into any of the recognized schools. Tufi justified the use of maslahah even to the extent of setting aside the text. He stressed maslahah as the basic and overriding principle of shariah. Tufi regards maslahah as a fundamental principle which may prevail over other methods such as ijma[58]. Tufi's preference of maslahah over against texts and ijma was prompted by his belief that textual sources as well as the opinions on which ijma is claimed were diverse, inconsistent and often self-contradictory. The principle of maslahah provided, for him, a consistent method. Tufi's major shortcoming was his failure to elaborate on a concrete criterion of masalih, how they are to be decided, especially in a case where there is a question of choosing among more than one maslahah. Tufi's second weakness in developing the concept of maslahah as a fundamental source lies in the fact that in his final analysis he too treated maslahah within the parameters of the four traditional sources. For him recourse to maslahah was necessary only after the traditional sources had failed.

Tufi's main thesis was based on the assumption, which many modern jurists have accepted, that the literal provisions of the Qur'an and sunnah were too limited to accomodate the increasing social changes. Even the method of extending these provisions by accepting the ijma of the past generations of scholars on certain matters failed to meet the demand of accomodation. The need to accomodate the changes could not be

denied, but how to extend the limited legal provisions to adapt to these changes? This is the question which forced Tufi and his supporters to treat maslahah as an independent source of law.

In modern times, the concept of maslahah received special attention from Muslim scholars. With the increasing demands of social change, the Islamic movements began to search in the Islamic tradition for a principle that would help them cope with the changing conditions. They found in maslahah that which they were looking for, and since then they began to give it more consideration.

In 1899, in his proposed reforms of the court system in Egypt and the Sudan, Shaykh Muhammad 'Abduh stressed the use of maslahah as a guiding principle in lawmaking[59]. It is to be noted here that Abduh referred to maslahah as a principle of interpretation of law rather than as an independent source of it. Abduh's intention was to invoke maslahah as a method of change, dynamism and adaptability. His use of maslahah departs from the old Hanafi principle of juristic preference (istihsan), which literally means choosing the better. In dealing with legal issues which are not covered by a clear and uncontroversial authority in the Qur'an, sunnah or ijma, a jurist may avoid reaching a decision on the basis of a strict application of analogical reasoning (qiyas) where this would result in an unnecessarily harsh or inequitable ruling. Instead, the jurist uses his common sense to arrive at the

most sensible and equitable decision, provided always he can justify his action by reference to the recognized sources. In other words istihsan is used as a priniciple to remove the rigidity of law at the discretion of the jurist. Istihsan, however, depends on analogy as a helping method to remove the rigidity of law in consideration of masalih (public human interests).

In 1906, Abduh's closest student and disciple Rashid Rida published in al-Manar Tufi's treatise on maslahah. He emphasized Abduh's doctrine on the basis of maslahah. Rida stressed Tufi's position that all specific rules enunciated in the Qur'an and sunnah should be subordinated to the Prophetic saying of no injury and no counter-injury (la darara wa la dirar), which Tufi understood as a general call for a frank consideration of maslahah in all cases of law. In a brief introduction, Rida recalls that he has himself often insisted that the promotion of material interests is the first principle of the Islamic jurisprudence in all social transactions. Rida's favorable account of Tufi appears clearly in his Yusr al-Islam where he invoked Tufi's celebrated hadith, "la darara wa la dirar" to indicate that maslahah takes precedence over a textual source.[60] The criticism to which Rida's approach may be liable is that he overlooks the decidedly unrepresentative place of Tufi among medieval scholars, as well as the authenticity of the hadith in question which ranks only as mash'hur (not directly

reported from the Prophet through a sufficient number of narrators that could bring it to the authentic rank of mutawatir.[61]

Another yet stronger criticism against Tufi's doctrine is that it opens the door for human value judgments wide enough to destroy the religious basis of law entirely and secularize the criteria of the legislation as well as its application. In Khallaf's view, Tufi "opened the door to suppression of the revealed texts, and made the judgments of the texts and ijma liable to abrogation by opinion. For consideration of the maslahah is no more than naked opinion and arbitrary speculation."[62]

The publication of Tufi's treatise in al-Manar raised endless reactions among the conservative scholars. Both Tufi and the concept of maslahah were bitterly opposed. Zahid al-Kawthari's criticism provides a fair idea of the campaign against Tufi. He wrote:

"One of the methods in attempting to change the shariah in accordance with their desires is to state that 'the basic principle of legislation in such matters as relating to transactions among men is the principle of maslahah; if the text opposes this maslahah, the text should be abandoned and maslaha should be followed. What an evil to utter such statements, and to make it a basis for the construction of a new shari'a!

This is nothing but an attempt to violate divine law in order to permit in the name of maslaha what the shar' (law) has forbidden. Ask this wicked one (al-fijir), "What is this maslaha on which you want to develop your law?"

. . . The first person to open this gate of evil was Najm Eddin al-Tufi al-Hanbali . . . No Muslim has ever uttered such a statement . . . This is a naked heresy."[63].

Kawthari's criticism of both Tufi and maslahah is typical of the traditional view of the concept. To him, like any other traditional conservative, maslahah is arbitrary and personal. In fact this fear of arbitrariness concerning reasoning on the basis of general human interests, which is viewed as a direct violation of divine law, is a familiar feature in the history of Islamic legal theory. Maslaha and similar legal principles such as istihsan, which were employed for the adaptability of Islamic law, were constantly opposed on the same ground.

Kawthari, however, did not deny the fact that the shar' considered the interests and good of the people, but he insisted that good and bad can only be ascertained through revelation. Maslahah as an independent principle for reinterpretation, or as a source of law, has no validity whatsoever for him.

This opinion was strongly supported by the Christian Arab Oxford Professor A. Hourani, who criticized the way Muslim modernists such as Abduh, Rida and others used to treat

maslahah in a utilitarian sense. He argued that such usage of maslahah was not justified. "For the traditional thought, maslahah had been a subordinate principle, a guide in the process of reasoning by analogy rather than a substitute for it."[64] It deserves mentioning here that Hourani's study of maslahah is confined only to the early period of Islamic legal theory. Because of this severe limitation he could not count the development in the treatment of maslahah by later theorists (usulis) such as Shatibi. In fact, the deficiences that Hourani ascribed to maslahah as an objective value in the sense that it could not show how moral judgment operates, and that it could not fill up the theoretical gap between means (moral and legal acts) and the end (eternal happiness), are not found in Shatibi's conception of maslahah as a legal value.

Shatibi defines maslahah as "that which concerns the subsistence of human life, the completion of man's livelihood, and the acquisition of what his emotional and intellectual qualities require of him, in an absolute sense".[65]

From the above definition Shatibi moves to set the following rules as characteristics of maslahah:

1. The purpose of legislation (tashri) is to establish masalih in this world and in the hereafter, but in a way that they do not disrupt the fabric of the law.

2. The Divine Legislator/God (Shari) intends the masalih to be absolute.

3. The reason for the above two considerations is that the Sharia has been instituted to be continuous (abadi), universal (kulli) and general ('amm) in relation to all kinds of obligations (taklif), obligated persons (mukallafin) and conditions/circumstances (ahwal).[66]

The above three characteristics thus require maslahah to be both absolute (mutlaq) and universal (kulli). The absoluteness means that masalih should not be relative and subjective. Relativity is usually based on equating a maslahah with one of the following: personal passions/desires (ahwa al-nufus), personal advantages (manafi), satisfaction of lusts (nayl al-shahawat) and individual interests (aghrad).

According to Shatibi, all of the above considerations render the concept of maslahah relative and subjective, which is not the consideration of the Divine Legislator. This is a clear refutation of Hourani's criticism of the concept of maslahah that we have seen above.

In his introduction to the published edition of his doctoral dissertation Dawabit al-maslahah fi'l shariah al-Islamiyyah, Muhammad Sa'id Ramadan al-Buti states that the Orientalists, whom he regards as new crusaders against Islam, have adopted a new measure to destroy Islam. They are urging Muslims to open the "gate of ijtihad" in order to accomplish this end, and they refer to the concept of maslahah as the fundamental principle of the shariah. He is, however, convinced that the real motive behind any proposal for ijtihad

is the destruction of Islam. He admits that the gate of ijtihad has never been closed and that the God has given full consideration to the principle of maslahah. But this principle, according to him, has always been restricted by a number of qualifications[67].

After a detailed analysis of the concepts of maslahah, he concluded that maslahah in its unqualified sense is identical with the concept of 'utility' and 'pleasure' in the philosophies of Stuart Mill and J. Bentham, which he considers as hedonistic and un-Islamic. The qualified concept of maslahah, for him, distinguishes itself from utility and pleasure when it takes into consideration three major characteristics. First, it is not limited only to this world, but it also considers the hereafter. Second, the Islamic value of good is not exclusively material. Third, the consideration of religion prevails over other considerations.

If Buti's qualifications of maslahah were accepted as they are, then maslahah would become superfluous as a legal source. The consideration of maslahah would only mean that maslahah is what the shariah commands. In other words, maslahah would have no place as a legal source. This is the logical conclusion from Buti's view of Islamic law and theology, according to which he rejects a distinction between this world and the hereafter. But Buti's study fails to bring out the real significance of the concept of maslahah, mainly because he has not given full consideration to the proponenets

of this concept such as Shatibi. Such deficiency is also found in almost all other statements on maslahah. This appears clearly in M. Kerr's examination of Rashid Rida's legal reforms, particularly as related to maslahah. Kerr observed that the logical conclusion of Rida's arguments for the use of maslahah would be that it is due, according to Kerr, to the theological nature of Islamic law which influences the legal sources including maslahah. The theological foundations of Islamic law insist on minimizing the part of human reason in the formulation of law. Kerr attempts to clarify two general aspects of Islamic law which, according to him, affect the function of maslahah. Firstly, Islamic law has its roots in revelation and thus is an expression of the will of God. The second aspect that affects maslahah is the emphasis on qiyas which is used, according to Kerr, as a means of preserving the authority of revelation. (MW, 1960: 170-181). However, Kerr's observations provide us with good evidence for our claim about the confusions existing in the minds of non-Muslim Western scholars of Islam. It is hard for Kerr to distinguish between divine will and the human role when it comes to the identification of maslahah as a source of law. However, while Kerr is correct in viewing qiyas as a means of preserving the authority of revelation, he completely overlooked its main function of extending the application of existing law to new cases by analogy to old ones, when a Muslim jurist needs to do that.

It is noteworthy that Kerr refers to such jurists as Ghazali and Qarafi, who viewed maslahah as confined to its correspondence with the textual sources. He also discusses the views of Ibn Taymiyyah, Ibn al-Qayyim and Tufi whom he viewed as proponents of the validity of maslahah as a principle of legal interpretation. He, however, did not see that these jurists regarded maslahah as subordinate to the textual sources and qiyas. In fact,slahah, would prevail only, according to those jurists, over the texts and qiyas when the latter appeared to be harmful to obey. Kerr, however, did not take into account Shatibi, who favors maslahah as an independent legal source.

The studies on maslahah discussed above present an unbalanced analysis of the concept. They have failed to determine the real significance of this essential principle as it was conceived and used by those jurists who viewed it as an independent source. A detailed study of early jurists such as Shatibi, besides the works of some contemporary jurists like A. Khallaf, may serve the purpose of identifying maslahah as a source not completely independent from the Qur'an and sunnah, but without overlooking its place among minor and subsidiary, as distinct from major and basic sources of Islamic law.

ENDNOTES

[1]See Abdul Wahhab Khallaf's Usul al-fiqh (Kuwait: Dar al-Qalam, 1978), p. 84.

[2]M.K. Masud, Islamic Legal Philosophy (Islamabad: Islamic Research Institute, 1984), p. 149.

[3]M.F. Abdul Bagi Al-Mujam al-Mufahras Li al-fa al-Quran. (Beirut, Dar al-Fikr, 1981), p. 410.

[4]Al-Qur'an 3:114.

[5]Masud, op. cit., p. 150.

[6]Khallaf, op. cit., p. 83.

[7]Rudi Paret, "Istihsan and Istislah". Shorter Encyclopedia of Islam. (Leiden: Brill, 1961), p. 185.

[8]Khallaf, op. cit., p. 83.

[9]Imam al-Haramyn al-Juwayni's al-Burhan fi Usul al-fiqh. Quoted in Masud's Islamic Legal Philosophy, op. cit., p. 151.

[10]Abu'l Husayn al-Basri Al-Mu'tamad fi Usul al-fiqh (Damascus: al-al 'ilmi al-firnasi, 1964), p. 888.

[11]al-Basri, op. cit., p. 805.

[12]Abu Hamid al-Ghazali Al-Mustasfa min ilm al-Usul (Baghdad: Muthana, 1970), pp. 286-7.

[13]Khallaf, op. cit., p. 84.

[14]Ghazali, op. cit., p. 284.

[15]Ibid, p. 290.

[16]Ibid, pp. 294-5.

[17]Khallaf, op. cit., p. 83.

[18]Ghazali, op. cit., vol. I, pp. 274, 284, 315.

[19]Masud, op. cit., p. 154.

[20]Ghazali, op. cit., p. 60.

[21]Ibid, vol. 2, p. 259.

[22]Ibid, p. 297.

[23]Ibid, p. 306.

[24]Ibn Khaldun Muqaddima. (Cairo: Amiriyya, 1320 A.H.), p. 431.

[25]Masud, op. cit., p. 156.

[26]Ibid, p. 157.

[27]Ibid, p. 157.

[28] Taha Jabir al-Alwani ed. al-Mahsul fi Usul al-Fiqh by Fakhr al-Din al-Razi (Riyadh: Imam Muhammad Ibn Saud Islamic University, n.d.) vol. 1, p. 87.

[29]Ibid, p. 13.

[30]Ibid, p. 90.

[31]Fazlur Rahman, Islam and Modernity: Transformation of an Intellectual Tradition (The University of Chicago Press, 1982), p. 27.

[32]Ibid, p. 27.

[33]Ibid, p. 26.

[34]Ibid, p. 20.

[35]Khallaf, op. cit., p. 86.

[36]Jamal al-Din al-Isnawi Nihayat al-Su'al. Printed on the margin of Ibn Amir al-Hajj's Al-taqrir wa'l tahbir, vol. 3, (Cairo: Bulaq, 1317 A.H.), p. 235.

[37]Khallaf, op. cit., p. 87.

[38]Sayf al-Din al-Amidi Al-Ihkam fi Usul al-Ahkam (Cairo: Matba al-Mararif, 1914), pp. 215-217.

[39]Ibn al-Hajib Mukhtasar muntaha al-Usuli (Cairo: Bulaz, 1317 A.H.), p. 289.

[40]Ibn Abd al-Salam Qawaid al-ahkam fi masalih al-anam, vol. 1 (Cairo: Istiqama, n.d.), p. 10.

[41]Ibid, vol. 1, p. 24.

[42]Ibid, p. 129.

[43]Masud, op. cit., p. 162.

[44]Abul Qasim al-Qushayri Al-Risala fi 'ilm al tasawwif (Cairo: Muhammad Ali, 1984), p. 181.

[45]Abdul Halim Mahmud Al-madrasat al-Shadiliyya wa imamuha Abul Hassan al-Shadili (Cairo: Dar al-Kutub al-Haditha, 1387 A.H.), p. 130.

[46]Ibid, p. 137.

[47]Ibn Abbad al Rundi, Sharh al-hikam l'il-Imam Abi'l Fadl Ahmad b. Ata Allah al-Iskandri (Cairo: Mustafa Afandi, 1320 A.H.), p. 99.

[48]Ibid, p. 106.

[49]Masud, op. cit., p. 163.

[50]Fazlur Rahman, op. cit., p. 407.

[51]Fazlur Rahman, Islam and Modernity, op. cit., p. 27 (Emphasis Added).

[52]Ibid, p. 28.

[53]Fazlur Rahman, op. cit., p. 407 (Emphasis mine).

[54]Ibn Taymiyya Qaida fi'l-mujizat wa'l karamat wa anwa khawariq al-adat. In Majmu al-rasail wa'l-masail, vol. V. (Cairo: Matbal Manar, 1349 A.H.), p. 22.

[55]Ibn al-Qayyim I'lam al-Muwaqqi'in, vol. I (Beirut: Dar al-jil, n.d.), pp. 196-200.

[56]Ibid, vol. 3, p. 3.

[57]Mustafa Zayd. Al-Maslaha fi al-tashri'i al-Islami wa Najm al-din al-Tufi (Cairo: Dar al-fikr al-Arabi, 1954), p. 18.

[58]Muhammad Abduh Taqrir Mufti al-diyar al-misriyya fi islah al-mahakim al-shariyya. In Al-Manar, ed. by M.R. Rida, vol. II (Cairo, mutabat al-Manar, 1899 A.H.), p. 761.

[59]Rashid Rida Yusur al-Islam (Cairo: Nahda, 1956), pp. 72-75.

[60]Khallaf, op. cit., p. 41.

[61]Ibid, p. 84.

[62]See Zahid al-Kawthari, Maqalat al-Kawthri (Cairo, 1372 A.H.), Quoted in M. Zayd, op. cit., pp. 164-166.

[63]Albert Hourani Arabic Thought in the Liberal Age, 1798-1939 (London: Oxford, 1962), p. 234.

[64]Al-Shatibi, op. cit., vol. 2, p. 25.

[65]Ibid, p. 37.

[66]Said Ramadan al-Buti, Dawabit al-maslaha fi al-Shariat al-Islamiyya, (Damascus, 1986), pp. 11-16.

[67]Ibid, pp. 23-60.

CHAPTER SIX

IJTIHAD AND ISLAMIC LEGAL METHODOLOGY

The Arabic word ijtihad is derived from the Arabic root j-h-d which means to make endeavor or effort. The Qur'an has only used the verb jahada in the often-quoted verse:

"And those who strive (jahadu) in Our (cause), we will certainly guide them to Our Paths"[1].

Jihad, another derivative from the same root, means to conduct utmost effort including the waging of war. The word ijtihada was used by the Prophet who, according to Imam Shafi'i, was reported to have said, "If the judge or ruler (hakim) gives a decision after exercising his utmost effort (ijtihad), he deserves double reward in case he is correct, and gets one reward in case he is wrong"[2]. We should mention here that the reward a judge or ruler deserves in case he errs as mentioned in the Prophetic tradition is for making utmost effort to find the truth.

The founder of the Shafi'i school of jurisprudence was also the first to mention that permission to exercise ijtihad is given in the Quranic verse ". . . Turn thy face in the direction of the sacred mosque . . ."[3]. According to this verse, every Muslim who is far away from the Ka'bah in the holy city of Makkah is asked to direct his face towards it. Shafi'i opined that in facing the Ka'bah a Muslim may succeed in maintaining the required accuracy or otherwise he may fail. In other words, it is a hit-or-miss decision. This

obligation, however, is considered discharged simply by being attempted, and, in addition, the worshiper gets one point of reward as he tries his best to comply with the Qur'anic command.[4]

In addition to the verse used by Imam Shafi'i to support his opinion, there are several other Qur'anic verses that obviously invite Muslims to use their intellect to check the direction of the Ka'bah when they are far away from it, and thus acquit themselves of that obligation. Relevant examples are Qur'an 6:97 and 16:16.

"It is He Who maketh the stars (as beacons) for you, that ye may guide yourselves with their help."

". . . And by the stars (men) guide themselves."

The sunnah of the Prophet is full of reports which clearly indicate that the Prophet himself may give a decision concerning some issue but may later change it for the benefit of the community. It is reported that the Prophet once publicly announced that it was not permitted for anyone in Medina to save or preserve the sacrificial meats of the animal sacrifices (adhani) on the tenth day of the twelfth month of the Islamic calendar for more than three days. The the hadith was related by the Prophet's wife A'ishah, "Some people from outside Medina came to share the sacrifices with the Medinese in the time of the Prophet. The Prophet, therefore, instructed the people of Medina not to keep the meat for more than three days and to offer the rest to the visitors as a

charity." She added, "On another occasion it was mentioned to the Prophet that people used to benefit from their sacrifices by melting the fat, preserving the meat and making waterskins out of the skin. When they mentioned that to him, he said "So what?" But they reminded him that he had forbidden them from keeping the meat beyond three days. The Messenger then responded, 'I only forbade you because of the group of needy people (daffah) who had visited just to have their share in the sacrifices. Now that they are not here, you may eat, offer as a charity and save."[5] This is an obvious example where a prophetic decision based exclusively on his personal ijtihad has changed according to the circumstances of the Muslim community.

The Prophet's wife A'ishah did us a great service in reporting the reason behind the change in the Prophet's position regarding the saving of the sacrificial meat which was later permitted for the people of Medina beyond three days contrary to the first prohibition. Ijtihad comes in here to play an important role in understanding the Qur'an and the sunnah in so far as their laws, teaching and prohibitions are concerned. The problem arises not with regard to the clear teachings of both the Qur'an and sunnah, but in relation to the understanding of the implicit indications of a dubious nature that call for rational efforts by able, learned and intelligent scholars whom Muslims used to call mujtahidun. The term mujtahidun refers to those educated Muslim

individuals who are capable of exercising ijtihad through making their best endeavors to form a secondary opinion from a general authentic religious source in a particular case. A mujtahid, therefore, makes his utmost effort (j-h-d) to derive particular rules from general sources. This precisely is what ijtihad is needed for.

THE PROPHET AS A MUJTAHID

It must be clearly noted that ijtihad, according to the usulis, is to be exercised only in the absence of a clear, relevant text (nass) of the Qur'an or sunnah, and in the absence of any decision unanimously passed by the Prophet's Companions. As far as the followers and the leading mujatahids are concerned, the principle of "selectivity" (takhayyur) would then be applied, as in the case where the Companions may differ on certain points or issues.

In many cases where there was no revelation, the Prophet used to give his own opinion, which the early Muslim society used to take from the beginning as binding. However, the Prophet at a certain point made it clear that his decisions on purely technical matters requiring professional knowledge are not binding (We have already mentioned the case of the date-trees). There is a Prophetic tradition narrated by Imam Muslim on the authority of the Prophet's wife Umm Salama that the Messenger said, "Verily you argue with each other to get a decision [in your favor] from me. It may be that one of you

will be able to argue his case better than his opponent and that I decide the case according to what I hear. However, if I give any one of you a right which, in fact, belongs to the other, do not take it."[6] The line emphasized above shows clearly that in his deliberations over litigations, the Prophet was acting just like any other human being and as such was subject to making mistakes, as indicated at the end of the above-quoted hadith where the Prophet advised his Companions not to take any property which is not theirs.

The possibility for the Prophet to make errors on certain technical matters brings us to the position of the Prophet's actions relation to ijtihad. From among the early scholars of usul who discussed this issue are al-Amidi and Abu Bakr al-Baqillani. Al-Amidi supports the view that it was possible for the Prophet to make errors of judgments, although he states that this question is a controversial one among the community and that it is not possible to reach any absolute decision.[7] While discussing the specific question of the fallibility or otherwise of the sunnah, al-Amidi goes on to state that while the entire Muslim community is agreed that a Prophet cannot deliberately err in those questions which are evidenced by definite miracles, there is no agreement with regards to points where a Prophet may unintentionally commit a mistake. Al-Amidi agrees in this respect with Abu Bakr al-Baqillani in holding that it is possible for a Prophet to unknowingly commit an error[8]. It is clear from these

statements that while the Prophet's judgments, decisions, sayings and actions are, taken as a whole, free from fundamental mistakes and errors, it is however, possible that, in technical details, the Prophet's conduct is not beyond fallibility.

This issue of fallibility seems to be one of theology more than of usul. The Sunnis and the Mu'tazilah largely agree on the fact that the Prophet's sunnah is, as a whole, infallible and correct but may not be so in details. The Mu'tazilah base their decision on rational arguments by saying that the Prophet must be regarded as immune from fundamental errors and as infallible on the whole because it would be irrational to believe that a person capable of committing large-scale errors should be the recipient of divine revelation (wahy); on the other hand, to believe that the Prophet is beyond all errors would put him beyond the realm of humanity which is also absolutely irrational. The Sunnis, on the other hand, refuse to have recourse to such rational argumentation and base themselves exclusively on textual authority. In their authority, the Sunnis find the exact counterparts of the Mu'tazili rationality, for the Qur'an refers to the Prophet's character as "great."[9] and describes him as a "model" for mankind,[10] but the same Qur'an describes the Prophet as a mere "human,"[11] and asks the Prophet to pray "O my Lord! Increase me in knowledge."[12]

Indeed, the Prophet could err even after he took all the necesary precautionary measures, such as taking in consideration his consultants' opinions in conformity with the Qur'anic injunction "And consult them in important matter (al-Amr)."[13] The Prophet, for example, decided the case of the prisoners of the Battle of Badr in accordance with the suggestion of Abu Bakr who, contrary to Umar, suggested that Muslims should free their captives in exchange for ransoms. Seventy captives were accordingly released but this action was severly condemned, and the deal was only conditionally approved as an exception to the general rule that jihad in Islam should be solely for the cause of Allah and any other motives must be strictly excluded[14].

The Prophet's ijtihad may sometimes be confirmed by the Quran as we have seen in the above case (Qur'an, 8:69), and sometimes not (Qur'an, 9:43, 80, 84, 108, 113. 33:37, 40. 66:1-5. 80:1-10); in such cases he was told that the better decision or action was other than that he had chosen.

Thus, the ijtihad exercised by the Prophet, whether confirmed or disavowed by God, set a good precedent for his Companions and later generations so that whenever they could not find a direct textual reference on the matter at hand, they were to exercise their own ijtihad for a convenient solution. The Prophet further enhanced this spirit by asking a number of his Companions to practice ijtihad on certain problems in his days. He would then either approve the right

or, otherwise, correct the wrong decisions they made. The best example of the Prophet's confirmations is shown in the case of Mu'adh Ibn Jabal whom the Prophet sent to Yemen as a judge. "What will you do if a matter is referred to you for judgment?" asked the Prophet. "I will judge according to the Book of Allah," Mu'adh answered. The Prophet asked, "What if you find no solution in the Book of Allah?" Mu'adh said, "Then I will judge according to the sunnah of the Prophet." The Prophet asked, "And what if you do not find [it] in the sunnah of the Prophet?" Mu'adh said, "Then I will make ijtihad as best I can and formulate my own judgment." The Prophet touched Muadh's chest and said, "Praise be to Allah who has guided the messenger of His Messenger to that which pleases Him (Allah) and His Messenger."[15]

The Prophet was always desirous that his followers should develop insight (fiqh) and clear understanding of religion as a way of life (din). About this, he said, "When Allah desires [something] good for someone, He gives him good understanding of all that concerns din."[16]

The Companions of the Prophet understood what we are now calling ijtihad as understanding (fiqh), as referred to in the above hadith, or insight (fahm), as explained in the advice that Umar gave to his judge Abu Musa al-Ash'ari. To him Umar proclaimed, "Judgment is to be passed according to express Qur'anic imperatives or established sunnah practices . . . Make sure that you understand clearly every case that is

brought to you for which there is no applicable text of the Qur'an or the sunnah. You, then, shall, through comparison and analogy, distinguish similarities and sort out the odds in order to reach a judgment that seems next to justice and best in the sight of Allah"[17].

Relying on the above quoted statement of Umar, Imam Shafii took ijtihad to mean reasoning by analogy (qiyas). For him ijtihad and qiyas are "two names for the same thing"[18].

According to Dr. Taha J. Al-Alwani, ijtihad before Shafi'i went no further than meaning one of the following:
(a) Applying one or another of the possible meanings in cases where a sentence may lend itself to two or more interpretations, e.g. when the Prophet asked the Muslims to pray at the siege site of the Banu Qurayzah.
(b) Comparative qiyas, which deals with a matter by comparing it with another similar matter which is dealt with in the Qur'an or sunnah. For example, there is the qiyas of the Prophet's Companion Ammar who compared the case of dry ablution (tayammum) when in a state of wet dream (janabah) to a complete shower (ghusl), and therefore rubbed his whole body with dust.
(c) Ijtihad by taking into account something which is potentially beneficial, prohibiting something which could lead to wrongdoing, deriving a particular ruling from general statements, or adopting a specific interpretation and so on.[19]

Dr. Al-Alwani further observed that qiyas (as synonymous to ijtihad) was widespread in the early period of Islam in cases where there was no relevant text in the Qur'an and sunnah and was practiced without any objection from any of the Companions. Related to this method, was another source which was, according to Al-Alwani, widely used. In his opinion, ijma was facilitated in the early period of Islam by the fact that the Companions were few, and it was easy for them to agree among themselves. He referred to some examples from the early history of Islam, such as the Companions' election of Abu Bakr as first caliph, the decision that apostates should be fought and killed but not taken as war prisoners, and the decision that the Qur'an should be collected and written down in one volume.[20]

Dr. Al-Alwani's observation on ijma during the early period of Islam remains unquestionably valid. However, the examples he cited to support his opinion that "ijma was easy by the time of the Companions" has not been accepted by many recent Muslim scholars as a basis for ijma. Such cases stand as evidence only for the fact that those present at the time of the decision agreed to it, and therefore it did not constitute a unaninimous agreeement of all the Companions. Quoting from Ibn Hazm's al-Ahkam, Shaykh A. Khallaf reported on the authority of Abdullah, son of Imam Ahmad Ibn Hanbal, that the former heard his father-Ahmad-saying:

"Whoever claims or says there is ijma on a matter is wrong or a liar. Who knows? There may be differences we are unaware of. It is, then, safe to say: 'I know no difference of opinion on this matter.'"[21]

In fact, the Companions in forming their own opinion differed among themselves, and some of them declared that the opinions of their brethren were incorrect. Some of them pondered over the arguments of the others, considered their views carefully and formed their own opinion in case of disagreement. However, if such views and opinions had been considered wholly correct, they would not have differed from each other[22]. In other words, the differences of the early Companions were on issues, not on formalities and unnecessary technicalities.

To elaborate further on this point, if a decision was made by any of the Companions, such a decision was considered binding only on that particular person who had passed it, while others remain absolutely free to either accept or reject it.

Ibn Abdul-Barr reported in his Jami Bayan al-Ilm that once Caliph Umar met a man who had a case and asked him as to what had happened about it. The man told him that the case was decided by 'Ali and Zayd in the way he described. Umar then said, "Had it been referred to me, I would have decided it differently." The man, thereupon, appealed, "What prevents you, then, while the authority belongs to you (as caliph)?"

Umar responded, "Had I been in a position to refer this case to the Book of Allah (Qur'an) or to the sunnah of the Prophet, I would have surely done so, but I am referring only to my own opinion (ray), and opinion is common."[23]

This is why the early Muslims constantly declared that the decisions which they reached through ijtihad, reasoning, or about which they disagreed among themselves, might be right or wrong and, hence, they attributed these decisions only to themselves. Though the early Muslims held different views on many matters, they remained one united community (ummah) respecting each other's different views on legal matters.

The political ambition and greed for power that had dominated the entire community since the assassination of the Caliph Uthman (d. 35/656) was primarily responsible for dividing the Muslims into groups differing from one another in some beliefs and legal issues. It must, however, be noted that the difference of sects and parties does not at all concern the faith itself. Moreover, there is no difference among Islamic sects about the oneness of Allah nor about Muhammad being His messenger and the seal of the prophets, nor are there any two opinions concerning the Qur'an as last revelation, nor its being the greatest miracle of the Prophet from Allah, nor in the fact that it has been handed down to Muslims, generation after generation, without alteration or change. Nor is there any disagreement in the fundamental practice, like the five daily prayers, zakat, hajj and

fasting; nor is there any fundamental difference in the way they are performed. In short, there is no difference of opinion about any of the five pillars (arkan) of Islam, or the six foundations of the faith (iman), nor in what are regarded as pure Qur'anic decrees such as the unlawfulness of wine, gambling or adultery, and the bindingness of the laws of inheritance. The difference of opinion concerns only such issues as have no permanent bearing on any pillar or on the general principles of Islam.

Notwithstanding the fact that differences in matters of creed and doctrine were on the whole, declared an evil[24], it must be asserted that differences over side-matters and some details which were not given in the Qur'an or the sunnah of the Prophet were possible.

It was rather considered necessary to make a deep study of the Qur'an and the sunnah in order to derive decisions out of them in matters that needed to be looked at from different rational viewpoints in accordance with the Qur'an and the sunnah. This is precisely what the Arabic word istinbat stands for[25]. In view of his understanding of the differences of the Companions, Umar Ibn Abdul Aziz (d. 101 H./720 C.E.) made his historic statement:

"I do like that the Companions of the Prophets should disagree, because were there only one view, the people would suffer great hardship. Surely the Companions are the leaders

to be followed. Now, if any one follows the view of any one of them, one enjoys ease."[26]

IJTIHAD AND MUJTAHIDS

We have already mentioned that ijtihad means exercising one's utmost effort to arrive at a decision on a matter in the light of the Qur'an and the sunnah. He who takes this task upon himself is called a mujtahid. A mujtahid must have, by definition, full comprehension of the basic sources of Islamic law, namely, the Qur'an and the sunnah, besides ijma and qiyas.

A mujtahid who may have his own independent ways for formulating legal maxims is expected to fulfill the following FOUR requirements stated by the later legal theorists of Islam:

1. He must be versed in the Arabic language. He should be abreast of all the etymological diction, grammatical structure, and rhetorical usage of the Arabs by learning or developing a taste to analyze the kinds of Arabic expressions in so far as they are related to the Qur'an and the sunnah.

2. He must have knowledge of the Qur'an, particularly its rules, provisions and verdicts, in addition to the circumstances of the revelations of its verses and their interpretations, be they real or metaphorical.

3. He must be well-versed in the sunnah - its decisions, texts, and chains of narrators, with a critical knowledge of

the reliability of the narrators. In this particular matter it may suffice to rely on the studies and comments made by the leading expert traditionalists, such as al-Bukhari, Muslim and others.

4. He must have knowledge of the methods of qiyas (analogical reasonings), its stipulations, and types and the decisions arrived at through various kinds of it, besides the different conditions and circumstances of each society[27].

Anyone who does not fulfill these four conditions fully cannot be considered a mujtahid. For a practical solution for the long-lived theoretical problem of who can be a mujtahid, we will discuss later in this dissertation some of the proposals offered by Muslim scholars like A. Khallaf, M. Iqbal and H. Turabi, who agree as to the difficulty if not total impossibility of fulfillment of the above four conditions in our days.

QIYAS AS A LEGAL METHOD

The Prophet and his Companions resorted to different methods in their ijtihad. Sometimes they extended the application of the provision (nass) before them to cover an undecided matter by comparing the two and finding some factors common between them. For example, the case of a woman whose husband died before consummation of her marriage with him while no dower (mahr) had been fixed was compared with the case of a woman who was divorced before the consummation of

her marriage and the fixing of its mahr. While the latter had been decided by the Qur'an,[28] the former had not been. The common factor in both cases is that both death and divorce have the same effect on the consummation of marriage. Consequently the juridical decision must be alike, so that the principle established in the Qur'an could be extended through the application of ijtihad by analogy.

Now, there is a Qur'anic verse which clearly mentions that in case mahr is fixed and divorce occurs before consummation, half of the mahr is to be paid (2:237). But this would not seem to apply if the husband dies before consummation and before the fixing of the mahr, in which case, according to verse 2:236, no mahr is due but only a suitable gift (muta). However, using his ijtihad, Ali nevertheless opined that half of the equivalent mahr usually fixed for the bride's aunts and other close relatives or peers should be paid to the wife in this case[29]. It is clear now that Ali's opinion is much in favor of the wife whose husband dies before consummation and without fixing any dower, because she, instead of being confined to a suitable gift, shall get, according to Ali, half of the dower due to her peers, just as if the dower had actually been fixed. This demonstrates the usefulness of ijtihad in extending the scope of the law's protection of the weak.

The Companions applied different methods according to their knowledge of and insight into the Qur'an and sunnah,

particularly when there was more than one provision that could be relevant to the case in issue. The Qur'an, for instance, indicates two different waiting periods (iddah) for Muslim wives whose husbands had died. In one verse, the Qur'an gives a pregnant woman the advantage of ending her term soon after delivery even if this happens immediately after the death of her husband (65:4), while another verse requires a woman to wait for four months and ten days following her husband's death (2:234). The early jurists from among the Companions differed about the status of a pregnant woman according to their approach to the above two Qur'anic verses.

Both Ali and Ibn Abbas thought that she must wait for the longer term of the two, that is, the delivery of the child, or four months and ten days. If she gives birth soon after the death of her husband, she will, according to them, have to wait to complete four months and ten days, and if her delivery does not take place after completing four months and ten days, she will have to wait till she gives birth to the child. In this way she will fulfill the requirements of both verses.

Ibn Masud, however, held a completely different opinion. In his total dependence on the theory of abrogation, he considers the first verse (65:4, delivery terminates) as abrogator and the second (2:234, four months and ten days) as abrogated. He, therefore, passes his famous decision that the waiting period will end in such cases with delivery even

though it may possibly end before the "four months and ten days" stipulated in the other verse.

Ibn Masud supports his view with the Prophet's decision in the case of Subayah al-Aslamiyyah who gave birth to a child within a few days of the death of her husband. The Prophet allowed her to marry whomever she liked in disapproval of advice originally given by her cousin Abu al-Sanabil[30]. It is thus likely that this tradition (hadith) reporting the Prophet's decision escaped the notice of those who had held the first view, Ali and Ibn Abbas, as it is highly unlikely that they would dare to form an opinion contrary to an established Prophetic precedent.

This issue, however, raises the question as to the degree of knowledge of the Prophetic sunnah required to qualify any Muslim scholar to count as a mujtahid. If Ali and Ibn Abbas had both fulfilled the conditions of ijtihad though they were unaware of that hadith, then it goes without saying that someone may be a mujtahid without being fully knowledgable about every detail of the Prophetic sunnah. A second possibility is that it may be open for anyone to reach a conclusion different from an early reported Prophetic decision based on one's own reading and understanding of both the law and the case at hand. I do not want to be misunderstood here; what I am saying is as simple as this: the case is open to various approaches and interpretations. It by no means stands

to support the rules and conditions which govern the concept of ijtihad as it is understood today.

Another important circumstance that we must consider is that the Prophet's Companions differed among themselves in employing their reasoning in absence or presence of a relevant text, some preferring one factor, and others considering another one. It seems that Abu Bakr considered the interest of all the Companions in serving Islam and therefore treated them equally in assigning their due shares of the booty, while Umar was inclined to give priority to the early joiners of Islam over the others and, therefore, gave them bigger shares. However, Umar's policy in this particular matter is held responsible, in part, for the discontent that started to spread in his later days and continued through the reigns of Uthman and Ali which helped the Syrian forces (late joiners) under Muawiyah to change the whole course of the early Muslim Caliphate.

Related to this issue is the so called ijma of the early mujtahids. It becomes self-evident that the prominent Companions who lived in Medina used to meet and consult each other about any difficult case uncovered by the Qur'an or the sunnah. When any one of them gave his opinion, they would discuss it, argue and counter-argue over it to eventually reach a decision which was unanimously agreed upon.[31] Thus,a consensus could easily be attained which, in fact, was not the consensus of all jurists of the society but only of those who

were available at Medina at the time of the event. However, when the Companions later dispersed in the newly conquered areas and there arose political differences, the gulf of dissension and protest started to widen and enlarge among the Muslims. Some sects, like Shiites and Kharijites, began to emerge and grow to favor their own opinions to those of their opponents. They started to develop their own texts, traditions and interpretations which deviated from the mainstream and developed outside the socio-political surroundings which formed, framed and stereotyped most influential Muslim individuals in later centuries. We should not leave this part without mentioning that Muslims in different countries differed on small matters of detail relating to worship, and also on major issues related to custom and usage. Naturally, people of each city would consult their own prominent jurists, who tried to solve any unprecedented problem according to local customs and usages familiar to them. The people of the Hijaz undoubtedly possessed a great treasure of sunnah decisions of the Prophet, as well as the traditions (athar) and opinions (fatawa) of the Companions, which were quite adequate to their purpose in as much as the inhabitants of Hijaz loved simple living and followed almost the same social customs and traditions that had been handed down to them from the days of the Prophet, Companions and Successors.

The people of Iraq, however, differed a great deal from the inhabitants of the Hijaz, in so far as they were frequently visited by people coming from far-off countries - Iran, Sind (Pakistan), Afghanistan, India, and Asia Minor, etc. It is natural that of these peoples had different social and political backgrounds, creeds and doctrines, habits and customs which they retained even after embracing Islam, giving rise, therefore, to a number of new problems whose solution required the broader approach and wider vision possessed by the early Iraqi scholars, who used to solve such problems in conformity with the spirit of the law rather than with its letter.

The people of Iraq did not adhere only to the strict dictates of the Qur'an and hadith, they also recorded and analysed the different opinions of the Companions, the Successors and their followers. In this respect Imam Abu Hanifah is considered to have been by far the most deeply acquainted with the differences of the learned Companions and the Followers. He was viewed as the greatest expert in discussing such differences with his students to train them to form an agreed opinion. Imam Malik of Medina (Hijaz) used to commend his forerunner Abu Hanifah for this talent, he appreciated his analytical method, and whenever he met Abu Hanifah's students, he made it his practice to ask them to report to him the problems and issues which their teacher had discussed with them in the course of their studentship[32].

Thus, the early works of fiqh and usul al-fiqh present a true picture of the methods which the leading jurists employed in different cases in different parts of the Islamic world. The Syrian Imam Awza'i's criticism of Abu Hanifah (Iraq) as elaborated by Imam Abu Yusuf in his al-Radd ala siyar al-Awza'i and his arguments in Kitab al-kharaj give us some details of their principles which they strictly followed. Similarly, Imam Muhammad Ibn al-tilsan al-Shaybani in his fiqh works analyzed the elementary principles and rational solutions revealing, in most cases, the impact of imam Abu Hanifah's methodology. It is quite likely that the lost works of the early scholars on usul such as Abu Yusuf[33] may have supplied raw materials for the celebrated Risalah of Imam Shafi'i (d. 204 /820), who combined the Iraqi methodology of Abu Hanifah and the Hijazi fiqh of Malik. It is also possible to say that the Shafii's Risalah would not have seen the light had it not been preceded by the early works of Hanafi usulists.

MODES OF REASONING: (ISTISHAB, ISTISLAH, and ISTIHSAN)

Shafi'i's genius of combining the methodology of both the Hanafi and Maliki schools shows itself in the concept of istishab, a method of legal reasoning particular to the Shafi'i school among the Sunnis. It is a juristic principle to the effect that a given judicial situation previously existent is held to continue to exist unless and until it can

be proved that it no longer exists or has been modified. Thus, based on the Qur'anic verse, "It is He Who hath created for you all things that are on earth," (2:29) everything remains lawful and permissible unless declared otherwise under the Qur'an or the sunnah. The concept can also apply to judicial, religious and legal decisions, so that the wife of a missing man, for example, may not remarry, nor can his estate be distributed, until proof of his death is established.[34] It should be noted that this rationalist view of legal reasoning was exercised by the early Shafi'i jurists not in order to formulate new sources or principles of law but only to arrive at a decision in the light of the traditionally-recognized ones.

Istihsan literally means "choosing for the better" and is vaguely translated as 'juristic preference'. In dealing with legal issues which are not directly covered by a clear and uncontroversial authority in the Qur'an or sunnah, a jurist may avoid reaching a decision on the basis of a strict application of qiyas where this would result in an unnecessarily harsh or inequitable ruling. Instead the jurist uses his common sense to arrive at the most sensible, equitable and reasoning verdict, provided always he can justify his action by reference to the recognized sources. Istihsan, like istislah which means taking the public interest into account, are both admitted to be of the rank of 'controversial sources' in cases where the strict application

of qiyas would have led to undesirable consequences. The two principles are confined to very narrow limits and never supersede the governing rules in the Qur'an and sunnah, their authentic interpretations by the recognized authorities, and the unavoidable conclusions to be drawn from them. In fact, they sometimes go no farther than making a choice between the several opinions held by the authorities, that is to say, ikhtiyar or selectivity (takhayyur). Custom is sometimes given preference and recognition through istihsan.

Imam Malik and his followers used to exercise istihsan in a number of cases. But they preferred the method of istislah by having regard for public interest (maslahah), a consideration which, according to A. Khallaf, "differs only in name and not in essence" from the reasoning of the Hanafis or the Shafi'is and to which essentially the same qualification applies.[35]

We may, therefore, conclude by saying that in formulating their legal opinions, the established schools of law did not base themselves merely on strict application of the test or mere qiyas; they, in fact, used other ways and methods for extending the application of the law to cover unprecedented problems and issues.

WAS THE DOOR OF IJTIHAD CLOSED?

The death of the Prophet Muhammad (10/632) marked the end in the Islamic history of the first period of legislation,

which was characterized by the completion of the revealed text (Qur'an and sunnah). After the time of the Prophet came the era of the Rightly-Guided Caliphs (Khulafa Rashidun) which lasted from the time of Abu Bakr, who reigned from 11/632. through Ali, who was assassinated in 40/661.

Abu Bakr's legal methodology was very simple. He used to look in the Qur'an. If he could not find a solution in it, then he would move to the sunnah of the Prophet as he understood it. If he was unaware of any sunnah reference, he would ask if there was any of the Companions who knew any Prophetic decision concerning the issue in dispute. If he could not find any solution in the sunnah, he would then summon the heads of the city and consult them. He would eventually follow their ijma (consensus) on that matter. If, however, none of the above procedures worked and produced any fruit, then he would resort to his own ijtihad either through interpreting an otherwise vague legal text or by passing his own legal decision in absence of any relevant text.[36]

An example of ijtihad of the first kind, interpreting a text, was obvious in the problem of kalalah, which means the inheritance of the estate of a deceased person who has left as heir neither a descendant nor an ascendant. The term raises a strong controversy concerning the historical development of the Islamic law of inheritance. According to some scholars, it refers to anyone who dies leaving behind no lineal heirs (children or parents), while others view it as referring to

anyone who dies without children, regardless of whether he is survived by a parent or a grandparent. The relevant Qur'anic text is 4:176, which Abu Bakr understood to give the deceased's sister a half of his/her inheritance if the father was not alive; otherwise, the sister would not inherit from the kalalah at all. Though the Qur'an does not specifically mention what it really means, it became clear now through Abu Bakr's decision the term kalalah means anyone who dies leaving behind no lineal heirs in either direction.

Abu Bakr's military action against the withholders of zakat is a good example of his own ijtihad relying on no text. "When a people say la ilaha illa Allah (There is no God but Allah), their blood and their property will become protected except where due (illa bi haqqiha)." The Prophetic expression illa bi haqqiha became a source of controversy and argument between Abu Bakr and Umar. According to Umar, the term was clearly defined in another hadith to cover only "adultery, murder and apostasy." Abu Bakr, however, was determined that zakat was included and swore to wage war on anyone who performed salat (prayer) but did not pay zakat (poor-due). However, Umar finally gave up his view for that of Abu Bakr, who militantly marched to end the refusal of the so-called Riddah tribesmen to pay.

When Abu Bakr's military commander Khalid Ibn al-Walid asked his advice as to how he should deal with a homosexual

man, Abu Bakr consulted the Companions and finally followed a harsh opinion given by his consultant Ali saying:

"This sin was committed only by one nation [the people of the Prophet Lot], and you know what Allah did to them. I suggest that he should be burnt to death."[37] Abu Bakr accordingly wrote back to Khalid instructing him that the man should be burnt to death.

It is obvious from the above incidents, particularly in the third example, that the use of qiyas (analogical reasoning) was unquestionably wide in cases where there was no relevant text in the Qur'an or sunnah and this did not arouse any objection from any of the learned Companions. In formulating his opinion about the last example above before the first caliph Abu Bakr, Ali had in his mind the Qur'anic references (11:82 and 15:73-74), where we are told that there was terrible blast or noise in addition to a shower of brimstone (sijjil mandud). Based on his understanding to the Arabic words sijjil mandud, he advised that the homosexual must be burnt to death.

The time of the second caliph Umar (d. 23/644) was characterized, in addition to the common usage of qiyas, by two other dominant features: (a) consideration of the general purposes and aims of the Shari'ah law, and (b) the common good of the entire Muslim community.

In his exercise of ijtihad, Umar would always try to find the rationale behind the law. If, however, he was convinced

that the need for enforcing any part of the law no longer existed, he would not hesitate to change his position according to the changing circumstances and conditions. His decision not to divide the conquered Iraqi land among the Muslim soldiers was in the interest of the entire Muslim society, though it might apparently have harmed the immediate interests of the victorious troops. These may have failed to appreciate the long-term need for the state to use the rich Iraqi resources for the protection of the increasing Muslim territories but Umar understood that need. Umar's action decreeing that the conquered non-Muslims should keep their lands in exchange for payment of a tax (kharaj) in fact served two other important ends also: (1) Muslim warriors, who were not trained as farmers like the conquered Iraqi non-Muslims, continued with their military expansions, while the Iraqi farmers served to feed them; (2) the Muslim widows, elderly and weak had, for the first time, a permanent source of financial support and security.

The oath of allegiance was given to the third caliph Uthman (d. 35/655) on condition that he follow the Quran, the sunnah of the Prophet, and the footsteps of the two caliphs Abu Bakr and Umar. However, Uthman also utilized ijtihad to reinterpret the law and expand its scope.

One of the two most remarkable incidents where Uthman counted on his own ijtihad were when he refused to shorten the noon (zuhr), afternoon (asr), and night (isha) prayers during

the days of pilgrimage (hajj), though the Prophet and the two caliphs used to do so. The most acceptable explanation for Uthman's action is that he was afraid that some bedouins might be confused when they saw him praying two instead of four prostrations (rakahs). Had this practice not been strongly objected to, and later changed after Uthman's death, it would have set an example for Muslims to restrict the application of the Prophetic practice for fear of confusion and chaos.[38]

Another yet more significant case of his personal ijtihad was Uthman's action that the Companion Zayd's rendition must be treated as the official standard recitation of the Qur'an throughout the Muslim lands.[39] Uthman's historic, yet unprecedented, decision was urged by spreading disputes and a series of disagreements over the correct and authentic ways of reading the Qur'an. From the time of Uthman, the Qurashi dialect was accepted as the only standard criterion for settlement of any dispute that might arise among Qur'an reciters from different tribes.

The fourth caliph Ali was almost like Umar in his attempt to find out the general purposes of the shariah law while extending legal verdicts from relevant texts through qiyas. Ali was unique in basing his opinion on the broader aims of the shariah. When Umar consulted him about the possible increase in the prescribed penalty (hadd) for alcohol consumers, he compared the outcome of drunkeness to that of false accusation of adultery or fornication (qadhf). He

accordingly advised that a drunk person should be flogged with "eighty stripes" similar to the punishment of whoever falsely accuses chaste women of adultery.(40)

When Ali was asked about the punishment of a group of persons who jointly committed murder, he looked to the criminal motive which the murderers jointly had. He further compared their case to those thieves whose hands were cut off because of their joint theft at the time of the Prophet, so for him, it was the collective criminal motive that must be deterred, which could be achieved only through exemplary punishments. Thus, he also preferred to burn alive those extreme heretics who defied him, although he was aware that the established sunnah precedent was to put them to the sword. He tried through law enforcement to differentiate between the ordinary form of apostasy and deification as a serious social problem.(41)

The period of the Rightly-Guided Caliphs ended in the year 40/661, when a new era of the juristic scholars (fuqaha) from among the Companions and elder followers of the Companions began. Though the sources of law remained at this stage almost the same - the Qur'an, sunnah, ijma and qiyas - some significant developments occured in the following forms:

1. Scholars started to develop a special interest in finding out the rationales behind the specific explicit meanings of the revealed text.

2. The sunnah as a source of law underwent an essential change in its course of acceptance and application. Political differences that caused the emergence of various religious and philosophical groups, such as the Shiah and Khawarij, left their marks on both hadith and athar, which together form the backbone of the sunnah. The Shiah refused to accept any hadith not narrated through their own chain, and the Khawarij rejected any hadith which is not supported by a Qur'anic text.

3. Because of the political disputes and sectarian divisions, in addition to the Companions' spreading all over the Muslim world, the ijma of one place, even Medina, was no longer feasible.

4. The fabrication of hadith, mostly for political reasons, became a real problem that eventually resulted in the imposition of overly-restrictive precautionary measures for the study and acceptance of hadith.[42]

THE TABIUN (FOLLOWERS)

The time of the Companions (sahabah) ended between 90-100/709-719, and was followed by the era of the general followers (tabiun), who became responsible for fiqh and fatawa.

The tabiun remained in major parts of their works bound by the legal decisions and juristic opinions of the Companions. However, the methods used by the followers in taking decisions started at this stage to become clear.

Differences of scholarly opinions on legal issues started to mature and develop according to different geographic regions and territories. Thus, important scholars were defined as those of the Hijaz, Syria, Kufah, and Basrah, etc.

In the light of the above complication and development, Umar Ibn Abdul Aziz (d. 101/720) ordered the compilation of the authentic sunnah of the Prophet and assigned the authority to pass legal opinions (fatwas) to a few named individuals.[43] This was the first official attempt by a Muslim ruler to control the then loose system of academic and scholarly research in the field of Islamic legal studies.

AL-SHAFI'I: FATHER OF USUL AL-FIQH

Al-Shafi'i, one of the four founders of the recognized Sunni schools of jurisprudence, was born in Gaza, Palenstine in 150/767. He began his studies of Islamic jurisprudence in Makkah and later joined the study circle of Imam Malik (d. 179/795) in al-Madinah. He moved to Iraq to study under Muhammad Ibn al-Hasan. There, he met and taught Ahmad Ibn Hanbal, the eventual founder of the Hanbali school of jurisprudence.[44]

In Iraq, al-Shafi'i defended his teacher Malik and his methodology against the Iraqis, whom he notices were eager to find fault with the legal methodology of the people of Madinah. Al-Shafi'i left Iraq for Egypt where he started to develop a critical evaluation of some opinions attributed to

Malik. Al-Shafi'i's major criticism against Malik was about the consensus of the people of Madinah which Malik accepted as a source of law. In his book al-Ikhtilaf Ma' Malik "Disagreement with Malik", he refuted, among other things, that concept.[45]

Al-Shafi'i also criticized Malik for applying the principle of maslahah without having recourse to the prime sources which, according to al-Shafi'i, were available. Al-Shafi'i's opinion on Abu Hanifah and his methodology was that, in many cases, Abu Hanifa concentrated on the particular, on minor issues and details, while he overlooked basic rules and principles.[46] So al-Shafi'i decided to set some rules for the collection of the principles of Islamic jurisprudence, the organization of its basic rules for their general application, and the development of a new methodology according to which points of disputes may be decided through proper recourse to valid and relevant forms of evidence. Thus, he helped Islamic jurisprudence might become the practical implementation of this methodology, and that a new figh might emerge to unify the two established schools of Abu Hanifah in Iraq and Malik in Madinah. It was for this purpose that al-Shafi'i wrote his Risalah, and developed his figh and legal techniques on the principles he expounded in his book.

The scholars of usul al-figh uninamously agreed that al-Shafi'i was the first one who wrote on the subject, and it is his Risalah that has shaped and influenced the status of

usul al-fiqh ever since.[47] Though the Risalah is of great revelance and importance to every student of the Islamic legal theory, we are here concerned only with that part of it on ijma and qiyas as sources of law, as they were perceived by al-Shafi'i as coming next to the Qur'an and sunnah respectively. In the conclusion of his treatise, al-Shafi'i fashioned and tailored the jacket of usul al-fiqh for centuries to follow. He wrote:

"We base our judgements primarily on the Qur'an and the agreed upon sunnah. As for the hadith which is narrated by only a few narrators, we accept that hadith as it is, though we are aware that there could be some hidden fault in its chain of narrators. Then we will refer to ijma, then to qiyas. Qiyas, however, is weaker than ijma, and it is used when necessary because it is not lawful to use qiyas when there is a narration concerning the matter in question."[48]

From the writings of al-Shafi'i in general, and the above quoted conclusion in particular, we know which sources of Islamic jurisprudence were agreed upon, and which were the cause of dispute in his time. The only sources which were agreed upon were the Qur'an and the sunnah (in general).

It is clear that there was disagreement over the particular (khassah) sunnah, which for al-Shafi'i means the single individual narration (khabar al wahid). Khabar al wahid was accepted by al-Shafi'i who, in contrast to Abu Hanifah, gave it priority over human intellect (ra'y).

Other issues of disputes and disagreements over their validity as evidence and sources include ijma; whose ijma may be accepted as evidence; matters in which ijma may be considered as evidence; and how the public may be made aware that there is ijma on any particular matter. Also questioned were qiyas and istihsan, where disputes existed as to their meanings, their technical nature, validity as evidence, the possibility and method of using them, and whether the actions of the Companions could be considered as qiyas or istihsan. Indeed, al-Shafii rejected istihsan altogether.

The science of usul al-fiqh became even more complicated due to the emergence of new terms which were not commonly discussed, though they might have been practically used under different names, by early scholars before Shafi'i. Examples of such terms are urf, adah, and istishab. It is the emergence of these terminologies along with few others that have determined the current status of usul al-fiqh.

The Risalah influenced not just usul al-fiqh but other related fields of Islamic studies, notably fiqh and hadith sciences. Ever since its appearance, scholars have been divided over the acceptance or rejection of the Risalah in whole or in part. It is natural for ahl al-hadith to appear as its champions and supporters, as opposed to ahl al ra'y who attempted to refute whatever of al-Shafi'i's work contradicted their methodology, which had started to produce its fruit before al-Shafi'i's Risalah. The war that ahl al-ra'y waged

against al-Shafi'i's treatise caused his close students and later his followers to fight back in defense of their teacher and his work that had bestowed an unprecedented prestige on the Shafi'i school of jurisprudence.

The series of al-Shafii's supporters include Ahmad Ibn Hanbal (d. 241/855), al-Shafi'i's closest student and friend, who wrote al-Sunnah and Ta'at al rasul ("Obedience to the Messenger"). Both indicate how Ahmad was committed to the methodology of his teacher. Abu Thawr (d. 240/854) wrote his Ikhtilaf al-fugaha ("Disagreement of the jurists") which was a sincere reflection of his teacher's thought. Abul Abbas Ibn Siraj (d. 305/917) wrote a book showing his disagreement with both Isa Ibn Aban and Muhammad Ibn Dawud al-Zahiri (d. 270/883) on matters in which they differed with al-Shafi'i. Some other Shafi'i scholars devoted themselves to writing commentaries on the Risalah. This category includes, but is not limited to, Abu Bakr al-Sayrafi (d. 330/941), Abu al-Walid al-Naysaburi (d. 365/975) and Abu Muhammad al-Juwayni, the teacher of al-Ghazali (d. 505/1111) author of al-Mustasfa.[49]

It is only in the fifth Islamic century when the science of usul al-figh began to crystallize and take its final form. During the early period of the century al-Qadi al-Baqillani (d. 402/1011) and al-Qadi Abdal Jabbar al-Hamadani (d. 415/1024) undertook to rewrite the whole subject of usul al-figh. Al-Baqillani, who earned the title of Master of the Scholars of Usul (shaykh al usuliyyin) wrote al-Taqrib wa al-

irshad ("Clarification and Guidance"), which continued to influence the field of usul until the end of the ninth Islamic century.

Imam al-Haramayn al-Juwayni (d. 478/1085) summarized al Baqillani's al-Taqrib wa al-irshad in a book entitled al-Mulakhkhas ("The Summary"). Many of al-Baqillani's ideas on usul were found in al-Juwayni's Mullakhas. Al- Juwayni also patterned his other work, al-Burhan ("The Proof") on al-Baqillani's al-Taqrib. He disagreed with al-Shafi'i on some issues so that many of his Shafii contemporaries rejected his commentary and did not give it the respect and attention that they gave to his student al- Ghazali's Mustasfa.[50] However, al-Juwayni's Burhan continued to influence later generations of scholars. This influence was obvious in the definitions that al Juwayni gave to the general terms that al-Shafi'i used in the Risalah. Al- Juwayni gave a precise definition to al-bayan, he explained its essence, and referred to its five categories as stated by al Shafi'i. For al-Juwayni, al-bayan means evidence which is, according to him, of two categories: received (sami) and rational (aqli). The basis for the sami is the Qur'an; so the closer the evidence is to the Qur'an, the more precedence it has. Hence, the order of priority of sources according to him is: the Qur'an, the sunnah, ijma, khabar al wahid, and qiyas. Note that khabar al wahid started to take precedence over qiyas.

In addition to al-Juwayni's al-Burhan and al-Ghazali's al-Mustasfa, Abu Ishaq al-Shirazi (d. 476/1074) wrote his two books: al-Lam ("The Bright Light") and al-Tabsirah ("Enlightenment"). These fifth century works on usul continue to be of tremendous effect and influence on recent works, not just in their following of a similar pattern but also in the order of their chapters and the treatment of their subject matter.

So nothing of the discipline known to us today as usul al-fiqh had emerged, with its particular terminology, during the time of the Prophet or his Companions. All of the various ijtihad processes employed during the early period of Islam were free of the later complications of the science, particularly with regard to the dispute over khabar al wahid and qiyas. The reason for the free thinking of the Companions is due, in part, to the way they used to derive detailed legal rulings on particular issues directly from the Qur'an and the sunnah as original sources.

ENDNOTES

[1]al-Qur'an 29:69.

[2]al-Shafi'i, al-Risalah, ed. Ahmad M. Shakir, (Cairo: Mustafa al-Babi al-Halabi, 1940), p. 494.

[3]al-Qur'an 2:149.

[4]al-Shafi'i, op. cit., p. 487-490.

[5]Ibid, p. 235.

[6]See al-Jami al Sahih by al-Imam Muslim, ed. by al-Nawawi, vol. 12, (Beirut: Dar al-Jil, 1987), p. 247.

[7]Sayf al-Din Al-Amidi. Al-Ihkam fi Usul al-Ahkam, vol. 1, (Cairo: Matabat al-Mararif, 1914), pp. 243-4.

[8]Ibid, pp. 243-244.

[9]al-Qur'an 68:4.

[10]Ibid, 33:21.

[11]Ibid, 17:93; 18:110; 21:34; 41:6; 42:51.

[12]Ibid, 20:114.

[13]Ibid, 3:159.

[14]Ibid, 8:67-69.

[15]Ibn al-Qiyyim's Ilam al-muwaqqin, vol. 1, (Beirut: Dar al-Jil, n.d.), p. 202.

[16]Muslim;s Sahih, op. cit., vol. 1, p. 133.

[17]Ibn al-Qayyim, op. cit., p. 206.

[18]al-Shafi'i, op. cit., p. 477.

[19]Taha Jabir al-Alwani's Usul al-fiqh, trans. by Yusuf Talal DeLorenzo and A. S. Al Shaikh Ali (VA:IIIT, 1990), p. 10.

[20]Ibid, p. 15.

[21]Khallaf, op. cit., p. 49.

[22]Ibn Abd al-Barr. Jami Bayan al-Ilm wa Fadlihi wa ma Yanbaghi fi Riwayatibi wa Hamlihi, 2d. ed. vol. 2. (Al-Madinah al-Munawarah: Al-Maktabah al-Salafiyah, 1968), p. 84.

[23]Ibid, pp. 80-81.

[24]al-Qur'an 11:118-119.

[25]Ibid, 4:83.

[26]See Ibn Hajar's Fath al-Bari fi Sharh Sahih al-Bukhari, vol. 4 (Cairo: n.d.) pp. 303-304.

[27]Khallaf, op. cit., pp. 218-219.

[28]al-Qur'an 2:236.

[29]Abu Bakr al-Kuzi Al-Jassas. Ahkam al-Quran, vol. 2 (Istanbul: Dar al-Khilafa al-Aliyah, 1916), p. 136.

[30]Muhammad Ali al-Sabuni, ed. Mukhtasar Tafsir Ibn Kathir, vol. 1, (Beirut: Dar al-Quran al-Karim, 1981), p. 213.

[31]Muhammad Ali al-Sabuni, ed Mukhtasar Tafsir Ibn Kathir, vol. 1, (Beirut: Dar al-Quran al-Karim, 1981), p. 213.

[32]Muhammad Abu Zahrah, Usul al-fiqh (Cairo, n.d.), pp. 377-378.

[33]Khallaf, op. cit., p. 17.

[34]Ibid, pp. 91-93.

[35]Ibid, p. 83.

[36]Ismail, M. Ismail. Al-Tashri al-Islami: Masadiruhu wa Atwaru-hu (Cairo, 1985) pp. 250-255.

[37]Muhammad Ibn Abdullahi Ibn Quadama. Al-Mughni, vol. 8, (Riyadh: Maktabat al-Riyadh al-hadith, n.d.), p. 188.

[38]Al-Mahdi, op. cit., pp. 122-123.

[39]Ibid, p. 120.

[40]Al-Qur'an 24:4.

[41]Ibn al-Qayyim. Al-Turuq al-hikamiyya (Cairo, n.d.) p. 19, but also see Abdul Azim Sharaf Eddin's Ibn Qayyim al-Jawziyyah: Usru-wa manhajuhu (Cairo, 1967) p. 316.

[42]Al-Mahdi, op. cit., p. 150.

[43]Al-Alwani, op. cit., p. 24.

[44]Al-Shak'a, M. Al-Imam al-Shafi'i (Cairo, n.d.) p. 35.

[45]Al-Razi, Manaqibal Shafi'i (Cairo, n.d.) p. 26.

[46]Al-Alwani, op. cit., p. 35.

[47]There is an objection to this idea by some Hanafis who claimed that Abu Yusuf was the first one to write on usul-al-fiqh.

[48]See the concluding part of the Risalah.

[49]Al-Alwani, op. cit., p. 51.

[50]Ibid, p. 49.

CHAPTER SEVEN

CONCLUDING REMARKS

1. The roots of the crisis go back to the fourth century of the Islamic era (the tenth Christian century) when a claim emerged among Sunni jurists that there was no further need for exercising independent reasoning (ijtihad) to formulate new rules of law. This is what came to be in Sunni Islam "closing the gate of ijtihad," to the effect that all future activity with regard to legislation would have to be confined to the explanation, interpretation and application of the doctrine enunciated by the four orthodox schools of jurisprudence.

2. The primary objective of Islamic legal theory was to lay down a coherent system of principles through which a qualified jurist could extract sound rulings for relevant cases at hand. So, in Islamic legal theory, discovering the law of God was of crucial significance, for it was the law that informed man of the conduct acceptable to God. It is for the purpose of finding the rulings decreed by God that the methodology of usul al-fiqh was established.

3. A systematic and careful study of the original legal resources reveals that these views on the history of ijtihad after the second/eighth century are entirely baseless and inaccurate. In fact, the gate of ijtihad was not closed in theory nor in practice. This, I think, is because ijtihad was indispensable in legal theory, as it constituted the only

means by which jurists were able to reach the judicial judgements decreed by God.

If the practice of ijtihad was the primary objective of the methodology and theory of usul al-fiqh throughout Islamic history, the question that may be asked is in what way was the gate of ijtihad thought to have been closed? It has been assumed, among other things, that the practice of ijtihad was abandoned because the qualifications required for its practice were made so immaculate and vigorous and were set so high that they were humanly impossible of fulfillment. Ijtihad is no longer effectively used, not because of this reason but due to the rigid nature of the Islamic legal theory, and as a natural effect of the decline of the Muslim ummah.

4. Though I, as a Muslim, believe in the Qur'an as God's divine word, I, on the other hand, strongly support the opinion that Islamic law in its major part, particularly as regarding the man-deduced and speculated rules, must remain flexible enough to fit in our ever-changeable world. All that we need is a proper understanding of the basic Qur'anic principles and rationale by well-versed scholars who may do their homework in the same way as the early Muslim jurists did.

5. This work calls for a greater freedom of independent inquiry to ascertain the terms of Islamic law from its sources. Of course such inquiry must proceed within the defined limits of the Qur'an and sunnah. Any proposed

departure from the law of the classical schools must be firmly grounded upon indications in the Qur'an and sunnah or at least not to be contrary to any of their regulation.

6. From studying the methods of the early Muslims, it becomes clear that their aim was not simply to ascertain the law and then to give opinions, on the contrary, their objective was always to apply the law according to the circumstances. We may only do that by restoring the science of usul al-figh to its proper place among the Islamic sciences by transforming it into a method of research into the sources of Islamic jurisprudence from which we may derive suitable rulings for the solutions of our daily problems. This would, in practice, be available only through independent non-political academic research councils.

7. The present education system is too far behind to go hand-in-hand with the Muslim's ambitions. Revolutionary changes are needed to bring the whole system in line with the Islamic revival.

8. The Muslim ummah needs a legitimate political leadership, elected by people through their free choice and responsible to them. Such leadership can mobilize the people and use their energies in the course of moral regeneration and socio-economic development. This will result in the fulfillment of the moral and social objectives of Islam and elimination of the causes that contributed to the Muslim decline.

GLOSSARY

ARABIC and TECHNICAL TERMS

Fatwa: a ruling or opinion on a point of law issued by a mufti.

Fiqh: the technical term for the science of Islamic jurisprudence. The doctors of the science are called faqih. Of the various schools of fiqh that arose among Sunni Muslims, four are regarded as orthodox. They are named after the jurists whose teachings they follow: Hanafi (after Abu Hanifa, d. 767); Maliki (after Malik ibn Anas, d. 795); Shafii (after al-Shafii, d. 820); and Hanbali (after Ahmad ibn Hanbal, d. 855). The Shia, Kharijites, and other sects have their own schools of jurisprudence, differing in some particulars and details from those of the Sunnis.

Hadith: a tradition relating an action, utterance, or decision of the Prophet. The corpus of hadith constitutes one of the major sources of Islamic law and jurisprudence.

Hijra: the migration of the Prophet Muhammad from Mecca to Medina in 622 A.D. The Muslim calendar dates from the Prophet's Hijra. The Muslim year is purely lunar and has 354 days. The months do not therefore correspond to seasons, and there are approximately 103 Hijri years to one hundred solar years according to the Gregorian calendar.

Ijma: Consensus of the community in general, and of the learned in particular. One of the four basic sources of Islamic jurisprudence and an essential prerequisite for ijtihad.

Ijtihad: Exerting oneself to the utmost degree to reach comprehension and form an opinion. Ijtihad gives Islamic jurisprudence its intrinsic dynamism but its exercise requires the fulfillment of certain rather stringent conditions. Individual ijtihad may be out of reach of contemporary Muslims, but group ijtihad is a viable way to operationalise this important institution.

Kafir: an unbeliever, that is, one who does not accept Islam. Sometimes this term is applied to a heretical Muslim whose beliefs or practices go beyond the limits of

permitted variation. The condition or doctrines of kafir are called kufr. To denounce a person or group as kafirs, or a doctrine as kufr, is called takfir.

Khalifa: an Arabic term combining the notions of deputy and successor; adopted as title by the successors of Muhammad in the headship of the Islamic state and community. With the rapid growth of that state into a vast empire, the term came to connote imperial sovereignty, combining both religious and political authority. With the rise of the military power of the amirs and the Sultans the status of the Caliphs declined, and they became little more than figureheads with some religious prestige as titular heads of Sunni Islam but no real power. In the forty years after the death of the Prophet, the period known as the patriarchal Caliphate, four Caliphs became in practice, though not in theory, dynastic and was held by two successive dynasties, the Umayyads based on Syria and the Abbasids based on Iraq. The Abbasid Caliphate was extinguished by the Mongol conquest in 1258, but a line of puppet Caliphs, sired by a refugee from Baghdad, survived at the Court of the Mamluk Sultans in Cairo until 1517. Rival Caliphates were maintained for a while by the Umayyads in Tunista and then in Egypt.

Khulafaa ar-Rashidun: The Rightly Guided Caliphs: Abu Bakr, Umar, Othman and Ali, who led the early Muslim community during 632-660 C.E.

Madrasa: a college or seminary for Muslim learning, frequently but not necessarily attached to a mosque.

Medina State: The ideal model of an Islamic state. Established by the Prophet after his migration Mecca to Medina.

Mufti: an authoritative specialist in Islamic jurisprudence, competent to issue a fatwa. Unlike the qadi, the mufti was not at first an office appointee. His status was private, his function advisory and voluntary, and his authority derived from his personal scholarly reputation. Later some rulers appointed official muftis from among recognized scholars, without thereby increasing their authority or eliminating the private practitioners.

Mumin: A true believer who has fully operationalised his beliefs into his daily life and who has developed

his character, through the application of Islamic teachings, to get as close to the ideal as possible.

Qiyas: One of the four sources of Islamic jurisprudence. Literally 'to compare'. Analogical reasoning of the learned with regard to the techniques of the Qur'an and the sunnah and the ijma of the scholars.

Shariah: Islamic law.

Shura: Co-operation and consultation for the benefit of the community; more particularly, consultation as a political principle.

Social change: A process by means of which a society modifies its instititutions, traditions, customs or beliefs (or any combinations of these and others) in accommodating response to stimuli acting upon them.

Sultan: an abstract noun meaning ruler or power, particularly that of the government. At first informally, then, from the eleventh century, officially, it was applied to the person of the ruler and come to designate the supreme political and military authority, as contrasted with the religious authority to which the Caliphs were increasingly restricted.

Sunnah: The deeds, utterances and unspoken approval of the Beloved Prophet Muhammad.

Sunni: A Muslim belonging to the dominant majority group in Islam, sometimes loosely translated "orthodox." A Sunni is a follower of the Sunna, the accepted practice and beliefs of the Islamic community, based on the precedents of the Prophet, his Companions, and his accredited successors, as established and interpreted by the consensus of the learned.

Taqlid: Following without inquiry. Literally 'winding round', 'clothing with authority'.

Ulama: plural of alim, a scholar, specifically in religious subjects. The term ulama is used to describe the class of professional men of religious learning who form the nearest Muslim entity to a clergy.

Umma: an Arabic term meaning approximately "community", used of both religious and ethnic entities. The two were not predominated. The term was commonly used for the religio-political community of Islam as a whole; it was also used for non-Muslim entities.

Usul: The fundamentals of Islam. Literally, the word means 'roots' or sources. The usul are held to be four: the Qur'an, the Sunnah, ijma and qiyas. Together the four elements are also referred to as the masadir al-shariah "sources of law."

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